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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

TJ

Before: Stephens LJ, Treacy LJ and McBride J

<u>STEPHENS LJ</u> (giving the judgment of the court)

Introduction

[1] On 6 February 2017 the appellant, TJ, was convicted at Omagh Crown Court on 15 counts of sexual offences including counts of gross indecency or inciting gross indecency with a child, indecent assault or attempted indecent assault on a female, rape and buggery with a girl. The counts related to a period of alleged offending between 18 May 2002 and 1 September 2005. On 24 April 2017 concurrent sentences were imposed by Deputy Judge Smyth QC. The overall effective sentence was one of 8 years 6 months imprisonment. The longest sentences of imprisonment were imposed for the offences of buggery though it is appropriate to record that the rape convictions attracted concurrent sentences of 7 years' imprisonment and 3 years' probation.

[2] The complainants in relation to these sexual offences were sisters and also stepsisters of the appellant. We anonymise their identity with the cyphers CG and DG.

[3] On 6 December 2017 the single judge, McCloskey J, gave leave to appeal against conviction. The appeal was heard on 13 March 2018 and on 21 March 2018 we allowed the appeal quashing the convictions with reasons to follow. We allowed time for the prosecution to consider whether they were seeking a retrial and we also listed that issue for hearing on 20 April 2018. A written judgment was delivered on 20 April 2018 and this court was informed that the prosecution was seeking a retrial in relation to the counts relating to the complainant CG but they were not seeking a

retrial in relation to the counts relating to DG. This means that the prosecution were seeking a retrial in relation to counts 8, 9, 10, 11, 14, 20, 21, 22, 26 and 27. Those are four counts of gross indecency or inciting gross indecency with a child, one count of indecent assault on a female or attempted indecent assault on a female, two counts of rape and 3 counts of buggery with a girl.

[4] It became apparent that Mr O'Rourke QC who appears on behalf of the appellant with Mr Fahy opposed any order for a retrial. We directed that written submissions be exchanged with reference to authorities and listed that issue for oral submissions today. We are grateful for the written and oral submissions that have been provided to us on behalf of the appellant and by Mr Mateer QC who appears with Ms Suzanne Gallagher on behalf of the prosecution.

Legal Principles

[5] Section 6(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that:

> "Where an appeal against conviction is allowed by the Court of Appeal under section 2 of this Act and it appears to the Court that the interests of justice so require, the Court, upon quashing the conviction and any sentence passed thereon, may order the appellant to be retried."

[6] Section 7(1) provides:

> "An appellant who is to be retried for an offence in pursuance of an order under section 6 of this Act shall be tried upon a fresh indictment preferred by the direction of the Court of Appeal and shall be tried before the Crown Court at such place as the Court of Appeal may direct or, if no such direction is given, at the place at which he was originally tried or such other place as the Crown Court may direct."

[7] The test to be applied by this court in deciding whether to order a retrial which is contained in section 6(1) is the test of the interests of justice. That test has been considered by the Supreme Court in *R v Maxwell* [2010] UKSC 48 and by this court in *R v Hewitt and Anderson* [2005] NICA 38 and *R v McClenaghan* [2016] NICA 51. The test is a broad and uncomplicated test as to whether the interests of justice require a retrial having regard to all the circumstances of this case. It calls for an exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance as between the public interest and the legitimate interests of the appellant. The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime with on the other side of the balance consideration as to whether such prosecution can be conducted without unfairness to or oppression of the defendant.

[8] On the public interest side of the balance the gravity of the offence is plainly a factor of considerable weight in considering whether to order a retrial. Society has a greater interest in having an accused retried for a grave offence than for a relatively minor offence.

[9] A question arises as to whether the application of the test of the interests of justice should be informed by analogy with the tests applicable on an application to stay proceedings for abuse of process. In *R v Maxwell* at paragraph [13] Lord Dyson identified the two categories of cases in which the court has power to stay proceedings for abuse of process. He stated:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" … or will "undermine public confidence in the criminal justice system and bring it into disrepute."

Lord Dyson then went on to state that the application of the test of the interests of justice is to a certain extent analogous to a second category application to stay a case for abuse of process. However, he also cautioned that the analogy should not be pressed too far - see paragraph [21].

[10] It was submitted to us on behalf of the prosecution that there is authority for the proposition that it is for the trial judge to hear any argument about abuse of process - see *R v Early* [2003] 1 Cr App R 288 and *R v Maxwell* at paragraphs 94-95 and *Panday v Virgil* [2008] 1 AC 1386 at paragraphs 36 and 37 - so that this court should not take into account any issues as to abuse of process. However, we consider that unfairness by broad analogy within the first category of abuse of process can and should be taken into account by this court in deciding whether in the interests of justice a retrial should be ordered.

[11] In respect of the impact on a retrial of obtaining information as to allegations made by DG by broad analogy we apply the principles developed in relation to that issue in relation to abuse of process set out by this court in *R v Williamson* under

citation MOR10396 and by this court in *R v XYZ* [2016] NICA 31. In particular at paragraph [26] of the judgment in *R v XYZ* Lord Justice Weatherup delivering the judgment of the court said:

> "What emerges is that the grant of a stay for abuse of process is exceptional. It is not exceptional where the defence has been placed in a difficulty about examining the reasons for complaints where that might elicit evidence of other allegations against the accused. Absent any issue of delay or the loss of documents or the loss of other evidence or other prejudice, the defence difficulty can be expected to be dealt with by control of the evidence and appropriate directions to the jury. The defence has a choice whether to challenge the complainants in a manner that reveals other allegations to the jury or to leave the matter hidden from the jury. If the defence elects to challenge the complainants in a manner that might lead to unfavourable evidence, then consideration could be given as to how some evidence might not be adduced before the jury. If the result is a gap in the evidence or that unfavourable evidence has been adduced, then appropriate directions may be given to the jury. There should be faith in the jury system that they will respect the directions of the trial Judge. The above approach is not to say that the presence of delay or the loss of documents or the loss of other evidence or other prejudice should necessarily result in a stay being granted. As always, the issue of the grant of a stay is fact specific."

[12] In respect of the impact of delay on the retrial by broad analogy we seek to apply the principles in *Attorney General's Reference No: 2 of 1992* QB 630. There is no general time limit within which proceedings have to be commenced where, as here, the alleged offences are indictable. Article 6 paragraph 1 of the European Convention on Human Rights requires a criminal charge to be heard within a reasonable time and time commences when the situation of the individual has been substantially affected, see *Ambrose v Harris* [2011] UKSC 2435 at paragraph 62. Delay contributed to by the actions of the defendant should never be the foundation of a stay. Deliberate delay on the part of the prosecution is likely to amount to an abuse of process. Inadvertent delay ordinarily has to be inordinate or unconscionable due to the prosecution's inefficiency and prejudice to the appellant from the delay is either proved or to be inferred. Unfairness can be minimised by a direction to the jury to take proper account of the fact that the appellant is handicapped in defending the case because of the length of time which has elapsed since the alleged offence was committed.

Discussion

[13] The appellant is charged with serious sexual offences against CG including three counts of buggery of a girl and two counts of rape. In particular those alleged offences were extremely grave but that is not to understate the gravity of the other alleged offences, involving as they do allegations of gross indecency with a child and indecent assault on a female. Clearly there is evidence supporting the allegations from CG, there is a clear public interest that these alleged offences should be retried and we attribute considerable weight in the balancing exercise to that public interest.

[14] On behalf of the appellant a number of factors have been raised on the other side of the balance and we will address each of them.

[15] First, it is stated that the alleged offending occurred some 14 years ago so that there will be a considerable passage of time since the alleged offending and any retrial. That is a factor to be taken into account but in our estimation it carries little weight as the impact of delay on the quality of the evidence can be dealt with within the trial process with suitable directions being given by the judge to the jury.

[16] Second, it is submitted that the appellant has had to endure having to face these proceedings over a 5½ year period during which there have been two full trials and 4 aborted trials. We have given anxious consideration to the explanations given as to why it has taken such a period of time for the matter to progress. We have taken into account the impact not only on the appellant but also on the complainant of that delay. We note that there have been four separate legal teams instructed on behalf of the appellant and whilst we do not have sufficient evidence to make any adverse findings in that respect against the appellant we consider that the delay cannot be all attributed to the prosecution. Accordingly, we do not consider this factor to have any significant weight in the balancing process.

[17] Third, the appellant whilst now on bail has been in prison for a period of nearly one year. However, if convicted on a retrial he could anticipate having to serve a further lengthy period in prison. Whilst we note that the appellant has had to serve approximately one year in prison we do not consider this factor carries any significant weight in the balancing exercise.

[18] Fourth, the appellant raises a number of issues where he and his advisers could be placed in a difficulty at a retrial in examining issues without eliciting evidence of the allegations which have been made against him by DG. We recognise that there is a forensic dilemma for the appellant at a retrial but the effect of information being provided to the jury as to the allegations against the appellant by DG can be subject to clear directions from the trial judge that the jury are to disregard the prejudicial effect of that information. Accordingly, we do not consider that the factor has any significant weight in the balancing process.

Conclusion

[19] We consider that the balance clearly comes down in favour of ordering the appellant to be retried and so order. We direct that a fresh indictment be provided and we would be grateful if that could be done today. We note that there has been a reporting restriction in relation to the identities of the complainants which is an automatic reporting restriction. We consider that there should be a reporting restriction in relation to the judgments of this court until after a retrial has taken place and the outcome of that is certain. We also direct that this judgment is transcribed so that copies will be made available to the parties and so that it can be made available to the trial judge. We also direct that the original judgment of this court also be made available to the trial judge.