

# Judicial Communications Office

Thursday 8 September 2011

## COURT OF APPEAL ORDERS RETRIAL

### Summary of Judgment

The Court of Appeal today ordered a retrial in the case of a man convicted of indecent assault of his niece. He had sought leave to appeal against his conviction on a number of grounds and also to introduce fresh evidence from his former wife in support of his appeal.

The appellant, who in order to protect the identity of the complainant is referred to as JSK, was convicted on 23 March 2010 of 8 counts of indecent assault on a child. The Court heard that the offending occurred during two different periods, in or about May 1986 when the complainant was aged about 4 years old, and later between 1992 and 1992 when she was aged between 10 and 16 years old. On 23 March 2010, JSK was found guilty by a jury on all 8 counts of indecent assault and was sentenced to a total of 7 years imprisonment.

JSK raised a number of issues in his appeal. These related to the admission of evidence by the trial judge and the manner in which he directed the jury on a number of matters. The Court of Appeal did not consider that any of the issues could have rendered the verdict unsafe. The Lord Chief Justice did repeat, however, that a judge should give an express direction to make the jury aware if the accused was of good character both before and after the offending. The fact that he was should be taken into account by the jury in his favour in determining the weight that they should give to the evidence of his good character.

JSK sought to introduce fresh evidence from his former wife in support of his appeal. He claimed that she first became aware of the allegations in March 2008 when she was visited by the PSNI. She made a statement to the effect that she knew nothing about the allegations. The officer said it was likely that police would have to speak to her again but as there was no further contact she assumed that the matter had not proceeded. The first she knew was when a report following the conviction was pointed out to her in a local paper.

The evidence given by JSK's ex-wife is at variance with the complainant's account. In the course of his charge to the jury, the trial judge stated that the prosecution case was that the assaults were carried out on the complainant when his wife was out of the house attending to his aunt. It was common case that JSK's wife often went to see his aunt around 9pm in the evening and stayed for approximately 45 minutes. Her evidence suggested, however, that during this time the children were either out at the pictures or the disco. In any event, they were normally still awake by the time she was going to bed around 11.30 pm.

The Lord Chief Justice said that the evidence of JSK's former wife appeared to be capable of belief and would have been admissible at the trial. The statements provided by the prosecution as a result of the interviews with her in March 2008 did not suggest that she had any material evidence to give. The defence sought her address to interview her but that address was not provided by the prosecution nor was the correspondence answered. The

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Lord Chief Justice found that in those circumstances there was a tenable explanation for the failure to adduce her evidence at the trial although it was fair to say that JSK's solicitors did not follow the matter up.

The Lord Chief Justice stated that the real issue was whether this evidence affords any ground for allowing the appeal. He said that the evidence disputes the corroborating evidence of the complainant's sister who said that she could see the applicant enter the room in which the complainant was sleeping. It also suggested that the offences, if they were committed, took place at a time that was somewhat later than the prosecution contended. The Lord Chief Justice said that, of itself, that did not cast any material doubt on the safety of the conviction since the issue for the jury was whether they believed the complainant and she had not tied the timing of the offences - this was something done apparently by the prosecution.

The Lord Chief Justice, however, said there was an additional feature in that the prosecution case at the trial was that JSK had only had an opportunity to commit the offences when his wife was out of the house. His ex-wife's evidence suggested that if the offences occurred they must have done so after she had gone to bed. This case was not apparently made by the prosecution at the trial. JSK would, therefore, not have had the chance to counter this allegation or for it to be explored before the jury. The Court of Appeal admitted the evidence and concluded that there is a "lurking doubt" about the safety of the conviction. In the circumstances, the Court directed that there should be a retrial.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website ([www.courtsni.gov.uk](http://www.courtsni.gov.uk)).

## ENDS

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