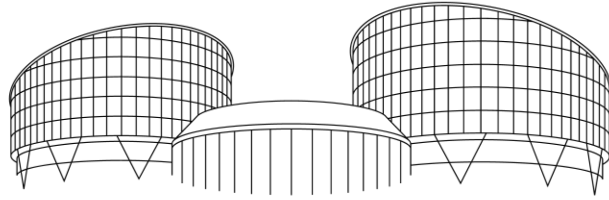

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 40612/11
John Joseph MCGLYNN
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 16 October 2012 as a Chamber composed of:
Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Fatos Aracı, *Deputy Section Registrar,*
Having regard to the above application lodged on 6 June 2011,
Having deliberated, decides as follows:

THE FACTS

The applicant, Mr John Joseph McGlynn, is an Irish national, who was born in 1952. He is detained at HMP Woodhill, Milton Keynes. He is represented before the Court by Ms B. Goff, a lawyer practising in Bray, County Wicklow, Ireland.

A. The circumstances of the case

1. The facts of the case, as submitted by the applicant, may be summarised as follows.

2. On the night of 14/15 October 1987, an eighty-eight year old woman, VC, was raped both vaginally and anally in the course of a burglary at her home. Soon afterwards, VC gave a statement to the police in which she stated two black men had broken into her house and she had been raped by a large black man with an ordinary English accent. She stated that she had the impression that the men were older than teenagers but could not be sure. In the course of the police investigation, semen was found on her nightdress, on a bed sheet and on swabs taken from her body. The samples were placed in storage. No-one was charged at the time of the offences and VC died in 1995.

3. The applicant is white, slightly built and has an Irish accent. He was thirty-five years of age at the time of the offences. In 2009 his DNA was found to match that found on the nightdress and bed sheet. He was arrested, charged with rape, false imprisonment, buggery and burglary, and went to trial before a judge and jury at the Aylesbury Crown Court from 1–9 June 2010. The applicant's defence was that he had been having an affair with VC and that they had consensual sex on a number of occasions, the last being the day before the rape took place, which explained the DNA on the bed sheet and nightdress. He denied, however, that he had been responsible for the burglary and rape.

4. At the start of the trial the prosecution applied for VC's police statement to be read to the jury under section 116 of the Criminal Justice Act 2003. The trial judge allowed the application. He considered that it was proper to have regard to the likelihood of it being possible for the defence to controvert the statement of the witness by the defendant himself giving evidence and/or calling evidence of other witnesses. He noted that, while the evidence of VC was important, and without it there would be no prosecution, it was not the sole or decisive evidence in the prosecution case. The trial judge further considered the defence complaint that they could not explore the grounds for VC's belief that she had been raped by a black man and could not be examined as to the affair the applicant said they had been having. The trial judge took the view that these were important matters but could be addressed by an appropriate direction to the jury in his summing up.

5. After VC's statement had been read to them, the police officer who took the statement gave live evidence to the effect that VC was well-spoken, "old school", stoic, and prim and proper. VC had told the police officer that she had not married until she was sixty years of age, that she had been a virgin when she had married and that she and her husband had sexual intercourse infrequently.

The jury also heard evidence from VC's friends to whom she had confided that she had been raped by a black man. The friends also gave evidence that VC had been a lively, intelligent and active woman, who was

involved in her local church. She had developed a tendency to be forgetful after she turned ninety.

A neighbour, AB, aged seventy-four at the time of trial, also gave evidence that she and VC had met the applicant at a café. She (AB) had exchanged numbers with him. She had seen him a few times afterwards, once in the company of a black man. (The applicant denied this last part of her evidence.) They had slept together once. (The applicant maintained it was on at least six occasions.) To her knowledge, the applicant and VC had never met each other after their meeting at the café.

The jury also heard expert evidence that the chances of the DNA on the bed sheet and nightdress belonging to someone other than the applicant were less than one in one billion. There was also forensic evidence that the applicant's fingerprints had been found in seven places in VC's home, including the window which had been forced open to obtain entry.

6. The prosecution also applied for leave to introduce the applicant's four previous convictions for domestic burglaries, which had been committed between 1979 and 1984, on the ground that they were relevant to an important matter in issue between the defendant and the prosecution, namely whether the applicant had a propensity to burgle. The defence opposed that application, arguing that there was not a sufficient degree of similarity between the past burglaries (which had not involved targeting the elderly or any sexual offences) and the present case, where the principal charge was one of rape. The trial judge nonetheless allowed the introduction of the previous convictions, agreeing with the prosecution that the test was only whether the applicant had a propensity to burgle and whether this was an important matter in issue between the defendant and the prosecution. He was satisfied that this was the case and was further satisfied that the admission of the convictions was not so prejudicial as to outweigh its probative value.

7. The applicant gave evidence in his own defence. He said that, after meeting VC at the café, he had performed odd jobs for her, including repairing her window, which explained the fingerprints. In any event, given his previous experience of burglary, he would have known to use gloves, had he been the burglar. On two occasions VC had complained of joint or muscle pains and he had rubbed some oil on the painful areas. On a further occasion he had been helping VC move items into her bedroom. He had made a pass at her and they had proceeded to make love on the bed. In total, they had sex on about eight or nine occasions and at least twice in the bedroom. After the last occasion, on 13 October 1987, he finished his relationships with VC and AB and moved away from the area. He did so because he worked in the building industry and was obliged to move wherever there was work.

8. In respect of VC's statement, the trial judge directed the jury in these terms:

> "...you should examine it with particular care, bearing well in mind that it does have certain limitations which I draw your attention to now.
>
> You have not had the opportunity of seeing or hearing [VC] in the witness box or of assessing her as a witness. When you do see and hear a witness you may get a much clearer idea of whether their evidence is honest and accurate. Her statement was not made or verified on oath and her evidence has not been tested in cross-examination, and you have not had the opportunity of seeing how her evidence would have survived some form of challenge. Her statement only forms part of the evidence and it must be considered in the light of all of the other evidence in the case. You must reach your verdict having considered all of the evidence. You should also have regard to the following discrepancies between her statement and her complaint and the prosecution evidence and the discrepancy [that] she was adamant that she was raped by a black man."

The trial judge went to outline for the jury the ways in which they could test the reliability of VC's statement, including the circumstances in which it was made, her comments to her neighbours after the rape, her lifestyle (including her tendency, later in life, to become forgetful), whether the statement was supported by or consistent with the other evidence in the case, and whether VC had any reason to be untruthful. He also instructed them that, to find the applicant guilty, they had to be sure that VC had been wrong in thinking that a black man had been responsible. They also had to discount the possibility that VC was having a secret affair with the applicant. Finally, the trial judge reiterated that the jury had to consider the amount of difficulty involved in challenging the statement in the absence of cross-examination.

9. In respect of the applicant's previous convictions, the jury were directed as follows:

> "The prosecution argue that those convictions are relevant because it establishes that the defendant has a propensity to burgle people's houses, as happened to [VC] on the night that she was also tied up, handcuffed, raped and buggered. If you agree, then the prosecution suggest that it makes it more likely that this defendant committed the offence alleged, namely, burglary. The defendant admits those convictions. You must decide whether it establishes a propensity in him to burgle [VC]'s home, in other words a propensity to commit burglary and therefore help you as to whether he is the burglar. The defence case, as you know, is that it was not this defendant, he was not the burglar and was not at the home of [VC] on the night she was attacked, and in consequence could not and is not therefore guilty of any of these offences. ... So you must ask yourselves, does it establish the propensity that the prosecution contend for then if it does then it is a matter for you to judge how far that assists you in resolving the question of whether it was this defendant who acted as the burglar on this occasion, and whether, whilst burgling the property, it was him who tied up and sexually assaulted [VC].
>
> Evidence of previous behaviour is only part of the evidence in the case. Its importance should not be exaggerated and it does not follow that just because the defendant behaved in a certain way in the past that he did so again on this occasion. Bad behaviour in the past cannot alone prove guilt; that is obvious."

10. The trial judge concluded his summing up by reminding the jury, as he had done at the starting of his summing up, of the respective cases of the defence and prosecution. He first summarised the defence case and then that of the prosecution.

11. On 9 June 2010, the applicant was convicted by the jury of rape, false imprisonment, buggery and burglary. The total sentence was one of fifteen years' imprisonment.

12. The applicant appealed against his conviction, *inter alia* on the ground that the trial judge erred in admitting VC's statement and the evidence of his previous convictions. He also argued that the trial judge's summing up had been unfair to him. On 16 March 2011 the appeal was dismissed by the Court of Appeal.

13. In respect of VC's statement, the court concluded:

> "[W]e in fact agree with the [trial] judge that the complainant's [VC's] evidence was not the sole or decisive evidence, albeit it is true that the prosecution might not have been pursued without it. The significance of the complainant's statement was that it established that these offences had taken place. [Counsel for the applicant] conceded that had the statement not made any identification of the persons who had committed this offence, and had it merely established that the relevant offences had been committed, then he could not sensibly have opposed it being adduced before the jury. What makes the difference, he submits, is that there was this identification and he was not able to cross-examine in relation to it. It is, we have to say, a somewhat bizarre submission, given that the identification itself is, of course, the most powerful evidence in favour of [the applicant].
>
> It is true that the Crown was seeking to introduce the complainant's evidence and then seeking to persuade the jury that they could be sure that she was wrong about part of it, namely the colour of the attacker and that he had an English accent. As the court noted in R v. Cairns, Zaidi & Chaudhary [2003] 1 Cr.App.R. (S) 38, there is no rule of law prohibiting the Crown from calling a particular witness in order to rely on a part only of the evidence. [Counsel] does not dispute that principle, but say that a different principle applied where the Crown is relying only on hearsay evidence. He referred us specifically to paragraph 108 of the judgment of Lord Phillips in the Horncastle case, where Lord Phillips said this, after referring to the provisions of the 2003 Act:
>
> > "I believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason."
>
> [Counsel for the applicant] submits that the key here is that the Crown is not relying on the reliability of the statement. That is not entirely accurate. It is reliable, say the Crown, with respect to the fact that those offences were committed in precisely the way that the complainant alleges. What the Crown say is not reliable is the identification evidence which she provides. But the statement does not have to be reliable in every respect before it can be properly admitted.
>
> In this case, in our judgment it would have been contrary to the interests of justice to deprive the court of this statement. Indeed, it would have the effect that this defendant would effectively be immune from conviction because a witness has died, which is

precisely what the 2003 Act was designed to prevent. In this case there was a strong *prima facie* case against the defendant on various serious charges and it would have been wrong, it seems to us, to have deprived the jury of an opportunity to consider his guilt because of the unfortunate death of the victim.

Accordingly, we consider that it was entirely in accordance with the principles in Horncastle that this statement should be admitted. Insofar as it assisted the [applicant] to establish his innocence, it was in his favour."

14. In respect of the applicant's previous convictions, the court found that they were plainly relevant to a propensity to burgle, one of the charges on the indictment. The court did not accept that, because a more serious charge was also on the indictment, it became unfair to admit the evidence.

15. For the trial judge's summing up, the court accepted that it might have been better if the judge, in his summary of the respective cases, had put the defence case last, but that was of no real moment. Moreover, although he had failed to refer to the fact that VC had identified her attacker as a black man with an English accent, that was plainly at the forefront of the jury's mind; it had been a fundamental pillar of the applicant's defence. The point had been made earlier in the summing up; it was an unfortunate oversight on the part of the trial judge that it was not referred to specifically when the summary of the respective cases had been given, but nothing more.

B. Relevant domestic law and practice

1. On absent witnesses

16. The relevant provisions of the Criminal Justice Act 2003 and the judgment of the Supreme Court in *R. v. Horncastle and others* [2009] UKSC 14 are set out in *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 43-45 and 57-62, ECHR 2011.

2. On bad character evidence

17. Bad character evidence is regulated by Part 11, Chapter 1 of the Criminal Justice Act 2003. Section 98 defines evidence of a person's bad character as:

"evidence of, or of a disposition towards, misconduct on his part, other than evidence which —

(a) has to do with the alleged facts of the offence with which the defendant is charged, or .

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

Section 101 allows for the admission of evidence of a defendant's bad character. It provides:

"(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if— .

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or.

(g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

Section 103, where relevant, provides:

"**'Matter in issue between the defendant and the prosecution'**

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include —

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2) —

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

> (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.
>
> (5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.
>
> (6) Only prosecution evidence is admissible under section 101(1)(d)."

Section 112(1) defines "important matter" as a matter of substantial importance in the context of the case as a whole.

COMPLAINTS

18. The applicant complains under Article 6 of the Convention that his trial was unfair in five aspects.

First, the trial judge had erred in admitting VC's statement. In this respect, he submitted that the statement was inherently unreliable, because VC had alleged that the burglars had been two teenage black men and that the man who had raped her had an English accent. The disadvantage caused to his defence by the admission of the statement was compounded by the delay in bringing the proceedings. There was no convincing explanation for this delay. The police had been in possession of his fingerprints prior to 1987, the year of the offence and could have, if they had wished, questioned him at the time of their initial investigation.

Second, the delay in prosecuting him prejudiced his defence. For instance, it made it impossible for him to produce evidence of his affair with VC.

Third, his trial was prejudiced by the admission in evidence of his four previous convictions for burglary. He submits that the burglary counts should have been severed from the indictment and tried at a later date.

Fourth, the trial judge had been unfair to the defence in his summing up. He had used emotive language and been prejudicial in summarising the defence case. In particular, in the final passages of the summing up the judge had summarised the defence case prior to summarising the prosecution case (thereby reversing the normal order of events) and had used words which had not been used by the applicant or his counsel.

Fifth, the forensic evidence in the case had been of poor quality. The prosecution had not produced evidence of fingerprints other than those found at the window. For the DNA evidence, only the samples on the bed sheet and nightdress had been found to match him, not the swabs taken from VC. Moreover, the DNA evidence had initially been taken to be indicative of two persons and it was only clarified during trial that it was indicative of only one person. A fragment of hair had initially been thought to be

Afro-Caribbean in original but was found, on further analysis to be plant fibre.

19. Under Article 8, he submits that he received no adequate warning of the likelihood of any DNA sample being used against him in a future trial and the leading of such evidence was a disproportionate interference with his right to respect for his private life as guaranteed by that Article.

THE LAW

20. Articles 6 and 8, where relevant, provides as follows:

Article 6

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."
>
> ...
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

Article 8

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Article 6

1. The introduction of VC's statement

21. This is a paradigmatic case of a witness who was absent from trial and whose evidence the prosecution relied on to secure the applicant's conviction. Consequently, following the Grand Chamber's judgment in *Al-Khawaja and Tahery*, cited above, it is necessary to consider whether there was a good reason for VC's absence; whether her evidence was the sole or decisive basis for the applicant's conviction; and whether there were sufficient counterbalancing factors including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place.

22. For the first, it is clear that VC's death meant there was a good reason for admitting her statement (*Al-Khawaja and Tahery*, § 153).

23. For the second, the Court is unable to accept the conclusion of the trial judge that, while the evidence of VC was important, and without it there would be no prosecution, it was not the sole or decisive evidence in the prosecution case. In Al-Khawaja's case, it was the very fact that the trial judge had observed "no statement, no count one", which compelled the Court to conclude that the absent witness's statement in that case was decisive (see paragraph 154 of the judgment). There are no grounds to distinguish the present case from that of Al-Khawaja; the simple fact is that, if VC had not given her statement to the police, there would have been no criminal case whatsoever and, if her statement had not been admitted at trial, the prosecution would not have been able to prove any of the essential elements of the crimes charged on the indictment. Consequently, as in Al-Khawaja's case, the Court is compelled to conclude that, although VC's statement was not the sole evidence against the applicant, it was certainly decisive.

24. For the third consideration – whether there were sufficient counterbalancing factors including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of the evidence to take place – the Court would first observe that, just as in Al-Khawaja's case, the interests of justice were obviously in favour of admitting VC's statement. Moreover, as in *Al-Khawaja*, the statement was recorded by the police in proper form and the reliability of VC's evidence was supported by the fact that VC made her complaint to two friends promptly after the events in question, and those friends gave evidence at trial.

Furthermore, at trial, in light of the DNA evidence linking the applicant to VC, the only real issues for the jury were: (i) whether VC had erred in thinking that a black man with an English accent had been responsible for the rape; and (ii) whether, as the applicant maintained, the DNA could be explained by the secret affair he was having with VC.

For the first, it is difficult to see what value cross-examination of VC would have had; as the Court of Appeal observed (see paragraph 13 above), VC's evidence that a black man had been responsible was the most powerful evidence in the applicant's favour.

For the second, clearly, if VC had given live evidence of an affair between her and the applicant, the case against the applicant would have collapsed. However, it was open to the defence to draw that possibility to the jury's attention during its closing speech; indeed, the whole thrust of the defence's closing speech was that it was possible for anyone to have a secret life of this kind. As it was, the jury, were fully entitled to disregard that possibility. They were able to weigh, on the one hand, the applicant's account of the supposed affair and, on the other, the prosecution's evidence

as to VC's prim and proper nature and her limited sex life, even with her own husband, as well as the implausibility of an affair between a thirty-five year old man and an eighty-eight year old woman. Thus, even though they had not heard from VC, it was perfectly open to the jury to conclude that the idea of an affair between VC and the applicant was simply an attempt by the applicant to explain away the damning DNA evidence against him.

Finally, it is of some significance that the jury were directed carefully and at length by the trial judge both as to the limitations of VC's evidence and as to the ways in which they could test its reliability (see paragraph 8 above). It was a direction which would have been of considerable assistance to them. As such, the Court considers the jury were able to conduct a fair and proper assessment of the reliability of VC's evidence.

25. Against this background, the Court considers that, notwithstanding the difficulties caused to the defence by admitting VC's statement and the dangers of doing so, there were sufficient counterbalancing factors to conclude that the admission in evidence of VC's statement did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

26. For these reasons, the Court considers this that complaint must be rejected as manifestly ill founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

2. The delay in prosecuting the applicant

27. The Court notes that the applicant does not appear to have made this complaint either at trial or on appeal. It therefore finds that the applicant has failed to exhaust domestic remedies in respect of this complaint. It is therefore rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

3. The applicant's previous convictions

28. In the context of a criminal trial, the admissibility of evidence is a matter for regulation by national law and the national courts and the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Al-Khawaja and Tahery*, cited above, § 118). The Court accepts that there may well be cases where the defendant's previous convictions or other evidence of his bad character are so far removed from the issues the jury have to determine and so prejudicial to the defence that their admission will result in a breach of Article 6.

29. However, this was not the case here. The applicant's previous convictions were plainly relevant to the jury's consideration of the burglary count on the indictment. Knowing that the applicant had previous convictions for burglary would have helped them determine whether to accept his denial of this count (and his explanation for his fingerprints on the window) or whether to find, instead, that he was guilty. The admission

of these convictions did not therefore render his trial and conviction on the burglary count unfair.

30. As regards the other counts on the indictment (rape, buggery and false imprisonment), the Court is unable to accept the applicant's submission that, for the sake of fairness, these should have been severed from the burglary count. The prosecution's case was that the rape, buggery and false imprisonment had been committed in the course of the burglary. It was not in dispute that VC had been tied up and raped and it was not in dispute that the person or persons responsible for the burglary were also responsible for tying her up and raping her. It would have made no sense for the burglary count to have been tried separately from the other counts and the Court can discern no reason for finding that the jury's consideration of the burglary count prejudiced their consideration of the other counts on the indictment.

31. This complaint is therefore also manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3(a) and 4 of the Convention.

4. The trial judge's summing up

32. A full transcript of the trial judge's summing up has been provided to the Court. There is no basis for the applicant's allegation that it was emotive in nature. In respect of the complaint that it was unfair because it summarised the defence case prior to summarising the prosecution case, the Court agrees with the Court of Appeal that this was of no real moment. Finally, contrary to the applicant's submissions, there is no rule in the Convention which requires a trial judge, when summing up a case, to use the same words as have been used by the defendant or his counsel. This complaint must therefore be rejected as manifestly ill-founded in application of Article 35 §§ 3(a) and 4 of the Convention.

5. The forensic evidence

33. The applicant's complaint under this head is directed to the domestic court's assessment of the evidence against him. As such, it is of a fourth instance nature and must also be rejected as manifestly ill-founded in application of Article 35 §§ 3(a) and 4 of the Convention.

B. Article 8

34. The Court observes that this complaint was never raised by the applicant at trial or on appeal. As such, he has failed to exhaust domestic remedies. This complaint must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Fatoş Aracı Deputy Registrar	Lech Garlicki President