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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

WILLIAM GIBSON ORR

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Before: Morgan LCJ, McCloskey LJ and Sir Richard McLaughlin

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MORGAN LCJ (delivering the judgment of the court)

[1] The appellant appealed his conviction at Downpatrick Crown Court on 4 February 2019 when, after a trial, he was found guilty on three counts namely, sexual assault by penetration contrary to Article 6 (1) of the Sexual Offences (NI) Order 2008, administering a substance with intent contrary to Article 65 (1) of the Sexual Offences (NI) Order 2008 and possession of a controlled drug of class A contrary to section 5 (2) of the Misuse of Drugs Act 1971. Leave to appeal was granted by Huddleston J. After the hearing we dismissed the appeal and now give our reasons. Mr McDowell QC and Mr Rea appeared for the appellant and Mr McCollum QC and Mr Johnston for the PPS. We are grateful to counsel for their helpful written and oral submissions.

Background

[2] The prosecution case was that following a leaving party at a restaurant in North Down in May 2016 and after further drinks at a nearby public house the complainant and others retired to the appellant's home nearby. While in the courtyard area of his house the appellant offered tablets from a bag to 2 sisters. One of them declined and when she asked what they were he told her "They'll make you happy". She overheard him tell a male who wanted some "No, they'll fuck you up".

[3] The party retired upstairs and the complainant ultimately fell asleep on a sofa. The appellant also fell asleep further along the same L-shaped sofa. As the party came to an end the complainant's friends tried to wake her up without success. The appellant suggested that they leave her there. They did so and went on their way.

[4] The complainant woke up around 5:00 AM. The appellant was now in behind her on the sofa with his hand over her body and down the front of her jeans. His fingers were inside her vagina. In her ABE she described him moving his fingers in and out very quickly and how it was "quite rough", "uncomfortable", "forceful", and "very deep". It was the forceful nature of what he was doing that woke her up.

[5] Once she realised what was happening she got up to leave and a taxi was called to take her home. The defendant gave her money for the fare. While waiting for the taxi there was no conversation about what had just happened. Unexpectedly a friend in England contacted her on WhatsApp to wish her a happy birthday. She had just turned 23 at midnight. She revealed to him what had happened in a WhatsApp text conversation.

[6] When she got home she had a 14 minute phone conversation with this friend starting at 5:23 AM and he recalled, "… she was absolutely distraught. I have never heard her like that before. She was really sobbing. I was unable to console her." They agreed that they would speak again in the morning and after the call ended the friend sent a few final texts urging her to tell someone and to seek advice.

[7] As she took a shower the following morning a yellow tablet dropped from her vagina and dissolved in the shower tray. There was a yellow discharge from her vagina. A towel was used to wipe away this discharge. The complainant told her mother and they both naturally panicked. Yellow staining left on the towel was later forensically examined and it was found to contain MDMA, a class A drug more commonly known as ecstasy. Low and high vaginal swabs taken later at the Rowan Centre were also yellow in colour and also contained MDMA. Her blood and urine samples also contained MDMA.

[8] At 9:45 AM that morning she texted the appellant saying:

> "What you did last night was not okay, and what the fuck was that yellow tablet I woke up and found in me? Just tell me what it was"

He replied at 9:56 AM, saying:

> "wot tablet the only yellow tablets I have are my stomach ones, vaguely remember giving some to dicky or dov or one of them lot as for wot happened I ain't got a clue, I'm totally fecked my heads spinning and whatever's up with me its more than drink related been throwing up all morning".

[9] Working backwards the Crown case was that:

(a) the tablet that dropped from her vagina was an ecstasy tablet;

(b) the appellant had at some point put that tablet into her vagina as she lay asleep and this was done with the intention of overpowering or stupefying her so as to facilitate his sexual penetration of her;

(c) that tablet came from the bag of tablets the appellant had been offering around in the courtyard earlier in the evening; and

(d) his behaviour and verbal comments while in possession of that bag of tablets supported the Crown case that it was ecstasy inside the bag.

[10] The appellant's case was that the complainant had arrived at his house alone. That was not in dispute. It was also not disputed that a bottle of Prosecco had been opened as it was her birthday. He recollected that the complainant had initiated a game of strip poker during which she had lost her shirt although she was wearing a vest under the shirt and the game did not apparently proceed any further than that. The complainant had no recollection of that.

[11] He remembered somebody at the party having drugs but denied having taking any himself or offering any to anyone else. He stated that the party broke up gradually and that he and the complainant were left sleeping on a sofa in his upstairs living room. He later awoke to find the complainant grinding her bottom into his crotch. They talked and kissed and the complainant removed her trousers after some sexual contact through the clothing.

[12] He admitted to digital penetration of her vagina while she kissed and caressed him. This went on, on his account for approximately 15 minutes until the complainant needed to go to the toilet. On her return she started to get dressed and told the defendant that she had a boyfriend and that he was too old for her. They then smoked a cigarette or two together before she asked for a taxi number after talking for about 30 minutes. It was not disputed that they had smoked a cigarette nor that she had asked him to get her a taxi. The complainant also asked if he had money for the taxi and he gave her a £20 note. She said she would pay him back the next day. That was also not disputed.

[13] The appellant stated that he only had indigestion type tablets for stomach problems and he remembered giving a man, D, one. He did handle what he believed to be drugs sitting on a table in the house after the sisters had left but at no time took any out or offered any to anyone.

The grounds of appeal

[14] It was submitted on behalf of the appellant that the learned trial judge's charge to the jury was fundamentally unbalanced in that it:

(a) failed to adequately refer to discrepancies between the account of the complainant and other evidence which formed the basis of significant points made by the defence;

(b) invited the jury to make allowance for potential weaknesses in the evidence relied upon by the prosecution while failing to recommend similar treatment for evidence relied upon by the defence;

(c) placed undue emphasis on or bolstered points for the prosecution, while undermining points for the defence; and

(d) diluted the standard of proof by inviting the jury to choose which account they preferred.

[15] We can deal quite briefly with the last point. It is common case that the learned trial judge directed the jury in the earlier part of his direction in the following terms:

> "The prosecution must not only prove the case against the accused, it has to prove the case beyond all reasonable doubt. It has to prove beyond all reasonable doubt that the accused is guilty of each and any charge that you consider in this case. It is not enough for the prosecution to prove that the accused is probably guilty of any charge; you must be satisfied beyond reasonable doubt before you can convict of any of the charges you have to consider."

[16] Quite rightly there is no complaint about that direction. The complaint is about a subsequent passage when reviewing the evidence where the judge said:

> "You must consider all of the evidence and decide what evidence you accept and what evidence you reject. In that, it is a comparatively straightforward issue. If you accept the evidence given by the complainant, then you will have little difficulty in being satisfied that she did not consent and did not have the capacity to consent to digital penetration of her vagina. Similarly, you will have little difficulty in being satisfied that in those circumstances the defendant could not reasonably have believed that she consented. On the other hand if you accept the version put forward by the defendant that she participated enthusiastically, as he has described, then you will have little difficulty in concluding that the complainant consented or, as a minimum, gave the defendant reasonable grounds for believing that she consented."

[17] We accept that this passage on its own did not raise the standard of proof required from the evidence for the prosecution to succeed or the benefit of the doubt to which the accused was entitled. But in our view any such difficulty was cured by the closing remarks of the learned trial judge. He said:

> "I remind you that only if you are satisfied beyond all reasonable doubt that the accused is guilty of the charge will you enter a verdict of guilty on that count. If you feel that the accused is not guilty of the charge, then you must find him not guilty. If you are left in the position where you are unsure of his guilt, you must again find the accused not guilty. But if, on the other hand, you are satisfied beyond all reasonable doubt that the accused is guilty, then it is your duty to return a verdict of guilty on that count."

[18] Those remarks were virtually the last words spoken by the learned trial judge before inviting the jury to retire. In our view the jury could have been in no doubt about the standard of proof that was required before they could return a verdict of guilty.

[19] The remaining three grounds essentially depended upon the treatment of the evidence of two witnesses. Neither witness was able to give direct evidence of the alleged circumstances on which the prosecution was based. It is not in dispute that the judge set out in detail the accounts given by the complainant and the appellant in his charge, those being the only people able to give direct evidence of the circumstances.

[20] The first was the taxi driver who collected her and brought her home at approximately 5:15 AM. The complainant's recollection in her ABE interview was that her WhatsApp conversation with her friend in England occurred while she was in the taxi. The timings of that conversation and that of the arrival of the taxi driver demonstrated that the WhatsApp conversation must have occurred while she was still at the appellant's home. The complainant accepted that in the course of cross-examination.

[21] The taxi driver also indicated that he did not remember the complainant being visibly upset during the taxi journey. That contrasted with the WhatsApp message to her friend in England where the complainant said that she was crying her eyes out. In her cross examination the complainant stated that she had tried to behave normally while in the premises of the appellant before the taxi arrived. She accepted that her presentation was not as described in the WhatsApp message.

[22] The taxi driver's recollection was that he had waited for a little time before the complainant came out of the appellant's house whereas the complainant stated that she had been outside waiting for the taxi. What wasn't clear was whether during that time she was in the courtyard of the appellant's house.

[23] The judge pointed out to the jury that the taxi timings were accurate and helped them to place the events in context. The complainant had accepted the accuracy of the taxi timings in the course of the trial. He also raised the question of the complainant's demeanour. He noted the evidence of the appellant that she was

sitting and engaging in an entirely normal conversation. She said that she wanted to avoid panicking and try to keep it as normal as possible. The judge pointed out that there is no standard reaction in circumstances such as this.

[24] The appellant also relied upon the evidence of S, a female who was also at the party. She stated that she had received a call from the complainant around 1:00 AM in which the complainant said that she was drunk and alone. According to that witness the complainant arrived at the party sometime between 1:30 AM and 2:00 AM. She had left the public house around 12:15 AM and appears to have spent some time at a fast-food carry out. The judge noted, however, in his remarks to the jury that there was a gap between the period spent in the public house and her arrival at the party. He told them it was quite right that they should take account of the fact that she could not account for periods of time and that there was a discrepancy between the times she gave in the course of the evening. The issue was the unexplained gap in time and the judge properly dealt with it.

[25] That witness also supported the appellant's account that the complainant had participated in a short game of strip poker as described by the appellant. This was not specifically mentioned by the judge. Its only relevance is to the complainant's recollection of the early hours of the morning. This witness also suggested that the appellant had given a paracetamol type white tablet to D. That tablet was round and white whereas the tablet described by the complainant was yellow and had the shape of a shield. The appellant relied upon that to seek to undermine the evidence of the sisters but it is clear from his charge that the judge carefully warned the jury about the care they should take in relation to the evidence of the sisters who were friends of the complainant. It was not disputed that the evidence demonstrated beyond doubt that an ecstasy tablet had been inserted into the complainant's vagina.

[26] Finally, the appellant complained that whereas the judge reminded the jury that there was no standard reaction in respect of the complainant's engagement with the appellant in his house after the event he did not do so expressly in respect of the appellant's response to the email later that morning suggesting that he had put a yellow tablet in the complainant. The appellant's case was that he did not understand what the complainant was talking about. That case was at the heart of the appellant's defence which the judge had fairly put before the jury.

[27] The classic guidance on the structure and content of the judge's summing up was given by Lord Hailsham LC in R v Lawrence [1982] AC 510 A519:

> "A direction to the jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the

> evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

[28] In light of our analysis of the charge we do not accept that the complaints about the summing up give rise to any concern about the safety of the conviction.

Conclusion

[29] For the reasons given we were satisfied that the conviction was safe and dismissed the appeal.