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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

V

A

Morgan LCJ, Girvan LJ and Coghlin LJ

Girvan LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal against conviction on two counts of sexual assault. Leave to appeal was granted by Deeny J acting as the single judge. The appellant was tried on a total of nine counts of various sexual offences against the daughter of his long-term partner ("the complainant"). These offences as alleged by the complainant occurred during four distinct incidents. The jury convicted him on two of the counts but acquitted him on the remaining seven counts. Mr MacCreanor QC and Mr Hunt appeared for the appellant. Mr Mateer QC and Mr Magill appeared on behalf of the Crown. The Court is indebted to counsel for their helpful written and oral submissions.

[2] The appellant's grounds of appeal against conviction can be summarised as follows:

(i) The guilty verdicts are inconsistent with the not guilty verdicts.

(ii) The prosecution's closing speech was unfair and prejudicial.

(iii) The trial judge's summing up was inadequate in respect of the lack of independent evidence.

(iv) The trial judge failed to give an adequate 'Makanjoula' warning.

(v) The trial judge's summing up was unbalanced in respect of the quality and reliability of the complainant's evidence.

(vi) The convictions are unsafe.

[3] The appellant was returned for trial on 2 March 2011 on a total of 9 counts of sexual offences allegedly committed against the same complainant on four distinct occasions between 14 June 2009 and 5 September 2010. He appeared at Belfast Crown Court on 4 April 2011 and pleaded not guilty to all charges upon being arraigned. His trial commenced on 3 December 2012 before His Honour Judge Kinney ("the trial judge") sitting with a jury. On 11 December 2012 the jury returned the following verdicts:

Count 1	Assault by penetration, contrary to Art.6(1) of the Sexual Offences (NI) Order 2008	Not guilty
Count 2	Sexual assault, contrary to Art.7(1) of the Sexual Offences (NI) Order 2008	Guilty
Count 3	Engaging in sexual activity in the presence of a child, contrary to Art.18(1) of the Sexual Offences (NI) Order 2008	Not guilty
Count 4	Sexual assault, contrary to Art.7(1) of the Sexual Offences (NI) Order 2008	Guilty
Count 5	Assault by penetration, contrary to Art.6(1) of the Sexual Offences (NI) Order 2008	Not guilty
Count 6	Sexual assault, contrary to Art.7(1) of the Sexual Offences (NI) Order 2008	Not guilty
Count 7	Assault by penetration, contrary to Art.6(1) of the Sexual Offences (NI) Order 2008	Not guilty
Count 8	Assault by penetration, contrary to Art.6(1) of the Sexual Offences (NI) Order 2008	Not guilty
Count 9	Rape, contrary to Art.5(1) of the Sexual Offences (NI) Order 2008	Not guilty

[4] On 15 March 2013 the trial judge sentenced the appellant to 3 years' probation which included a requirement to attend the Community Sex Offenders Group Work Programme. A Sexual Offences Prevention Order was also imposed and the appellant was further notified that he would be subject to the sexual offences notification requirements for 5 years.

The evidential background

[5] The appellant was the long-term partner of the complainant's mother. The complainant who was born on 22 August 1993 was a daughter of her mother's previous relationship. The appellant had been living in the family home since 1997. There was a son from the relationship between the appellant and the complainant's mother but he sadly died in April 2009. At the time of the incidents giving rise to the charges the appellant was between the ages of 38 and 40 and the complainant was between the ages of 15 and 17.

Counts 2 and 3

[6] Count 1 relates to events which occurred last in terms of time and we will refer to that count later. The first set of sexual offences was alleged to have occurred between 14 June and 18 June 2009 when the complainant was under the age of 16. They are the subject of Counts 2 and 3. These counts relate to an incident which the complainant alleged occurred at Shimna Valley in June 2009. The complainant gave evidence, by way of an ABE video recording, that she and the appellant were sitting in the appellant's car. She said the appellant reached over and felt her leg so she climbed into the back seat to get away from him. The appellant then reached round into the back and touched her knee. The complainant went to get out of the car but was pulled back into the car by the appellant. He then proceeded to lift her top and bra and kiss her breasts (count 2). She also said that during this incident the appellant exposed his erect penis and was touching it (count 3). However, when she initially made her complaint to police, the complainant told Detective Constable Pilson that the appellant had had sexual intercourse with her on this occasion. She did not repeat that allegation during her ABE interview. Under cross-examination the complainant initially denied this occurred. Then said she could not remember. Finally she said she did not know. The appellant did not dispute that he would have been in the car with the complainant at Shimna Valley. He denied that any of the offences occurred. The jury found him guilty of the sexual assault on count 2 but not guilty of performing a sexual act in front of the complainant on count 3.

Counts 4, 5 and 6

[7] Counts 4, 5 and 6 relate to another incident in the car. It was alleged that it occurred shortly after Christmas 2010 by which date the complainant had turned 16. On this occasion, the complainant said, while the appellant was driving her in his car he pulled the car over and began to touch her leg (count 4). When she told him to

stop, he did so and began driving again. A short time later he pulled the car over again and began touching her leg again. He then put his hand down inside the complainant's trousers and underwear and penetrated her vagina with his fingers (count 5). The complainant also said that while he was doing this the appellant took her hand and rubbed it up and down his erect penis (count 6). In cross-examination the complainant said she had no memory of the incident but then said she could remember aspects of it. The appellant did not dispute that he would have travelled home from a visit to the grave of the deceased son with the complainant in the car, but he denied any of the alleged offences occurred. The jury convicted the appellant on Count 4 of touching the complainant's leg but acquitted him of the further two counts.

Counts 7, 8 and 9

[8] Counts 7, 8 and 9 related to an alleged incident at the complainant's sister's house on 13 February 2010. In evidence the complainant alleged that the appellant had been at the house to fix the electricity and she had accompanied him. While there the complainant claimed she had been using hair straighteners upstairs, the appellant came up, sat beside her and then pulled down her tights. The complainant said she pulled her tights back up and moved away. She then said that a short time later, after she had been to the toilet, the appellant pulled her into her sister's bedroom where he removed her tights and underwear, performed oral sex on her (count 7), penetrated her vagina with his fingers (count 8), and then penetrated her vagina with his penis (count 9) before withdrawing his penis and masturbating over her leg. The appellant denied such offences happened. The jury acquitted him of all three of these charges.

Count 1

[9] Count 1 related to an incident on 5 September 2012. The complainant gave evidence that she and the appellant were in the living room at home and the complainant was doing sit-ups and press-ups. The complainant then lay on her stomach and asked the appellant to stand on her back. The complainant claimed that after doing this for a short while the appellant lifted the back of her top, unhooked her bra and started to kiss her back. He then removed her trousers and underwear and digitally penetrated her (count 1). The appellant accepted that this incident took place but claimed it was consensual activity. His version of events was that after standing on the complainant's back he got off and gave her a back massage. During the massage he started to caress her bottom over her trousers, he then slid his hands under her top. He said the complainant then helped him remove her pyjama bottoms and bra and she lifted herself up so that he could caress her breasts. He then removed her pants, caressed her vagina until she was fully aroused and then inserted his fingers into her vagina and pleasured her. He said that she did not ask him to stop; she made groaning noises and made movements indicating she was enjoying it. The jury acquitted him of this charge. Since the appellant admitted committing the sexual acts in question the jury must have concluded that the

complainant consented to the acts or that the Crown had not satisfied them that she was not consenting. During the incident on 5 September 2010 the complainant's brother had been up in bed. When he came down to get a drink which he had left in the living room he disturbed the complainant who was not yet fully dressed and the appellant appearing flustered. The brother enquired as to what was going on and the complainant told him the appellant had been abusing her since the death of his son. The complainant's brother contacted other family members and the police were then contacted.

The Crown's closing speech

[10] We can deal briefly with the ground that the prosecution closing speech was unfair, prejudicial and likely to engender sympathy towards the complainant. The appellant contends that the speech, rather than focusing the jury's consideration on the evidence, emphasised the manner in which the complainant was questioned by defence counsel and how the defence case was conducted. The appellant submits that this is not in accord with the fundamental need for evidence based verdicts and strict adherence to the burden of proof. Moreover, the prosecution went on to state that the complainant's family life had been "wrecked." This had no foundation in the evidence before the court and such a 'victim impact' type statement was emotional, prejudicial and likely to engender sympathy towards the complainant (R v West [2009] NICA 53). The prosecution submits that the closing speech was an appeal to the jury to avoid sympathy and that, indeed, the jury's verdicts show they did not act on sympathy. It argues that the present case was wholly different to what occurred in R v West.

[11] The criticisms raised by the appellant must be read in the context of the speech as a whole and also in light of the counterbalances which prosecuting counsel invited the jury to consider. Crown counsel told the jury that they must approach both the complainant and the appellant fairly. Whilst Crown counsel's reference to the appellant admitting 'the abuse' and his reference to the complainant once as the daughter rather than the step daughter of the appellant were regrettable we are satisfied that the trial judge dealt properly with the issue and the Crown immediately corrected the mistakes. We reject this ground of appeal.

The issue of inconsistent verdicts

[12] The appellant, relying on the case of R v CK [2008] NICA 24, and the more recent decision of R v J [2012] NICA 39 applying R v Dhillon [2010] EWCA Crim 1577, argued that Count 2 was so inextricably linked to Court 3 and that Count 4 was so inextricably linked to Counts 5 and 6 that a fair minded jury could not reasonably have found that the acts covered by Counts 2 and 4 did occur while at the same time finding that the acts covered by the other counts did not.

[13] The Crown argued the verdicts were not inconsistent. It further argued that merely because the jury returns inconsistent verdicts does not mean that the

convictions have to be quashed (R v C [2002] NICA 26). The trial judge properly directed the jury to give separate consideration to each count. In doing so, they were entitled to disregard evidence of the complainant in part or at least remain unsure about any given part of her testimony. Mr Mateer reminded the Court of Buxton LJ's dictum that "credibility is not a seamless robe." A jury is entitled to convict on some counts even though they have concluded the complainant has exaggerated or indeed fabricated other evidence (R v Dhillon [2010] EWCA Crim 1577). Furthermore, in the present case, whilst Count 2 took place within the same sexual encounter as Count 3, it was a "different facet or act" within the encounter (R v J [2012] NICA 24); and the same was true of Count 4 vis-à-vis Counts 5 and 6.

[14] In CK the Court of Appeal found there to be a 'logical inconsistency' which could not be explained where the appellant had been convicted of indecent assault but not gross indecency arising out of the same incident. In that case the complainant had said that the appellant had pulled her close in order to make her perform oral sex upon him. However, upon analysis the Court of Appeal said the two charges were "inextricably linked". The Court's reasoning was that, in the circumstances of the case, the pulling of the complainant towards the appellant was only of a sexual nature if it was for the purpose of forcing her to perform the sexual act upon him. Since the jury were not convinced that she was forced to perform the sexual act, they could not reasonably have concluded that the assault was sexual in nature.

[15] In Dhillon the Court, recognising that it is notoriously difficult to successfully challenge a jury's verdict on the grounds that inconsistent verdicts have been returned, enunciated the relevant principles

(i) The test for determining whether a conviction can stand is the statutory test whether the verdict is safe.

(ii) Where it is alleged that the verdict is unsafe because of inconsistent verdicts, a logical inconsistency between the verdicts is a necessary condition to a finding that the conviction is unsafe, but it is not a sufficient condition.

(iii) Even where there is a logical inconsistency, a conviction may be safe if the Court finds that there is an explanation for the inconsistency. It is only in the absence of any such explanation that the Court is entitled to conclude that the jury must have been confused or adopted the wrong approach, with the consequence that the conviction should be quashed.

(iv) The burden of establishing that the verdict is unsafe lies on the appellant.

(v) Each case turns on its own facts and no universal test can be formulated.

It is firmly established that a verdict will not be illogical simply because credibility is in issue. In R v G [1998] Crim LR 483 Buxton LJ pointed out that neither credibility nor reliability is a seamless robe. A jury is entitled to accept part of a complainant's evidence whilst rejecting or, more accurately, not being sure about other parts.

[16] There was no necessarily illogical inconsistency between the jury's conviction of the appellant on Count 2 and acquittal on Count 3 or between their conviction of the appellant on Count 4 and acquittal on Counts 5 and 6 or between the convictions and the acquittals on the remaining counts. The jury could logically have concluded that, while they were satisfied that the touching of the complainant alleged on those two counts occurred, they were not satisfied that the Crown had proved that the other alleged acts had occurred. In view of the way in which the complainant's evidence emerged it was entirely understandable why the jury were not satisfied in relation to the other counts. There was evidence in relation to Counts 2 and 4 which could have led the jury to conclude that the case was proved. The evidence was of a different quality. The true questions in this appeal, however, are whether the trial judge in his charge to the jury adequately directed the jury on how they should approach the complainant's evidence; how they should deal with inconsistencies in the complainant's evidence and with her incorrect initial allegation that sexual intercourse had occurred in the car during the Shimna Valley incident; and whether any special warning should have been given to the jury as to the need for special care or caution in relation to acting on her evidence.

The trial judge's charge to the jury

[17] Mr MacCreanor contended that the trial judge in his charge failed to adequately warn the jury of the need to exercise considerable caution in weighing the evidence of the complainant. He submitted that this was because the complainant had been demonstrated to be a person prepared to make a false accusation of sexual intercourse in the Shimna Valley incidents which she subsequently withdrew and because her evidence was riddled with inconsistencies, with the complainant hiding behind a claim of lost memories. He submitted that because of these features of the case her allegations on every count had to be scrutinised with particular care if her credibility on any of the counts was rejected by the jury.

[18] In R v Makanjuola [1995] 2 Crim App Rep 469 it was argued on behalf of the applicants that the judge should in his discretion have given the full corroboration warning notwithstanding the abolition of any requirement to do so. That argument was dismissed by the Court which indicated that any attempt to re-impose the straight jacket of the old common law rules was to be deprecated. The Court, however, concluded that the judge does have a discretion to warn the jury if he thinks it necessary in appropriate cases. Lord Taylor CJ stated:

> "The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise

> how a judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Act. Whether, as a matter of discretion a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where however the witness has been shown to be unreliable he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court will be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content."

The Court went on to point out that where the judge does decide to give some warning in respect of a witness it would be appropriate to do so as part of the review of the evidence and his comments as to how the jury should evaluate it, rather than as a set piece legal direction.

[19] In the present case there was a clear evidential basis for suggesting that the complainant might be unreliable in her evidence. She had initially made an allegation to the police that sexual intercourse had occurred in the incident which was the subject of counts 2 and 3. This was a serious allegation. Yet she dropped that allegation when she took part in the ABE interview and in the course of the evidence before the jury she gave evidence from which it was clearly open to the jury to conclude that she had knowingly made a false accusation which she subsequently dropped. The trial judge in his charge to the jury described it as a "false" allegation. Mr Mateer argued that the judge's view that the allegation was false was not necessarily borne out by the complainant's evidence which could have been interpreted more benignly in favour of the complainant on the basis that she

had forgotten exactly what had happened during the incident. We found the Crown's argument on this point unconvincing since the overall impression of the evidence in the transcript is that the complainant had indeed made an accusation which she subsequently did not pursue. The trial judge's use of the word "false" was accordingly not unjustified. It is to be noted that the Crown, which, like the defendant, had advance notification of the judge's charge, did not challenge the judge's use of the word false. In any event taking Mr Mateer's point at its height there was evidence from which it was open to the jury to conclude that there had been a deliberately false allegation made. The judge did not, however, direct the jury on the potential consequential implications on the question of the complainant's general credibility which would follow from the making of a serious sexual allegation which was subsequently dropped.

[20] Furthermore, in the light of the run of the complainant's evidence in which she was unable to confirm allegations previously made it was open to the jury to find her evidence unreliable. Though it was also open to them to accept the Crown case that the trauma and nature of events had been such as to lead to her suppressing in her mind memories of events of which she had spoken in the ABE interview closer to the actual events themselves. If the jury did conclude that she was unreliable in relation to significant aspects of her evidence, then they needed to appreciate the implications that that might have in relation to her general credibility in respect of each and every count.

[21] The case, thus, presented features that did in fact call for a warning to exercise caution. The trial judge appears to have recognised this. He did in fact tell the jury that they should have regard to "the need for caution". The judge did not highlight to the jury that he was in fact giving them a *warning* or that he was *urging* them to exercise considerable care in their analysis of the evidence of the complainant. Every jury in any case must exercise caution in weighing up the evidence of a case. A warning to exercise caution arising from inconsistencies in a complainant's case or from the making of false accusations, if it is to be fully meaningful, must be properly expressed in terms to make clear to the jury the need to be especially careful in the weighing up of the evidence. It should be given in the context of the review of the evidence rather than as a set piece at a later stage divorced from the evidence. That is why in Makanjuola the Court indicated that it would be appropriate to give the warning as part of the review of the evidence and the judge's comments on how the jury should evaluate it rather than as a separate legal direction. In R v Joshi [2012] NICA 56 the Court of Appeal said the following in relation to Makanjuola warnings:

> "The learned trial judge did not at any stage ask the jury to treat the complainant's evidence with caution but it is clear from Lord Taylor's guidance that the nature of any warning that a judge decides to give in relation to a witness should be woven into the review of the evidence and the language used should reflect

the strength of the warning considered appropriate by the judge."

The current JSB Bench Book at Section 4.6 dealing with Evidence (Inconsistent Statements) indicates that where a witness (and this would clearly include the complainant in the present case) has made inconsistent statements the judge should warn the jury to judge the degree of inconsistency and the extent of the importance of any inconsistency. The jury should be directed to ask itself how the inconsistencies affect the reliability of any of the witness's evidence and if the jury concludes that the witness has been inconsistent on an important matter the jury should treat the separate accounts "with considerable caution". The judge's charge in the present case (which to be fair to the trial judge predated the current JSB Bench Book treatment of the issue) does not highlight these points to the jury.

[22] The trial judge correctly directed the jury that they had to consider the case against the defendant on each count separately. This was in accordance with the standard direction in the Bench Book. However, as Lord Lane CJ observed in the Foreward to the First Edition of the English Bench Book, specimen directions are not intended as a substitute for the careful preparation which every summing up requires. Directions will often require adaptation suitable to the circumstances of a particular case and should not be regarded as a magic formula to be pronounced like an incantation. In a case such as the present one where there is a common issue affecting each of the counts (in this case the general credibility of the complainant) the jury must understand that the consideration of each separate count does not mean that conclusions reached on some of the counts may not have important significance in relation to others. If the jury reject as incredible evidence given by the complainant on some of the counts, their rejection of her credibility in those counts must play into their assessment of her credibility on others. It is for that reason that in R v Harbinson this Court counselled against the practice of taking verdicts in sexual abuse cases of this kind in a piecemeal manner because if a jury convicts on, for example, count 1, and delivers their verdict, they cannot revisit that verdict even if as a result of subsequent deliberations they conclude they must acquit on other counts because they did not find the complainant to be a credible witness on those counts. Before delivering their verdicts on the various counts, the jury must stand back and review preliminary conclusions on some of the counts which they may ultimately consider they must revisit having regard to conclusions reached in later deliberations on the other counts. It is impossible to know how the jury in the present case structured their approach to deciding the case or whether they had reached a conclusion on counts 2 and 4 (the first counts in relation to two separate incidents) before they had reached conclusions on the other counts. It is not possible to know whether, having decided counts 2 and 4, they felt inhibited from revisiting their conclusions on those counts after rejecting the complainant's evidence on the other counts. The somewhat bald specimen direction required an adjustment in the present case so as to make clear to the jury that:

(a) their conclusions about credibility on some counts could be relevant to their assessment of the complainant's general credibility and her credibility on other counts; and

(b) before returning their verdicts they should stand back and satisfy themselves that, notwithstanding any adverse assessment of the complainant's credibility on some of the counts, they could safely conclude that her evidence on the other counts was sufficiently credible to justify conviction on those counts.

Disposal of the Appeal

[23] Since for the reasons given the trial judge's charge did not adequately direct the jury on these issues we must quash the convictions on counts 2 and 4. We will hear counsel on the question of any application for a retrial.