Neutral Citation No: [2018] NICA 10 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **MOR10569** *Delivered:* **15/02/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

JOSEPH HENRY SMYTH

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Before: Morgan LCJ, Stephens LJ and Deeny LJ

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MORGAN, LCJ (delivering the judgment of the Court)

[1] The appellant was tried on four counts:

- Count 1 – Section 18 Offences against the Person Act 1861 ("OAPA") causing GBH with intent
- Count 2 – Section 4(1) Welfare of Animals Act (NI) 2011
- Count 3 – Section 66(1) Police (NI) Act 1998
- Count 4 – Section 20 OAPA causing GBH

Count 1 alleged that he caused grievous bodily harm with intent and Count 4 was an alternative to Count 1. He was convicted on Count 1 and sentenced to an extended custodial sentence of eight years followed by a period of three years on licence. He was acquitted on the second count and sentenced to a period of four months imprisonment, concurrent with the sentence on Count 1, on the third count. No order was made on the fourth count. The conviction appeal concerns an irregularity in the taking of the verdicts. Mr Gibson appeared for the appellant and Mr Steer for the PPS. We are grateful to both counsel for their helpful written and oral submissions.

Background

[2] The appellant and the complainant had been in a relationship for some months. On 14 September 2015 they were at the home of the complainant. Each had consumed a substantial amount of alcohol. Later in the evening the appellant moved the complainant's small dog off the bed. There was a dispute about the way in which he treated the dog which was the subject of Count 2 on which he was acquitted.

[3] The prosecution case was that the appellant had gone downstairs to put the dog out and he had been followed by the complainant. The appellant dragged the complainant back upstairs by the hair, punching her as he did so. He hit her with a Hoover as a result of which she had an 8 cm laceration to her head which had to be treated with staples. He latched onto her nose with his teeth and bit her on either side of the nose. Her nose was broken. She held her arms up to her head to try to protect herself as she was being punched. She tried to get out of the bedroom window onto the flat roof of the ground floor bay window to get away. The appellant came over to the window and kicked her as a result of which she fell to the ground injuring her back in the fall. She sustained a fracture to the base of the fifth metacarpal and a fracture to her lumbar spine. The complainant then went to a neighbour for help.

[4] The appellant agreed that there had been some form of dispute between the complainant and himself. He did not accept that he had kicked her off the balcony and claimed that she had fallen as a result of her drug consumption. Nor did he accept that he had formed the intent to do her really serious harm. He was eventually arrested at the complainant's home and in the course of the arrest he spat at the arresting officer. There is no appeal in relation to his conviction on Count 3.

[5] It is common case that there is no criticism to be made of the trial judge's charge to the jury at the close after the speeches of counsel. She directed the jury carefully on the intent required for the offence contrary to section 18 OAPA. She also directed the jury properly on the approach that they should take to the alternative counts. She indicated that because Counts 1 and 4 were alternative counts the jury could not find the appellant guilty on both. First they had to consider Count 1 which was the more serious charge and it was only if they found the appellant not guilty on that count that they needed to move on to consider whether he was guilty of the offence contrary to section 20 OAPA.

[6] The jury retired to consider their verdict on the afternoon of 12 December 2016. They deliberated for about three hours without any indication that they had reached a verdict and were asked to return the following morning. At 12.32 the following day the judge indicated to counsel that she considered it appropriate to bring the jury back to give them a direction in relation to a majority verdict. She indicated to the clerk that questions should be put to them as to whether they had reached a unanimous verdict and if they had not she would give them a direction.

[7] The jury returned at 12.36 and the judge advised them that she was going to ask the clerk to put some questions to the foreperson. The clerk asked the foreperson if they had reached a verdict on Count 1 upon which they were all agreed. She answered "No". The clerk proceeded to ask for verdicts on counts 2 and 3 but those are not the subject of challenge in these proceedings. The clerk then asked the jury if they had reached a verdict on Count 4 on which they were all agreed. The foreperson replied "Yes" and when asked for the verdict indicated that the appellant was guilty.

[8] At 12.37 the trial judge asked the jury to retire for a few moments. The prosecution submitted that the jury had not yet given a verdict on Count 1 and that they should be asked if they required further time. Mr Gibson submitted that Count 4 was an alternative to Count 1 and since they had given their verdict on Count 4 there was no need for them to consider Count 1 any further.

[9] The trial judge concluded that Count 1 was properly before the jury and they had not yet returned a verdict in relation to it. They needed to return a verdict before a verdict in relation to Count 4 could be considered. In those circumstances she proposed to advise them that she was not at this point accepting the verdict in relation to Count 4 and was going to give them a majority direction in relation to Count 1.

[10] The jury were brought back at 12.57 and the judge directed them on the following terms:

> "Members of the jury, I apologise, I think there may have been a little bit of confusion. You were asked if you had reached a verdict in relation to Count 1 and the answer was no. That being the case, and given that I explained to you in my charge that Count 4 is an alternative, I cannot accept your verdict in relation to Count 4 unless there has been a verdict in relation to Count 1. Now, that being the case and given the time that you have already spent deliberating in relation to it, I am just going to remind you that your first duty is to see if you can reach a verdict, be that guilty or not guilty, on which you are all agreed in relation to Count 1. If, however, that is not possible I can now accept a majority verdict, that is one on which at least 10 of you are agreed. So what I am saying obviously applies now to Count 1, that is the count that you have not returned a verdict in relation to at this point, so I would like you to retire and consider the matter further and, as I say, if you are

able to reach a verdict on which at least 10 of you are agreed then you should let the jury keepers know and we will come back to court at that point."

[11] The jury retired at 12:59 and lunch was provided for them. The hearing resumed at 14:13 when the jury were recalled. The clerk asked the foreperson if at least 10 of the members of the jury had reached a verdict on Count 1. She replied in the affirmative and indicated that the appellant was guilty by majority 10-1.

Discussion

[12] The first matter to consider in this case is the manner in which the jury should be questioned when they are asked to return with a view to giving a majority verdict. We agree that it was appropriate to ask the jury if they had reached a verdict upon which they were all agreed on Counts 1, 2 and 3. Since in this case the jury indicated that they had not reached a verdict on which they were all agreed on Count 1 no questions should have been put on the Count 4 since in accordance with the trial judge's direction it was an alternative to Count 1.

[13] Where the jury has indicated that it has reached a verdict in respect of which they are agreed on some counts it is generally preferable not to take any verdicts until all the counts have been dealt with. This is particularly the position in sexual abuse cases as this court has pointed out in R v Harbinson [2012] NICA 20, R v A [2014] NICA 2 and R v S and C [2015] NICA 51. In this case the issue would probably have depended upon whether there was any possibility that the publication of the verdicts on Counts 2 and 3 would have prejudiced any retrial of Count 1 in the event of a disagreement by the jury. The important point is that the judge should engage in a discussion with counsel about any possible risks before taking a partial verdict.

[14] In this case once the jury had given its verdict on Count 4 Mr Gibson submitted that it was no longer open to them to return a verdict on Count 1. In this court Mr Gibson has correctly not pursued that argument. In R v Andrew Nigel Fernandez [1997] 1 Cr App R 123 the accused had been charged with robbery (Count 3), having a firearm with intent to commit theft (Count 4) and handling stolen goods (Count 5). Count 5 was an alternative to Counts 3 and 4. The jury returned a guilty verdict on Count 5 before giving any verdict on Counts 3 and 4. In that case the jury had not been properly directed in relation to the alternative counts and the clerk had not been prevented from asking for a verdict on Count 5 before Counts 3 and 4 had been dealt with.

[15] Hobhouse LJ giving the judgment of the court set out the relevant principles follows:

> "Where, as a result of the failure by the judge properly to direct the jury or control the procedure of the court, the jury is allowed, inappropriately, to return a verdict on a count in an indictment which has only been included in the indictment as an alternative to other more serious counts, the verdict in respect of the alternative is irregular. The judge is under a duty to take from the jury, and the jury are entitled to give, their verdicts upon the more serious counts. If the verdict is prematurely returned on an alternative count before the jury had given their verdict, or been discharged from giving their verdict, upon the more serious count, the judge should decline to accept the verdict on the alternative count. If he accepts it, it should ordinarily be quashed on appeal, as occurred in Hill and Sinnott."

[16] The issue arose again in R v McEvilly [2008] EWCA Crim 1162 where the accused was charged in the alternative with attempted murder on Count 1, wounding with intent contrary to section 18 OAPA on Count 2 and wounding contrary to section 20 OAPA on Count 3. He pleaded guilty to Count 3. After four hours the jury were brought back and indicated that they had not reached a majority verdict on count 1 but had on Count 2. When asked, the jury found the appellant guilty. The judge then gave them further time in relation to Count 1 and shortly thereafter they came back with a majority guilty verdict on that count.

[17] In the appeal in relation to the attempted murder conviction Lord Justice Keene concluded that no finality had been reached as to the attempted murder charge when the verdict on the section 18 count was taken. The judge had not established from the jury that there was no realistic prospect of a verdict if they were given more time. There was a procedural error in taking the verdict on Count 2 but that did not affect the safety of the conviction on Count 1. In the circumstances the court quashed the conviction in relation to Count 2 and vacated the plea in relation to Count 3.

[18] In our view these authorities provide ample support for the jurisdiction of the learned trial judge to decline to accept the jury's verdict on Count 4 and conclude that the jury should be discharged from giving a verdict on that count in the event of a conviction on Count 1.

[19] Mr Gibson contended, however, that the learned trial judge's direction set out at paragraph [10] above inappropriately pressurised the jury into coming to a verdict on the first count. In particular the judge indicated that she could not accept a verdict on Count 4 unless there had been a verdict in relation to Count 1. That, it was

suggested, removed from the jury the possibility of a disagreement or at least pressurised the jury into avoiding a disagreement.

[20] Mr Steer submitted that this part of the charge should not be taken out of context. The judge went on to remind that their first duty was to see if they could reach a verdict, be that guilty or not guilty, on which they were all agreed and if that was not possible she could accept a majority verdict. She then indicated that she could accept such a verdict if they were able to reach it. He contended, therefore, that the learned trial judge left all options open.

[21] One of the difficulties faced by an appellate court is that the written word does not necessarily convey the impression that the judge's remarks may have left upon the jury and those present when they were delivered. It is for that reason that the appellate court is likely to be influenced by the actions of those present when the remarks were made. If the remarks created an impression that the jury were being pressurised in any direction this court would have expected that either the prosecution or defence would have intervened by way of requisition to ensure that the matter was corrected.

[22] We do not in any way seek to criticise the approach taken by Mr Gibson in this appeal since the point was there to be taken on foot of the transcript but in light of the absence of any requisition at the time we consider that this was a relevant indication that the remarks did not give rise to any sense of pressure upon the jury.

Conclusion

[23] For the reasons given we do not consider the conviction on Count 1 unsafe. We consider that the trial judge was correct to decline to accept the jury's verdict on Count 4 and that once the jury had returned a guilty verdict on Count 1 the proper course was to discharge the jury from giving a verdict on Count 4.