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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

DH

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Mr McDonald QC with Mr Stephen Fitzpatrick (instructed by Elliot-Trainor Partnership) for the Appellant
Mr McMahon QC with Ms McCullough (instructed by PPS) for the Respondent

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Before: Morgan LCJ, Maguire J and McAlinden J

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MORGAN LCJ (delivering the judgment of the court)

[1] The appellant appeals against his conviction on 10 counts of rape and 9 counts of indecent assault in respect of one complainant and one charge of perverting the course of justice at Newry Crown Court in October 2019. He was acquitted on 4 counts of indecent assault, 2 counts of rape, 1 count of common assault and 1 count of gross indecency in respect of a separate complainant. There were four essential complaints. It was submitted that there was inconsistency in the verdicts, that more guidance was needed on consent, that the appellant's case on motive had not been put to the jury and that there had been confusion over the content of certain specimen counts. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The complainant was born in December 1977. The appellant was her uncle. She alleged that the abuse started when she was 5 or 6 years old and continued until she was 15. She became pregnant and gave birth to her son when she was 16. Her parents had alcohol addiction issues and her pregnancy was discovered by her aunt in Dundalk who took her to hospital and made arrangements for the birth.

[3] The aunt established that the appellant was the father but the complainant's grandmother was adamant that this should not be made public. The identity of the

father remained a secret. In his early 20s the child persisted in seeking to establish who his father was. The complainant decided to go to the police in 2017 but did not make a statement as she had not informed her son of his father's identity. She made a police statement in 2018.

[4] When interviewed by police the appellant denied that there had been any sexual contact between himself and the complainant. DNA samples were taken as a result of which it was established that he was the father of the child. His case at trial was that there had been a single incident of sexual intercourse as a result of his being seduced by the complainant. Prior to his police interview the appellant offered to pay the complainant £15,000 if she withdrew the complaint. She refused and at trial the appellant maintained that this was an offer of money for the child. He was convicted of intending to pervert the course of public justice and there is no appeal from that conviction.

[5] The following were the counts on which the appellant was convicted which are the subject of the appeal:

(i) Count 1 was the first incident the complainant recollected when she was 5 or 6 years old. She was playing in the appellant's bedroom and he told her to shut her eyes and pretend she was dead. He rubbed his hand on her vagina under her pants.

(ii) Counts 3, 4, and 5 comprised two specific counts of fondling her vagina on a mattress in the attic of the appellant's home and one specimen count of the same behaviour at the same age.

(iii) Count 19 was a specimen count alleging 4 to 5 occasions on which the appellant made her masturbate him in his car at a carpark when she was aged between 8 and 10.

(iv) Count 7 was a specific count of the appellant pushing the complainant onto the sofa and gyrating his groin against her and count 8 was a specific count of kissing her and putting his hand on her vagina. She was aged 10 at the time.

(v) Count 9 related to activity when she was 12. She was babysitting and the appellant told her to get into his bed and he then put his hands on her vagina.

(vi) Count 11 was a specific count of kissing and putting his hands on her pants in the car at a carpark and Count 12 was the first rape on the same occasion when he asked could he try something different by putting his penis into her.

(vii) Count 13 was a specimen count in respect of many more rapes in the car aged 13 and 14.

(viii) Count 14 was a specific count in the car at a carpark when he put his hand in her knickers and Count 15 was a rape on the same occasion when she said no but he said he could not go home with an erection. The appellant was 14 or 15 years old. Count 16 was another specific count of rape at a carpark when

the complainant asked the appellant not to do it anymore because she did not want to get pregnant.

(ix) Count 17 was a specific count of rape in a layby when he used a condom and count 18 was a specimen count in respect of further rapes in the same circumstances. The appellant was aged 14 or 15.

(x) Count 22 was a rape on a summer's afternoon when she was 15 at a building site against a wall and Count 24 was a further rape aged 15 in the appellant's bedroom when she was kneeling in a chair and was raped from behind.

(xi) Counts 27 and 28 were specimen counts alleging numerous rapes aged 14 and 15. She described this as happening twice a week but accepted that during the summer she spent a lot of time in Dundalk and for six months of that period the appellant was away.

[6] The appellant was acquitted on the following counts.

(i) Count 2 was an allegation that the complainant and another child were playing in the attic with dolls while the appellant was lying on a mattress beside them. The children were aged 5 or 6 at the time. The complainant alleged that the appellant grabbed her hand and put it on his erect penis, moving her hand up and down. The complainant's friend had no recollection of the incident.

(ii) Count 6 related to an allegation when the complainant was 7 years old. She alleges that she was in the back seat of a car being driven by her mother with her brother and the appellant. She claimed that the appellant whispered "Don't say a word and I'll buy you sweets." He put his hand inside her pants and rubbed her vagina during the car journey. No one else in the car gave any evidence of this occurring.

(iii) Count 10 concerned activity at a pool table in a bedroom. The complainant alleged that the appellant groped her and pushed her against the table gyrating against her with his hands inside her pants and touching her bum. She claimed that this occurred on a number of occasions. This was a specimen count.

(iv) Count 20 was an allegation of rape when the complainant was aged 14 or 15. She alleged that this occurred in the appellant's car under a canapé beside his house. She said she was really frightened as anybody could have seen and she was afraid of getting into trouble.

(v) Count 21 was an allegation of common assault in that he threw a firework into the bathroom while she was there at the same age.

(vi) Count 23 was an allegation that when the complainant was in the appellant's bedroom on the CB radio he raped her. She said that she was in her school uniform and the appellant's wife and children were downstairs. She alleged that he got on top of her, pulled her knickers off and had sex with her and

that she continued talking on the CB during this. She described him ejaculating onto the carpet and rubbing it in with his foot.

Inconsistency

[7] This court recently reviewed the legal principles on inconsistent verdicts in R v PF and we repeat that here. The legal test to be applied in such cases was subject to extensive analysis in R v Fanning [2016] 1 WLR 4175. Having reviewed the authorities the court concluded that the approach that should be taken was that set out by Devlin J in the unreported case of R v Stone (13 December 1954).

> "When an appellant seeks to persuade this court as his ground of appeal that the jury had returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is upon the defence to establish that."

[8] This approach had been expressly approved by the Court of Appeal in England and Wales in R v Durante [1972] 1 WLR 1612 and was subsequently adopted in this jurisdiction in R v H [2016] NICA 21. In Fanning the court went on to deal with four specific matters. First, the court rejected the submission that a different test might apply to:

(1) multiple counts arising out of a single sexual encounter where the complainant alleged different forms of sexual acts closely related in time; or

(2) multiple counts arising out of events occurring over a long period of time measured in days, weeks, months or years.

It was therefore unnecessary and inappropriate to compare the circumstances in one case with another as was urged on the court in R v S [2014] EWCA Crim 95.

[9] Secondly, the burden of showing that the verdicts cannot stand is upon the appellant. It is for the appellant to persuade the court that the nature of the inconsistencies are such that the safety of the guilty verdicts are put in doubt. That question will turn on the facts of the particular case and it is not safe to attempt to formulate a universal test.

[10] Thirdly, there were suggestions in some of the cases that if the credibility of the complainant was rejected on one count it was difficult to see how it could not be rejected on another. That suggestion should be rejected. It was generally permissible for a jury to be sure of the credibility or reliability of a complainant or witness in relation to one count in the indictment and not to be sure of the credibility or reliability of the complainant on another count.

[11] Fourthly, in Fanning the court also indicated that in the overwhelming generality of cases it will be appropriate for the judge to give the standard direction that the jury must consider the evidence separately and give separate verdicts on each count. That applies to cases where there may be multiple counts involving the same complainant and cases where there are specific counts and specimen counts. The court adopted the observations of Lord Bingham CJ in R v W (Martyn) unreported 30 March 1999:

> ".. we would point out that the judge's direction in this case, as is acknowledged, was in conventional terms. He urged separate consideration of each count. He emphasised that the facts were for the jury. He suggested that most, if not all, of the counts in relation to each complainant would stand or fall together, but he did not direct the jury that, as a matter of logic, it was necessary for counts 1 to 7 and 8 to 16 respectively to be decided in the same way. He was not invited to give such a direction. The defence acquiesced in the direction which he did give, and on appeal Miss Worrall expressly approves it. If the view of the defence was that any differentiation by the jury in the verdicts on counts 1 to 7 or on counts 8 to 16 would of necessity be inconsistent, then that is a view which should have been put to the judge and he should have been invited to give a different direction. As it is, it would be anomalous that a jury, directed that the facts were for them, that they should consider the charges separately without any obligation to decide all the counts in relation to each complainant the same way, and that they should not convict unless they were quite sure, should then be held to have returned irrational or logically inconsistent verdicts because they took the judge's direction at its face value and gave effect to it."

We agree.

[12] Turning then to the individual counts on which the appellant relied Count 2 concerned an allegation when the appellant was five or six years old. She alleged that it occurred in the presence of her friend who was of the same age. The friend gave evidence but did not recollect the incident. By their verdict the jury indicated that they were not satisfied beyond reasonable doubt of the complainant's reliability on that count. In light of the inability of the other child to recollect the incident that suggests a careful jury rather than an unreasonable jury. Exactly the same reasoning can be applied in relation to Count 6.

[13] Count 10 concerned activity at the pool table in a bedroom. This was a play area for everyone in the house and, therefore, was highly accessible. The jury were entitled to bear that in mind in considering whether these events were likely to have occurred in that circumstance. The same can be said in relation to Count 20 where

the appellant's car would have been highly visible to anyone in the vicinity. None of this gives rise to the conclusion that this was an unreasonable jury.

[14] Count 23 related to an allegation of rape when she was using the CB radio. The description of the event was unusual in that she said that she continued talking while the rape was going on. The jury were obliged to take into account that unusual background in ease of the appellant and their verdict suggests great care in doing so. Count 21 was of a different nature and appears to have been in the nature of a prank.

Consent

[15] The learned trial judge gave a split direction dealing with issues of law in advance of speeches by counsel and summing up on the facts thereafter. He directed the jury that consent was not a defence to indecent assault in the case of a girl under 17. He contrasted that with the offence of rape which could only take place if it was proved that there was no consent. He specifically directed them that before rape could be established they must decide beyond a reasonable doubt on the evidence before them that the complainant did not consent.

[16] He then specifically directed them on consent:

> "What is consent, members of the jury? Well, consent to something which we are directed really. We don't need to tell juries what consent is, except in special circumstances, which really don't apply here. You all know, it's a commonly used word. It means voluntary type behaviour. It means accepting what's going on. It means agreeing. All of those words can be used for consent, but you know what consent is, members of the jury, it's a common word and you will understand what consent is."

[17] The appellant's case was that the rape alleged at Count 24 was consensual. The judge addressed that in the following terms:

> "Now, so you must find that A did not consent beyond a reasonable doubt. But that's not the end of it. You must also then go on to find that the defendant either knew she didn't consent or was reckless as to whether she consented. So those are the elements. There has to be sexual intercourse. It has to be proved that A did not consent. It has to be proved, either that the defendant knew she wasn't consenting or was reckless as to whether she consented. What is recklessness? Well, in essence recklessness is normally, members of the jury, taking a risk or not caring."

[18] The defence case in respect of the rape counts other than that comprised in Count 24 was that the sexual intercourse did not occur. The direction on consent was not the subject of any requisition at the trial and in our view was entirely appropriate having regard to the circumstances of the case. There was nothing in the circumstances of this case which required the judge to go further than to explain to the jury that they should address the issue of consent having regard to the ordinary meaning of that word.

[19] Some criticism was made of an intervention by the judge in the course of the trial to establish whether the case was being made that the complainant took her pants off to facilitate the sexual encounter which was the subject of Count 24. We consider that this was a point of clarification which the judge was entitled to pursue and does not give rise to any concern about the verdict.

Motive

[20] It was common case at the trial that the complainant found it difficult to bond with the child after his birth. The child eventually returned to live with the complainant's parents and was brought up as a child of that family. As discussed earlier the boy became insistent about identifying his father in his 20s. The complaint made to the police occurred at about the time of the disclosure of the identity of the boy's father.

[21] The submission made in a footnote to the skeleton argument on appeal is that the verdict was unsafe because the judge made no reference to this background in his charge. We do not accept that submission. This matter was not the subject of a requisition at the hearing. The judge gave extensive directions in relation to delay both in terms of the prejudice caused to the appellant and the impact upon the reliability of the complainant's account. We do not consider that any further examination of the background concerning the child was required.

Confusion over specimen counts

[22] It was a consistent theme of the appellant's defence that the complainant's account was unparticularised to the point where the appellant was unable to defend himself. That arose in particular in relation to Counts 27 and 28. Those counts were based on an assertion by the complainant that she had been raped approximately twice a week over a two-year period. She accepted in cross-examination that she spent most weekends in Dundalk away from the appellant and that the appellant himself had been away for a period of about six months during the two-year period. That was exploited on behalf of the appellant as an inconsistency.

[23] In the course of their deliberations the jury sent a note to the court seeking "clarification on count 27 and 28, does this relate to twice a week rape?" The judge answered, yes. The second question was "can you tell us the difference between count 27 and 28?" The judge directed the jury that there was no difference between the counts. They were sample counts. If the jury were satisfied beyond reasonable doubt that rape took place during the alleged period they were entitled to convict on

one of the counts. If they were sure beyond reasonable doubt that it took place on at least two occasions they were entitled to convict on both counts.

[24] Mr McDonald objected to the direction. He submitted that there was a void of evidence about those counts. The judge indicated that he had given very clear directions including counsel's submissions on the point and there had been no requisitions.

[25] We consider that there is some difficulty with these counts having regard to the indictment as a whole. The counts related to repetitive rapes during the period from 12 December 1991 to 12 December 1993 when the appellant was aged 14 to 15. These were not, however, the only specimen counts dealing with this period. Count 13 concerned the period from 12 December 1990 to 12 December 1992 and alleged many more rapes in the appellant's car at a carpark. Count 18 concerned the period from 12 December 1991 to 12 December 1993 and concerned repetitive rapes in a layby.

[26] We consider that the jury needed a clear direction that counts 27 and 28 could only be satisfied if the jury were satisfied beyond reasonable doubt that there were further rapes during the relevant period other than those comprised in the earlier specimen counts. The direction would need to have been extremely careful having regard to the fact that there was no indication as to the place or circumstances in which any further rapes were alleged to have occurred. It was necessary in our view to draw attention to the overlap in the time period and the danger of convicting the appellant of two offences on the same evidence.

[27] We accept that no such direction was given and having regard to the lack of particularity in those particular counts we consider that the convictions on those counts were unsafe.

Conclusion

[28] For the reasons given we allow the appeal against conviction in respect of counts 27 and 28 only.