Neutral Citation No: [2024] NICA 54	*Ref:*	**McC12569**
	ICOS No:	**23/094753/A01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**28/06/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPLICATION FOR LEAVE TO APPEAL CONVICTION IN THE MATTER OF

THE KING

v

JORDAN GLASGOW

Mr Charles MacCreanor KC and Shannon McKenna (instructed by McCallion Jones Solicitors) for the Applicant
Ms Geraldine McCullough KC and Jim Johnston (instructed by the Public Prosecution Service) for the Respondent

---

Before: Keegan LCJ, McCloskey LJ, and McFarland J

McCLOSKEY LJ (*delivering the judgment of the court*)

Reporting Restrictions

[1] The complainant is entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992 as amended. We have also used a cypher for the complainant's friends to avoid identification of the complainant.

Introduction

[2] Leave to appeal having been refused by the single judge, Rooney J, Jordan Glasgow (the "applicant"), at the material time aged 20, renews before this court his attempt to challenge a majority (11/1) jury verdict convicting him on 29 February 2024 of a single count of sexual assault. The jury returned a separate verdict of not guilty in respect of the second count on the indictment, namely rape of the same person, a female teenager four years younger than the appellant. The verdicts were the culmination of a trial conducted from 20 to 29 February 2024. The appellant was punished by a two-year custodial sentence, which is not challenged.

Factual Matrix

[3] The following is distilled from the agreed schedule of facts generated at the sentencing stage. The injured party and the applicant met by arrangement around half past midnight on 13 October 2022 at a wall on waste ground situated between their home addresses. They had been in each other's company a few times previously. The purpose of this meeting was to smoke a joint of cannabis which was supplied by the applicant. The injured party felt unwell after smoking the joint. She felt lightheaded, panicked, paranoid and anxious. She felt "zoned out" and she regretted taking the joint. She felt the applicant touching her on her lower back, hips and thighs, then around her vagina. He then put two fingers inside her vagina which he moved in and out a few times for a few seconds.

[4] Nineteen days later the injured party made disclosures of the alleged events to a nurse practitioner, who then told her parents. A complaint was made to police on 1 November 2022 and an ABE interview was conducted on 16 November 2022. The applicant was arrested on 19 November 2022 and was interviewed by police. He denied the offences but gave police a full account of his version of events, the gist whereof was that the victim had been sitting on his knee and that they had engaged in consensual kissing only. The applicant provided his password for his phone to facilitate an examination of the device.

Grounds of Appeal

[5] There are two grounds of appeal:

(i) The conviction on Count 2 is an inconsistent verdict;

(ii) The Crown closing contained an unfair and prejudicial comment.

Ground 1: Inconsistent Verdicts

[6] The trial judge's charge to the jury included the following passage:

> "Now, I just want to say something finally, very briefly, and that is you have to consider each of those counts separately, it's not a job lot. You have to make two separate decisions, one in respect of count 1; one in respect of count 2. Now, there may, of course, be evidence relating to one of those counts that assists you in reaching your verdict on the other count, but don't assume that your verdict has to be the same for both counts. It might be the same but it doesn't have to be, so don't assume that it does."

In another passage the judge stated:

> "She said she didn't remember how Jordan got behind her but he started touching her over her hips, her back and her thighs, and she said she realised that he had slid his two fingers into her vagina and that he then put his penis into her vagina, and she said she felt a burning sensation. She said she knew it was his penis because she turned round and saw it. She said it went on for about a minute and she asked him to stop but he didn't, and she had to push him away to get him to stop. She said she didn't know if he used a condom."

The judge provided an overview of the evidence of the injured party's account to the nurse practitioner, the evidence of her friend (CD) and the evidence of her mother.

[7] The judge then drew the jury's attention to inconsistencies in the injured party's evidence and gave a *Makanjuola* warning in respect of her evidence:

> "In this particular case, members of the jury, because [AB] has admitted to you that she has told lies to her mother about the scratches, to the police about the fact that there was kissing, and because of the inconsistencies that I've drawn to your attention and because of the note from Beechcroft, which, if it's correct, that the only person [AB] had told at that time, the 1st of November, was EF, she says, well, if she said that, that was a lie as well. So, because of those admitted lies and because of the inconsistencies you should be extremely cautious before relying on the account that [AB] has given to you."

The trial judge commented on the police investigation, noting the deficiencies including: the victim's refusal to provide her phone; the lack of statement from one of the first people to whom a complaint was made; and the lack of forensic evidence as a result of the delay in the incident being reported. The judge then summarised the applicant's evidence, noting his denials had been consistent since his arrest.

[8] The judge continued:

> "So, members of the jury, it's for you to decide where the truth lies. If you are sure that [AB's] account is true, then you must find Jordan guilty. If you're not sure, if you think that she may not be telling the truth, then you must find him not guilty.
>
> Members of the jury, I know I've taken up your time this afternoon. I hope that this has been helpful and that I - and

> that it has not confused you. Each of us, Ms McCullough, Mr MacCreanor, myself, each of us has tried to help you by bringing to your attention important points in this case, because what we've tried to do is give you lots of different perspectives on the evidence so that you can work out for yourselves what you believe happened in this case. No-one has tried to confuse you, each of us has tried to help you. I hope we have done so."[1]

[9] Prosecuting counsel's closing presentation to the jury repeatedly emphasised the need for the jury to decide which of the victim and the applicant was telling the truth. The Crown highlighted the victim's evidence in respect of both the sexual assault and rape, during the hearing and during her ABE interview. In all accounts the digital penetration was followed immediately by the alleged rape. This was emphasised by Crown Counsel in their summary of the victim's evidence. The jury was invited to look at the case as a whole. Senior defence counsel addressed the jury in similar terms.

[10] The submissions on behalf of the applicant highlight in particular the inconsistencies which were brought to the trial judge's attention and which then formed part of the judge's direction to the jury, ultimately giving rise to the Makanjuola warning. It is suggested that the direction given by the judge was largely "global" in nature, as the case had been approached in such a way by both the Crown and the defence. The applicant specifically agrees with the judge's direction that the jury would have to decide which of the two protagonists was telling the truth.

Unsafe Conviction: the test

[11] See *R v Pollock* [2004] NICA 34 at para [32]:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe.'
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where a conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the

[1] See pp26-27, lines 27-5 of LTJ's charge to jury from 28 February 2022, at tab D3 of green folder.

court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

Ground 1 determined

[12] The test to be applied when considering whether a conviction should be quashed based on apparently inconsistent verdicts was rehearsed comprehensively in the decision of this court in *R v DH* [2020] NICA 57:

"**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."

[13] See also the summary of the governing principles in *Blackstone* 2004 at D26.28 and *Archbold* 2024 at 7-70. With specific reference to an injured party's credibility, Archbold states:

> "Where the complainant's credibility is in issue and their evidence is uncorroborated, verdicts are not to be regarded as unsafe just because the jury had also returned not guilty verdicts on other counts based on that complainant's evidence (see also *Fletcher* [2017] EWCA Crim 1778). Where the appellant had been convicted on one count and acquitted of another, any inconsistency between the verdicts on the two counts only assisted the appellant if it pointed to the conviction on that count being unsafe, rather than an error in the appellant's favour on the other count: *McDonald* [2018] EWCA Crim 798; [2018] Crim. L.R. 853."

We consider this passage to be orthodox doctrine.

[14] The effect of the governing principles is that the threshold to be overcome in sustaining a complaint of inconsistent jury verdicts is an elevated one. The prosecution case was, in effect, that the two alleged offences were committed in the course of a single transaction. This, we would observe, was the inescapable reality of the factual situation put forward. This did not alter, confuse or conflate the separate nature of the two offences. Most importantly, this was clearly conveyed by the judge in her directions to the jury. The two verdicts, on their face, are perfectly rational.

They disclose no aberration. They are harmonious with the governing principles. They generate no reservations on the part of this court about the appellant's conviction. We concur with the reasoning of the single judge. We identify no merit in this ground of appeal accordingly.

Ground 2

[15] The closing address to the jury of leading prosecuting counsel stimulating the second ground of appeal contained the following passage:

> "Members of the jury, as you come together to discuss and weigh up the evidence and reach your verdicts, be careful of the clouds of confusion created by those who aim to confuse you and steer you away from the truth, always applying your critical common sense eye and compare that account given by the defendant to the clear, definite, unwavering and meticulous account provided by [AB]."

Reacting, senior defence counsel, in the absence of the jury submitted to the trial judge:

> "Your Honour, … That's really emotive - be careful of the clouds of confusion and those who aim to confuse you. And I draw that to your attention before I make a comment on it in my speech, your Honour, but that's just totally, entirely inappropriate
> …
>
> saying something like that … is inaccurate, the aim of confusing a jury, rather than testing the evidence."

[16] The judge retired and, upon resuming soon thereafter, directed the jury as follows:

> "Thank you, members of the jury. As I explained, we're now at the stage of the process where counsel for the prosecution and counsel for the defence have an opportunity to address you and comment about the evidence you have heard, and then tomorrow I will also try and assist you in your consideration of the evidence. But I thought it might be helpful just to explain something about this and that is each barrister in a criminal case, both the prosecution and the defence have professional obligations, and in particular they have an obligation to assist you in your consideration of the evidence. And you'll appreciate that there are lots of different ways that one can approach evidence, think about evidence, in any situation, lots of

different perspectives, and what we're trying to do in this process is to assist you to think about the evidence in every possible way so that you are best placed to make the right decision in this case.

Now, as part of the professional obligations that I have mentioned to you, the defence barrister has an obligation, again a professional obligation to bring to your attention any matters that might affect your view of the prosecution case. That is right and proper, it's a professional obligation. Again, what we're all trying to do here is help you. As I've explained to you, it's your view and your view alone that counts, but we're trying to help you. So, I certainly hope that when I speak to you tomorrow, you don't think that I'm confusing you in any way, I'm doing my best not to, and in the same way Mr MacCreanor, when he addresses you, will be trying to help you.

So I hope I've explained it. I - I do explain this to juries at this point because from a jury's point of view, it might seem that there's an awful lot of information coming your way, and it can feel a bit difficult to work your way through it, but we're trying to help you and when you've heard everything, you've heard what the prosecution have to say, when you've heard what the defence have to say, and tomorrow, when you hear what I have to say, we hope that when you go to your room, you'll be able to reflect on all of that and that you'll be in the very best position to reach a proper verdict in this case. So I hope that, again, isn't bombardment of information."

[17] Senior defence counsel, in his closing presentation to the jury, highlighted this discrete issue in three separate places: at the commencement of his address, in a later passage and in his final words.

[18] The duties of prosecuting counsel were formulated by this court in *R v West* [2009] NICA 53 in these terms:

"**The duties of prosecuting counsel**

[8] In *Boucher v R* [1954] 110 CCC 263 it was stated:

'It is the duty of Crown counsel to be impartial and exclude any notion of winning or losing. He violates that duty where he uses inflammatory and vindictive language against the accused

> and where he expresses a personal opinion that the accused is guilty.'

The court in *R v Gonez* [1999] All ER (D) 674 succinctly set out the proper approaches to be adopted by prosecuting counsel thus:

> 'Counsel's submission, which we accept, is that it is the role of prosecuting counsel throughout a trial as indeed before it to act as a minister of justice. It is incumbent upon him or her not to be betrayed by personal feelings in relation to the prosecution. It is incumbent on counsel prosecuting not to seek to excite the emotions of a jury. It is for prosecuting counsel not to inflame the minds of a jury … A final speech should as a matter of form, as it seems to us, be a calm exposition of the relevant evidence, so far as it is relevant to give such an exposition and an equally calm invitation to draw appropriate inferences from that evidence.'

In *Randal v R* [2002] 1 WLR 2237 Lord Bingham stated that:

> 'A reference should never be made to matters which may be prejudicial to a defendant but are not before the jury.'

In *Ramdhanie v Trinidad and Tobago* [2006] 1 WLR 796 the Privy Council held that prosecuting counsel's closing speech created a material irregularity and unfairness rendering the verdict unsafe. Prosecuting counsel's final speech had included passages that in effect told the jury or strongly implied that there was incriminating material about the accused that not been put before them. The speech contained emotive and unjustified comments.

[9] The nature of prosecuting counsel's role is succinctly stated in the Code of Conduct for the Bar of Northern Ireland at paragraph 1701:

> 'It is not the duty of prosecuting counsel to obtain a conviction by all means at counsel's command but rather to lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution and

> should assist the court in all matters of law applicable to the case.'
>
> The role of prosecuting counsel is also dealt with in the Public Prosecution Service Code paragraph 5.1.5 of which reads:
>
> > 'A prosecutor must not advance any proposition of fact that is not an accurate and fair interpretation of the evidence or knowingly advance any proposition of law that does not accurately represent the law. If there is contrary authority to the propositions of law being put to the court by the prosecutor of which the prosecutor is aware that authority must be brought to the court's attention.'
>
> [10] While the closing speech in *Ramdhanie* contained egregiously objectionable material, junior Crown counsel's closing speech in the present case fell well below the acceptable standards of propriety. Unless the trial process adequately dissipated the clear dangers that it created of the jury being emotionally swayed in favour of a conviction and misled as to key pieces of evidence the speech created a material irregularity rendering the verdict unsafe."

[19] Refusing leave to appeal in respect of this ground, the single judge reasoned as follows:

> "In my judgement, if the improper statement by Crown Counsel had the potential to unfairly prejudice the jury against the applicant, any such prejudice and unfairness was rectified by the LTJ in her further direction to the jury."

In this context we draw attention to Lord Bingham's statement in *R v H & C* [2004] 2 AC 34, at para [14]:

> "The duty of prosecuting counsel, recently considered by the Judicial Committee of the Privy Council in *Randall v The Queen* [2002] 1 WLR 2237, para 10, is not to obtain a conviction at all costs but to act as a minister of justice. As R and J put it in the Supreme Court of Canada in *Boucher v The Queen* [1955] SCR 16, 23-24:

> 'Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly.'"

[20] We consider that the impugned statement of leading prosecuting counsel was inappropriate, though not egregiously so. It fell on the wrong side of the notional line. However, we are satisfied that the trial judge handled this matter carefully and skilfully and in a manner which successfully provided an appropriate counterbalance to any risk of unfair prejudice to the applicant. This assessment is reinforced by senior defence counsel's closing address: see para [17] above. There was no distortion of the equilibrium which is an essential element of every criminal. In summary, this ground of appeal generates no reservations on the part of this court about the safety of the applicant's conviction.

[21] It is opportune to remind all prosecuting counsel of their duties, as rehearsed in *R v West* and *R v H & C* (above). They are absolute and solemn in nature. The heat of battle, a real life feature of many criminal trials, frequently experienced by this court via transcripts and of which this court readily takes notice, must never distract attention from and can never dilute these ever present duties.

[22] There is one further discrete issue. Leading prosecution counsel's address to the jury contained a separate passage to the effect that the injured party had come to court seeking "justice" and it was for the jury to deliver "justice." This was supplemented by the unequivocal statement that the injured party was telling the truth. Statements of this kind are to be avoided, firstly, as they are in substance an impermissible expression of counsel's personal opinion and a distraction from the jury's fundamental task and duty of deciding the case according to the evidence and applying the basic rules, as well as lacking the detached objectivity required of every prosecutor.

[23] Statements of this kind must also be avoided, secondly, because, doing "justice" does not form part of the juror's oath and lies outwith the jury's duty and function. Furthermore, "justice" has an intrinsically nebulous and unavoidably subjective meaning. Thirdly, doing "justice" does not feature in the dictionary, or lexicon, of the criminal trial. The fundamental components of these criminal trials are burden of proof, standard of proof, the presumption of innocence, fair trial and deciding the case solely according to the jury's assessment of all the evidence. Fourthly, such statements have an inappropriate emotive element.

Omnibus conclusion

[24] For the reasons given, the safety of the applicant's conviction is unshaken and the renewed application for leave to appeal is dismissed.