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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOHN McKINNELL

Before: Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ (delivering the judgment of the court)

[1] This is an application for leave to appeal against conviction for the offence of unlawful sexual penetration. The jury convicted the applicant by a majority verdict but also acquitted him by majority verdict of a separate charge of rape arising out of the same incident. The applicant initially sought leave to appeal on the grounds that these verdicts were inconsistent; that the jury's 'special verdict' on the circumstances of the offence, namely that the applicant was a guest in the house at the time of the offence, was inconsistent with the verdicts; and that the trial judge failed to properly direct the jury in relation to the issue as to whether the applicant was a guest in the house.

History of the Case

[2] On 2 March 2011 the applicant was returned for trial at the Crown Court sitting in Belfast on three counts:

Count 1: Rape contrary to Article 5(1) of the Sexual Offences (NI) Order 2008;

Count 2: Unlawful sexual penetration contrary to Article 6(1) of the Sexual Offences (NI) Order 2008;

Count 3: Driving whilst disqualified contrary to Article 168A(1)(c) of the Road Traffic (NI) Order 1981.

[3] The applicant was arraigned on 13 April 2011 and pleaded not guilty to Counts 1 and 2, but guilty to Count 3. His trial commenced on 11 June 2012 before

Judge Burgess ("the trial judge") sitting with a jury. On 21 June 2012 the jury returned a majority verdict acquitting the applicant of rape. Following further deliberation the jury then returned a majority verdict (11-1) convicting the applicant of unlawful sexual penetration. The trial judge then asked the jury to confirm whether the applicant had committed the offence whilst being a guest in the house or if he had been a trespasser. Following a short deliberation the jury stipulated that the applicant had committed the offence whilst being a guest in the house.

[4] On 11 September 2012 the trial judge sentenced the applicant to a determinate custodial sentence of 4 years, comprising 2 years custodial period and 2 years licence period, for unlawful sexual penetration. A Sexual Offences Prevention Order was also imposed for 10 years. The applicant is also subject to the Sexual Offences Notification Requirements indefinitely and has been placed on the ISA's Adult Barred List. The applicant was also sentenced to 6 months' imprisonment for driving whilst disqualified and disqualified from driving for 3 years.

The evidence relating to the offence

[5] The complainant gave evidence that she had been out for the evening with her partner, both of whom had consumed alcohol. When they returned home the applicant appeared with some beer and the three of them sat in the complainant's living room and drank further (although it is disputed whether the complainant herself had anything further to drink). At some stage the complainant went to bed. She awoke to find the applicant on top of her allegedly having sexual intercourse with her (Count 1). The complainant struggled and shouted at which point the applicant put his hand over the complainant's mouth, allegedly withdrew his penis from her and then digitally penetrated her (Count 2). When the applicant had finished the complainant said that she ran downstairs and found her partner asleep on the sofa. She woke him and told him that the applicant had just raped her. The police were then phoned. Medical evidence indicated bruising in and around the complainant's mouth and arms.

[6] The complainant's partner ("the partner") gave evidence that the complainant had gone to bed. Sometime later the applicant had gone upstairs to use the bathroom. When the partner went upstairs he found the applicant beside the complainant's bed with his hand under the duvet ("the duvet incident"). The partner ordered the applicant out of the house but was unable to find his keys to lock the door. He then fell asleep on the sofa and was awakened sometime later by the complainant claiming the applicant had raped her. He then saw the applicant coming down the stairs.

[7] The applicant gave evidence that he had been drinking with the complainant and her partner in their house. During this time the complainant and her partner had an argument which became violent. The complainant went upstairs and came back down in her underwear. Following another argument, this time about her lack of attire, the complainant went to bed. He claims that sometime later he went

upstairs to use the bathroom. The complainant called him into the bedroom where she kissed him and behaved in a manner indicating she wanted further sexual contact. The applicant says he then digitally penetrated the complainant but claims it was totally consensual.

Grounds of Appeal

[8] The applicant's initial grounds of appeal against conviction can be summarised as follows:

(i) The conviction on count 2 was inconsistent with the acquittal on the first count ;

(ii) The jury's 'special verdict' was wholly inconsistent with their verdicts;

(iii) The trial judge misdirected the jury in not providing full guidance in his charge on whether the applicant had been ejected from the house by the partner.

The Single Judge's Decision

[9] Maguire J, acting as the single judge, gave a written decision dated 15 January 2013 refusing leave to appeal conviction. He opined that there was no reason why a jury might not be sure about rape (for example, on the grounds that the penetration by the applicant's penis had not occurred), but at the same time be sure that the digital penetration (which the applicant accepted he did) had not been consensual. Furthermore, the jury's special verdict that the applicant was not a trespasser at the time of the offence was not inconsistent with their finding that digital penetration had been non-consensual as that issue did not have a bearing on the issue of consent.

[10] Mr Kelly QC on behalf of the applicant abandoned ground 1 of the application for leave to appeal, accepting that the single judge's analysis on that issue could not be faulted. The focus of appeal was on what emerged from the special verdict which the jury gave as a result of the trial judge's decision to ask the jury to decide whether they found that the applicant had been a guest in the house or a trespasser when he committed the act of unlawful penetration.

The Special Verdict

[11] In his charge to the jury the trial judge said the following in regard to whether the applicant had been ejected from the house by the partner (page 43 of the Book of Appeal):

> "The evidence of [the complainant] and [the partner] is that after that period, whatever it might have been, [the complainant] went to bed and remained there

> until after the events which give rise to the allegations which you are considering. [The partner] states that at some stage when Mr McKinnell had gone to the toilet he was concerned he had been away for some time, had gone upstairs and had seen him, the defendant, on his knees with his hand under the duvet cover of the bed where [the complainant] was sleeping. He, [the partner], asked him what he was doing, and when he was downstairs that confrontation continued and Mr McKinnell was ordered from the house by [the partner]. You will remember that while in her notes Police Constable Kinsbury recorded that [the partner] told him that the defendant was, and I use the words in his notebook "in bed" with [the complainant] it was the evidence of [the complainant] and [the partner] that during all of this time she was asleep. [The partner] states he couldn't find the keys of the house and, therefore, had remained downstairs and had fallen asleep on the sofa."

[12] After the jury gave its verdict, the trial Judge requested the jury to withdraw for a short period and the following exchange took place:

> "JUDGE BURGESS: I suspect you may guess what I am asking to ask, but I think that the way the case ran it might be helpful for the Court to know the factual basis upon which the jury made their decision, namely, whether the defendant left the house and came back again or it was part and parcel of an incident that happened while he was in the house. Because I think that would be difficult to leave to the Court and I don't think I particularly want to get involved in a Newton Hearing or anything. What do you think?
>
> MR KELLY: Your Honour, I have no concern about your inquiry of the jury, the only observation I would make is that perhaps it is put to them, as it were, *en masse* and they be given a short period of time to discuss that.
>
> JUDGE BURGESS: That would be the mechanics of doing it.
>
> MR KELLY: But I have no objection.

JUDGE BURGESS: I think it is an important factor potentially in the case. It could be an aggravating factor that someone goes away and comes back again as opposed to dealing with that. It may be that the jury have come to a conclusion differently, in which case I don't get an answer it drops back on to me on to how I do it, but even that in some respects would be important because I think if there was a dispute there it must fall to the benefit of the defence, that would be normally the approach that the Court would take, is that not right?

MR KELLY: Yes your Honour.

JUDGE BURGESS: Happy with that?

MR KELLY: Yes I am.

JUDGE BURGESS: Mrs McKay?

MRS McKAY: Yes your Honour.

JUDGE BURGESS: Just bring the jury in for me for a moment please. I couldn't say anything until I heard the verdict.

(JURY RETURN 4.49)

JUDGE BURGESS: A matter had occurred to me Mr Foreman, first of all I will take the issue paper off you if I may and I am going to ask you to retire again because I want this to come back as just a considered indication and advice to me if you are able to do it. There are two scenarios in this case, one where the offence for which you have held the defendant guilty occurred when he was in the house and after that left the house and that was it. That was not Miss Shaw's version nor that of [the partner], that he left the house and came back again and the offence was committed, do you understand? Could I ask you to retire and let me know if you are agreed as to which of those scenarios it was. If you can't agree tell me that. People can come to conclusions for different reasons and I appreciate that and I know counsel appreciate that, but if you can give me a unanimous view as to which

of those it was that would be extremely helpful to me in terms of how I deal with the case in due course. Do you understand? But I would prefer you did that if I gave you some time, as much time as you needed just to come back and tell me if you can tell me that, okay? That fair enough Mr Kelly, are you happy enough with that?

MR KELLY: Yes.

…

(JURY RETURN 4.55)

JUDGE BURGESS: Now Mr Foreman, first of all could I ask if you have an agreement in which you are all agreed?

MR FOREMAN: Yes.

JUDGE BURGESS: You do? Is that that he returned to the house or not?

MR FOREMAN: Not.

JUDGE BURGESS: He didn't return to the house?

MR FOREMAN: No."

Discussion

[13] As pointed out in Blackstone's Criminal Practice 2013, paragraph D19.80, it is not in general good practice to ask the jury questions about the basis on which they have returned a verdict of guilty. Humphrey J giving the judgment of the court in R v Larkin [1943] KB 174 said:

> "The court deprecates questions being put to the jury as to the meaning of a verdict which they have returned unless the verdict is inconsistent or ambiguous. Where the verdict returned is plain and unambiguous it is most undesirable that the jury be asked any question."

In R v Solomon and Triumph [1984] 6 Crim App Rep (S) 120, after a review of the authorities, the court stated that in a criminal case the jury cannot bring in a special verdict. It is for the jury to say whether the offence was committed and the judge to decide on penalty. The court recognised a common practice in manslaughter cases where the jury may have reached their verdict on alternative grounds. In such cases

the judge should generally seek guidance from the jury concerning the basis for their verdict. Apart from such cases it is not difficult to see why it is undesirable to ask a jury to explain an otherwise unambiguous verdict. The jury may have reached agreement on the general verdict although not necessarily on the same basis of fact and to invite the jury to refine a decision would be to lead to confusion. The judge is entitled to make up his own mind on disputed questions of fact for the purpose of sentencing.

[14] Neither prosecution nor defence counsel drew the trial judge's attention to the authorities and the defence, perhaps for understandable tactical reasons, willingly acceded to the course adopted by the judge.

[15] There was nothing in the special verdict returned that of itself calls into question the safety of the conviction on Count 2. Mr Kelly, however, argues that what happened and the way in which the jury was addressed in respect of the subject matter of the special verdict highlighted, with the benefit of hindsight, shortcomings in the trial judge's charge to the jury in relation to the conflict in the evidence between the defendant and the partner on the question whether the applicant was ejected from the house or returned to the house as a trespasser. He argued that the trial judge should have made clear to the jury that the conflict in the evidence had important implications for the general credibility of the partner. The jury should have been directed that if the jury accepted the partner's evidence on the issue of ejection it could support the complainant's evidence because it would assist the jury in determining whether the partner indeed saw the duvet incident. If, on the other hand, the jury rejected the partner's story about ejecting the defendant from the house, it would substantially affect the question of his credibility in respect of the duvet incident, the action which, according to the partner's evidence, triggered his ejection of the defendant from the house. The jury should have been properly alerted to the significance of the interrelationship between the question of his ejection and the duvet incident and what impact the acceptance or the rejection of the evidence in relation to the duvet incident would have on the question of consent.

[16] Mr Kelly frankly accepted that the applicant raised no requisition arising out of the way in which the judge directed the jury in his charge. Both he and Ms Orr QC on behalf of the Crown also frankly accepted that they had not analysed the question as to what issue the evidence relating to the duvet incident related. Mr Kelly accepted that he had not raised any objection to the admission of the evidence, although it was evidence which went to bad character. Nor had he or Ms Orr turned their minds to the impact of the bad character provisions in Part II of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. Since the evidence was in fact adduced by agreement, it was admissible evidence under Article 6(1)(a). Had the issue been properly addressed before the commencement of the trial, the Crown could properly have been expected to serve a notice pursuant to Article 16 of its intention to rely on the evidence. This would then have focused attention on the question of the proper purpose of the evidence and called for a consideration by the

defence of whether it was going to consent and, if not, given the court a role to play in relation to the admissibility of the evidence and the determination of the purpose for which it was to be adduced. It seems inevitable that the evidence would have been admitted under Article 8(1)(a) (as relating to propensity) and on the ground that it was important explanatory evidence under Article 7 (for it provided an explanation as to the context in which the partner said that he ejected the applicant from the house).

[17] Since the evidence was admitted by agreement, the court was not called on to exercise any role in deciding as to whether it should be admitted and for what purpose. This, however, did not mean that the trial judge should not have taken account of the nature of the evidence, which was in fact evidence of bad character on the part of the applicant. The charge to the jury should more fully have explained to the jury the importance of the jury being satisfied of the correctness of the evidence in relation to the duvet evidence, which was potentially very damaging incriminatory evidence against the applicant on the issue of consent. The jury should have been warned in clearer terms that if they rejected the evidence of the partner about his purported ejection of the applicant from the house that would have been a very relevant matter affecting his credibility in respect of the duvet incident.

[18] While the charge to the jury should have given clearer and more explicit directions on this aspect of the evidence, we entertain no doubt as to the safety of the conviction. The jury returned to court after a few minutes to confirm that they considered that the defendant was a guest in the house and therefore had not been ejected. It is clear that this question must have been analysed and discussed and agreed before they convicted on Count 2. Since the alleged ejection, on the partner's evidence, was the consequence of what he had claimed to have seen in the duvet incident, by necessary implication the jury must have rejected the partner's evidence in relation to that aspect of the case. There would appear to be no logical reason why they would have been satisfied that he did not eject the defendant and yet believed that he saw what transpired in the course of the alleged duvet incident, which the partner was asserting was the trigger for his ejection of the applicant. The jury clearly must have been satisfied beyond reasonable doubt that when, as he admitted, the applicant digitally penetrated the complainant he was doing so without her consent. There was ample evidence to justify them coming to that conclusion.

[19] In the result we refuse leave to appeal.