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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GL

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Mr Weir QC with Ms McKay (instructed by PPS) for the Prosecution
Mr Greene QC with Mr Toal (instructed by KRW LAW Solicitors) for the Defendant

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Before: Morgan LCJ, Treacy LJ and O'Hara J

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MORGAN LCJ (delivering the judgment of the court)

[1] In October 2019 following a trial presided over by Her Honour Judge Smyth at Belfast Crown Court the appellant was convicted on 3 counts of sexual assault of a child under 13 contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008 ("the 2008 Order"), 1 count of sexual assault of a child under 13 by digital penetration contrary to Article 13 of the 2008 Order and 1 count of rape of a child under 13 by penetration of her mouth by his penis contrary to Article 12(1) of the 2008 Order.

[2] He was acquitted of 1 count of sexual assault of a child under 13 contrary to Article 14 of the 2008 Order, 2 counts of digital penetration of a child under 13 contrary to Article 13 of the 2008 Order, 3 counts of penile rape of a child under 13 contrary to Article 12(1) of the 2008 Order and one count of rape contrary to Article 5(1) of the 2008 Order. We are grateful to all counsel for their helpful oral and written submissions.

Inconsistency

[3] The sole ground of appeal is that the guilty verdicts are inconsistent with the acquittals. 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."

[4] 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 and on the basis of that authority was urged upon us in this case.

[5] 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.

[6] 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.

[7] 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.

Background

[8] The complainant was born in April 2004. The appellant was her mother's partner and lived in the same house. She contended that the abuse started when she was 10 and continued until she was 13 when she told her mother. The police were contacted and the complainant made an ABE statement on 8 March 2018.

[9] Counts 1 and 2 were allegations that the appellant had rubbed his genital area against her, described as grinding. The complainant alleged that this first occurred when she was 10. The appellant and her mother had returned from a night out. The complainant said that her uncle had been babysitting but it was common case that when the appellant and her mother went out the complainant would usually have stayed over at her granny's house. The complainant said that the appellant was lying on the sofa. She described him as drunk and said that he called her over. He

then lifted her up and put her on top of him grinding against her. Both of them had clothes on. That formed the basis of Count 1.

[10] Count 2 was a specimen count. It related to allegations of grinding behaviour usually on weekend mornings. The complainant alleged that she often went into the bed shared by the appellant and her mother on Saturday mornings and watched television. While doing this she alleged that the appellant would have grinded on her and sometimes would have pulled her bottoms down a bit. She said this happened more than 10 times.

[11] The appellant agreed that the complainant would have come into the bed in which he had been sleeping on Saturdays. He contended that on occasions she would have thrown her leg across him so that the area between her legs was against his hip. He referred to this as "dry humping." The appellant was unanimously acquitted on count 1 but convicted on count 2. It was contended that such an outcome was inconsistent.

[12] The appellant was also convicted on count 3. The allegation was that the appellant had used a pink vibrator which he applied to the complainant's genital area. It was common case that there was a pink vibrator in the home. The appellant denied that this event had occurred. The appellant's case on this count depends upon a finding that there was inconsistency in respect of other counts. If that is established the appellant submits that this must be an unreasonable jury and consequently all of the convictions must fall.

[13] Counts 4, 5 and 6 were allegations of digital penetration. Count 4 was a specific count in respect of an allegation that digital penetration had occurred in the appellant's bed but stopped abruptly when the complainant's mother entered the room. The mother's evidence was that she remembered an incident when she came into the room and had the impression that the complainant's pyjama bottoms were being pulled up. Although that supported the complainant's case the mother's evidence was that she had no suspicion of any untoward activity until the complainant made her disclosure in March 2018. The appellant was unanimously acquitted on this count.

[14] Count 5 was a specimen count alleging digital penetration more than 10 times. This was alleged to have occurred in the appellant's bed on Saturdays while the television was on. The appellant was convicted on this count. He was acquitted, however, on count 6. That was an allegation of digital penetration on holiday in Spain. The complainant had been affected by the sun while on holiday and spent a great deal of time inside. Her mother's brother and his child had also accompanied the family on holiday. The brother had not noticed anything untoward and had spent a considerable amount of time with the children.

[15] Counts 7, 8, 9 and 12 were allegations of rape. Count 7 was a specific count of rape on holiday and count 8 was a specific count in relation to an incident when the

child was wearing a Cinderella dress. Count 9 was a specimen count dealing with rapes until her 13th birthday and count 12 was a specimen count dealing with rapes thereafter.

[16] The complainant give a particularly detailed account of the incident involving the Cinderella dress in her first ABE. Despite that the jury was not satisfied beyond reasonable doubt that there had been penetrative sex. After the first ABE the mother asked the complainant on 19 April 2018 if she had had sex and the complainant said that he kept trying to put his penis inside her but she was pulling back. There was also conflicting medical evidence about whether signs of injury would have been expected if the complainant's account was correct. Dr Hall for the prosecution thought not and Dr Forbes for the defence would have expected to see some signs of injury. It was common case that there were no signs of injury. The complainant also did not repeat this allegation when giving her oral evidence in cross-examination.

[17] Subsequent to the first ABE the complainant made further disclosures which were the subject of a further ABE on 31 May 2018. She alleged that when she was 12 or 13 she was in the back living room with the appellant. He was standing with his boxer shorts on. They were talking and he then held her head down, took his penis out of his shorts and put it in her mouth. That was count 10 and the appellant was convicted.

[18] The appellant maintained that there had been an incident where he had been lying sleeping on a sofa when he woke up to find that the complainant was at the side of the sofa with his penis in her mouth. The appellant contended that the complainant had pulled down his tracksuit while he was sleeping so as to expose his penis before putting it in her mouth. The appellant contended that this was evidence of the sexual attraction of the complainant to him which he had never encouraged. He said that he never told the complainant's mother about this incident or about his concerns about the complainant's attraction to him until the complainant made her allegation.

[19] Count 13 related to a further incident which the complainant reported on 31 May 2018 concerning a single occasion when she was in her mother's bedroom and remembered the appellant moving her genital area over the top of his mouth. She thought she was probably 12 when this happened. The appellant was convicted on this count.

Discussion

[20] There is no dispute that there was a case to answer in respect of each count on which the appellant was convicted. There is no criticism of the charge by the learned trial judge in which she directed the jury that they should examine the evidence on each charge independently. The jury convicted on 3 specific counts being that in relation to the pink vibrator, that involving oral rape and that involving the use of his mouth on her genital area. Leave to appeal was not given on those counts but

they are the subject of a renewed application on the basis that the verdicts on the other counts display an absence of rational reasoning such that the conclusions of this jury are not safe on any count.

[21] The remaining convictions were on counts 2 and 5. Both concerned claims of a campaign of activity in the appellant's bed on Saturday mornings. The complainant alleged that the appellant had used that as an opportunity for grinding and digital penetration. The appellant agreed the complainant came into bed as she alleged but claimed that she had engaged in advances of a sexual kind putting her leg across his hip.

[22] The jury were satisfied beyond reasonable doubt that both campaigns had been conducted. Those verdicts were, of course, internally consistent in the sense that each alleged activity was found to have been conducted in the bed. Although these were specimen counts they were based on allegations alleged to have occurred on a particular day of each week and at a particular time of the day. The appellant had a fair opportunity to put his case and the jury was satisfied beyond reasonable doubt that it should reject that case.

[23] It is now necessary to examine the counts on which the appellant was acquitted to determine whether they individually or cumulatively indicate that the guilty verdicts were inconsistent. The first acquittal was on count 1 which was a specific count alleging grinding at home on a sofa when the appellant had returned home after he had been out drinking with the complainant's mother. There was conflicting evidence about whether the appellant at that age was at home with a babysitter or sent to her granny's house when the mother and appellant went out for the evening. The complainant said that her uncle did babysit from time to time. She did not remember if he had on this occasion. The jury was entitled to take that into account in its deliberations on the reliability of the complainant's account.

[24] Count 4 was an allegation about an incident when the mother came into the bedroom while the complainant alleged the appellant was digitally penetrating her. She says she stood up and either she or the appellant pulled up her pyjamas. The complainant's mother remembered such an incident but her evidence was that she did not have any concern about impropriety at that time. The mother's account to that extent did not support the complaint and that was a matter the jury were entitled to reflect.

[25] Count 6 was a specific count alleging digital penetration while on holiday. The circumstances in which it occurred were unclear. The complainant spent a large part of that holiday inside because of the sun and was in the company of the younger child and the mother's brother. The jury had to determine whether the particularity was sufficient.

[26] The 4 not guilty verdicts on the rape charges plainly do not give rise to any basis for inconsistency with the counts in respect of which the appellant was

convicted. The account of the appellant herself to her mother that she sought to draw back when penile penetration was attempted was enough to raise doubt about penetration. The appellant himself called into question whether the child at that age would have actually understood the meaning of sex. Added to that was the disputed medical evidence about whether one might have expected to find some evidence of injury. One of the allegations of rape allegedly occurred when the complainant was wearing a Cinderella dress but in her oral evidence the complainant did not repeat the allegation of penetration. The fact that the jury was not satisfied beyond reasonable doubt about the rape charges does not suggest that the appellant was a person of such unreliability that her account on the other charges had to be rejected.

[27] The trial judge properly drew to the attention of the jury inconsistencies in the complainant's account about what she told her friends and when she stopped going into the bed in which the appellant slept. The judge was correct to point out that inconsistencies do not of themselves suggest dishonesty of the part of the witness. The reliability of the allegations was what the jury had to determine. The jury was satisfied that the campaign of abuse alleged in the bedroom was established and rejected the conflicting account of the appellant. Where there was evidence tending to call into question the reliability of the complainant's account the jury was entitled to give it weight. That is the mark of a careful jury, not an unreasonable jury.

Conclusion

[28] For the reasons given we do not consider that the convictions are inconsistent with the acquittals. The appeals against counts 2 and 5 are dismissed and leave to appeal counts 3, 10 and 13 is refused.