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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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Delivered:	**21/10/1016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM DUNGANNON CROWN COURT

R

-v-

H

Morgan LCJ, Weatherup LJ and Keegan J

WEATHERUP LJ (delivering the judgment of the court)

[1] The appellant was convicted on 7 October 2015 on two counts of indecent assault on a male between April 2006 and September 2007 after a trial before Her Honour Judge McReynolds and a jury. The issue on this appeal concerns a complaint of inconsistent verdicts. Mr McCrory QC appeared for the appellant and Mr Mateer QC for the prosecution.

[2] The appellant was aged 21 years at the date of conviction. The original Bill of Indictment contained 25 counts of sexual offences against four young persons. The appellant faced 13 counts (1-13) against A, a male, was found not guilty on 7 counts and the jury disagreed on the remaining 6 counts. The appellant faced 10 counts (14-23) against B, a male, was found guilty on the two counts, 14 and 17, which are the basis of this appeal, was found not guilty on 4 counts and the jury disagreed on a further 4 counts. The appellant was charged with one count (24) against C, a female, and found not guilty. A further count (25) against D, a male, was removed from the indictment before the commencement of the trial.

[3] The appellant's grounds of appeal are in essence that the convictions on counts 14 and 17 are inconsistent verdicts in light of the other findings and

disagreements of the jury. In particular, the circumstances giving rise to counts 14 to 16 arose on the same occasion and the circumstances giving rise to counts 17 to 19 arose together on another occasion. Thus the appellant refers to the particular inconsistency that arises from being convicted of only one of the three counts that related to each occasion.

The counts concerning B and A and C.

[4] Counts 14 to 19 were all specific counts and each involved indecent assault on a male, contrary to Article 21(1) of the Criminal Justice (NI) Order 2003, in that the appellant on a date unknown between 17 April 2006 and 1 September 2007 indecently assaulted B, a male person.

[5] B is 21 months younger than the appellant. At the time of the alleged offences the appellant and B were staying in a static caravan beside their grandparents' house. They were playing Grand Theft Auto and the characters kissed. The appellant kissed B and put his tongue between his lips but B kept his mouth closed. This event was the basis of count 14 on which the appellant was convicted.

[6] B ran out of the caravan into the house to where he had been provided with a mattress on the bedroom floor. The appellant came into the room and allegedly put his hands down B's shorts and handled his penis. This was the basis of count 15 on which the jury disagreed.

[7] The appellant then allegedly put a finger or fingers into B's anus. This formed the basis of count 16 on which the jury disagreed.

[8] B's evidence was that he became distressed at these events and telephoned his father who came and collected him from the house, although it had been intended that he would stay overnight. The incidents were not reported at the time.

[9] Counts 17 to 19 occurred in the back of a 7 seater motor car. B's parents were in the front of the vehicle, his younger brother and sister were in the second row of seats and the appellant and B were in the back seats. The appellant and B were playing a game with 2p coins which were being thrown on the floor of the motor car and B was picking them up. In the course of the game the appellant made B touch his penis. This was the basis of count 17 on which the appellant was convicted.

[10] In the back of the motor car the appellant allegedly rubbed his penis around B's mouth. This was the basis of count 18 on which the jury acquitted.

[11] In the back of the motor car the appellant allegedly put his penis into B's mouth. This was the basis of count 19 on which the jury acquitted. The incidents in the motor car were not reported at the time.

[12] Counts 20 and 21 involved sample counts of touching B and getting B to touch the appellant, on which the jury disagreed. Counts 22 and 23 were specific counts involving the touching of respective private parts, on which the jury acquitted.

[13] The complaints concerning A involved eight counts of indecent assault in 2008, one count of incitement to gross indecency in 2008, three counts of sexual assault in 2011 and one count of rape in 2011. On counts 1 to 3 the jury disagreed on indecent assault; counts 4 to 6 were repeat offences and the jury found the appellant not guilty; on counts 7 to 9 the jury disagreed; counts 10 to 13 were the sexual assaults and rape three years later and the verdict was not guilty.

[14] Count 24 against the female C, resulting in a not guilty verdict, involved an alleged stroking by the appellant of C's inner thigh.

The approach to appeals on the ground of inconsistent verdicts

[15] It is necessary to review the approach of the Court of Appeal in relation to appeals based on inconsistent verdicts. This issue was considered by the Court of Appeal in R v McDonald [2016] NICA. This Court applied the approach adopted earlier in R v A [2014] NICA 2 which in turn had followed the decision of the Court of Appeal in England and Wales in R v Dhillon [2010] EWCA 1577. In R v McDonald the approach to inconsistent verdicts was summarised as follows:

> "(i) The test for determining whether a conviction can stand is the statutory test whether the verdict is safe.
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> (ii) Where it is alleged that the verdict is unsafe because of inconsistent verdicts, a logical inconsistency between the verdicts is a necessary condition to a finding that the conviction is unsafe, but it is not a sufficient condition.
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> (iii) Even where there is a logical inconsistency, a conviction may be safe if the Court finds that there is an explanation for the inconsistency. It is only in the absence of any such explanation that the Court is entitled to conclude that the jury must have been confused or adopted the wrong approach, with the consequence that the conviction should be quashed.
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> (iv) The burden of establishing that the verdict is unsafe lies on the appellant.
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> (v) Each case turns on its own facts and no universal test can be formulated."

[16] This approach, based on R v Dhillon, has now been revised by the Court of Appeal in England and Wales in R v Fanning [2016] EWCA Crim 550. The Court of Appeal carried out a comprehensive review of the authorities and concluded that the correct approach to the issue of inconsistent verdicts had been stated by Devlin J in R v Stone [1955] Crim LR 120, that a gloss on that approach had been applied in subsequent cases, as summarised in R v Dhillon, and that the Court of Appeal should return to the original approach stated by Devlin J.

[17] The approach of Devlin J in R v Stone in 1955 was formally adopted by the Court of Appeal in England and Wales in R v Durante [1972] 56 Cr App R 708 and was expressed as follows –

> "Where 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."

[18] There then developed, from around 1991, what the Court of Appeal in England and Wales described as "a more complex approach", leading to that summarised in R v Dhillon in 2010 as set out above. This approach was later subject to qualification in two further judgments.

[19] In R v Fanning the Court of Appeal in England and Wales concluded as follows (at the risk of selective quotations from the judgment being seen as reintroducing a gloss on the test):

> "15. In *Stone*, Devlin J set out a clear test in cases where inconsistency between verdicts is advanced as a ground of appeal…. It is a test that is clear; it can be applied by this court without any further elaboration.
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> 16. It also accords with and does not usurp the constitutional position of the jury…. the jury is the body which is entrusted under our constitution to reach a verdict that must be based on evidence, even though on rare occasions the verdict may not be in the eyes of lawyers flawlessly logical. The merit of the test established by Devlin J is that it recognises the

constitutional position whilst providing the necessary safeguard for a defendant.

19. In our judgment, the court should return to the clear law set out in Devlin J's test formally adopted in _Durante_ and apply it rather than the reformulation as now summarised in _Dhillon_ (as qualified as we have set out in two further judgments). We consider that there was no sound reason for departure from the law as established in _Durante_. The test did not need elaboration, but rather careful application without elaboration to the circumstances of each case….

Cases are fact specific

20. It should be unnecessary for us to emphasise, although each case is fact specific, that the test set out by Devlin J can be applied to each case. We only do so because it was suggested that different tests might apply to: (1) multiple counts arising out of what was described as a single sexual encounter where the complainant alleged different forms of sexual acts closely related in time; and (2) multiple counts arising out of events occurring over a long period of time measured in days, weeks, months or years. In our view no such distinction should be drawn….

The burden lies on the defendant

24. The burden of showing that the verdicts cannot stand is upon the defendant….

Credibility

27. …. It has become clearly established that absent a specific direction, 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 on the indictment and not be sure of the credibility or reliability of the complainant on another count…. In *G (Steven)* [1998] Crim LR 483 the court said: 'A person's credibility is not a seamless robe, any more than is their reliability. The jury had to consider (as they were rightly directed) each count separately, and might take a different view of the reliability of the evidence on different counts. It was too simplistic to draw a stark distinction between reliability

> and credibility (as had been put in the argument). It was for the jury to decide on the basis of all the material before it whether it was sure of the particular allegation on each count'.
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> *The directions to the jury*
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> 29. In the overwhelming generality of cases it will be appropriate for the judge to give the standard direction that they must consider the evidence separately and give separate verdicts on each count….
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> 30. However, there may be rare cases where it will be necessary for the defendant, if he wishes to contend that he can only be found guilty if guilt on another count is established, to seek such a direction from the judge…."

[20] Having considered the review of authorities undertaken by the Court of Appeal in England and Wales we are satisfied that the same approach should be adopted in this jurisdiction.

The application of Devlin J's approach to the present case.

[21] The trial Judge directed the jury that they must consider each count separately and they did not have to return the same verdict on any set of counts. The appellant makes no complaint of misdirection of the jury.

[22] The trial Judge in summing up indicated to the jury that they were unlikely to reach different verdicts in respect of the charges relating to each individual complainant. Nevertheless the jury felt able to do so and particularly in respect of B where the appellant was convicted on two of the counts.

[23] It may be entirely appropriate in the circumstances of a case such as the present that the jury would be satisfied beyond reasonable doubt in relation to one incident or series of incidents, whether involving one or more complainants, and not be so satisfied in relation to other charges arising out of the same incident or series of incidents, even involving the same complainant. The jury may properly reach a different conclusion on the reliability of a witness on different counts.

[24] We repeat the words of Devlin J –

> "…. 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."

[25] The jury were clearly discerning in not being satisfied beyond reasonable doubt in relation to C, in not being so satisfied in relation to seven of the charges against A, in having disagreed on a further six charges against A, on not being so satisfied on four of the charges against B, on disagreeing on a further four of the charges against B and on being so satisfied on two of the charges against B.

[26] In relation to B, counts 14 to 19 were charged as specific counts.

[27] As to counts 14 to 16, the incidents occurring in the static caravan and the grandparents' house, the jury convicted the appellant of kissing B in the caravan but disagreed as to the allegations of sexual assault on B in the house.

[28] The jury clearly distinguished between the offence occurring in the static caravan and the allegations relating to the bedroom. In so doing the jury was satisfied as to the lesser complaint and not satisfied as to the more serious allegations.

[29] As to counts 17 to 19, the incident in the car, the jury convicted the appellant of the touching of B but found him not guilty of oral contact with B.

[30] Again the jury distinguished between the lesser complaint and the more serious allegations. The trial judge's summing up drew attention to the discrepancy between what B said and what his mother said, namely that she understood B to have described repeat behaviour. The jury were entitled to make the distinction given that the counts charged specific offences and there was conflicting evidence as to whether there were complaints of repeat offences.

[31] In relation to counts 20 and 21 of touching B and getting B to touch the appellant, the jury disagreed. On the specific counts 22 and 23 of touching of respective private parts, the jury acquitted.

[32] We are satisfied in relation to the counts involving B that there is nothing inconsistent or illogical or unreasonable in the verdicts delivered by the jury. On the evidence available to the jury they were entitled to reach the verdicts they did.

[33] In relation to the verdicts returned on the counts involving A, we are also satisfied that there is nothing inconsistent or illogical or unreasonable in the verdicts returned and the convictions on counts 14 and 17. On allegations by a different complainant the jury disagreed in relation to the first three counts and acquitted on the repeat offences charged on the next three counts. Then the jury disagreed on the next three counts. The final four counts related to allegations arising three years later when A was aged 16 years and the jury acquitted.

[34] Similarly, in relation to the verdicts returned on the one count involving C, we are also satisfied that there is nothing inconsistent or illogical or unreasonable in the verdict returned and the convictions on counts 14 and 17. On an allegation by a different complainant, who was 7 years old at the date of the alleged incident involving touching over her clothes, where the consistency of the reports of the allegation was raised, the jury acquitted.

[35] Looking at the matter overall and reverting to the test as to whether a reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusions reached by the jury, we are satisfied that this is not an instance of inconsistent verdicts.

[36] The issue for this Court is whether the convictions are unsafe. The approach was set out in R v Pollock [2004] NICA 34 as follows –

> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
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> 2. This exercise does not involve trying the case again. Rather it requires the court, where 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.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the 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.

[37] We are satisfied that the convictions are safe. We have no sense of unease about the correctness of the convictions. Accordingly, the appeal is dismissed.