THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 2016/23

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

B.F.

Appellant

JUDGMENT of the Court delivered 17th of July 2017 by Mr. Justice Edwards.

Introduction
1. The appellant, B.F., a male, was charged with a count of attempted vaginal rape contrary to common law, a count of oral rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act 1990, and three counts of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990, all in respect of one A.C., a female, on the 24th of September 2011.

2. At the appellant's trial before a jury on all five counts, the trial judge directed a not guilty verdict in respect of one count of sexual assault on the basis that there was insufficient evidence, and the jury delivered not guilty verdicts on the two further counts of sexual assault and also on the count of oral rape. However, by a unanimous verdict the jury found the appellant guilty of the remaining count, namely that of attempted rape.

3. The appellant was subsequently sentenced to six years imprisonment to date from the 11th of December 2015, with the final three years suspended upon conditions.

4. The appellant now appeals against his conviction only.

The Relevant Evidence in the Case
5. The appellant, who was with a male friend, Q, and the complainant, who was with a female friend, R, met by chance on the 24th of September 2011 while socialising. They had both consumed a large amount of alcohol on the previous night. They crossed paths on a Dublin City street while each pair was looking for an "early house" to serve them more alcohol. Having joined up together the group of four then proceeded to a licensed premises in Dublin City centre where they were served one drink before being refused further service. R decided to go home and the complainant, the appellant and Q decided to get more alcohol from an off-licence and to return to the appellant's rented accommodation in Palmerstown.

6. When they reached the appellant's house, the three continued drinking in the appellant's bedroom until they all fell asleep on the bed together. At some point Q awoke and left the house.

7. Under examination in chief, the complainant told the jury, *inter alia*, that some time later, she awoke on the bed to find her tights pulled down to her knees. The appellant was shirtless and on top of her. The complainant told the jury how the appellant tried to kiss her and she just kept moving her head out of the way. He then grabbed her arms and put them behind her head, while still trying to kiss her. The complainant tried to wriggle out from under him and screamed a few times. He then pulled her tights the rest of the way down and removed more of his own clothes. The complainant asked him what was he doing, pleaded with him to stop and told him to *"fuck off".* She told they jury that despite her shouting and hitting him he was *"smirking through most of it, kind of joking that I wanted him to do what he was doing."* She said that he said a few times that he was *"just having the buzz".* She told the jury that the appellant tried to put his penis into her vagina and *"was trying to use his hand. At one point I did think his penis did go in a bit but that may have been his hand, I don't know."* According to the complainant he failed to penetrate her vagina with his penis as he did not have an erection so he attempted to have anal sex with her. Again, he failed as he did not have an erection. She alleged that he then tried to put his penis and testicles in her mouth but her mouth was closed. She screamed and bit his penis, kicked him in the face and ran out of the room.

8. She recalled that afterwards, she was shouting when one of the appellant's housemates came out of his room and took her to the bathroom. Another housemate was also present and one of them gave her a cigarette. She was taken to the living room and one housemate made tea. She stayed and sat beside the appellant on the couch because she *"presumed either the police or a taxi was coming."* She left because she *"got a little bit scared"* after a roommate of the appellant, who she thought had believed her, appeared to her to become less sympathetic. She got the appellant's address and left.

9. One of the roommates who attended to the complainant testified that B.F. appeared quite drunk and aggressive. P, a female roommate of the appellant who remained in her room while the commotion was ongoing and did not attend to the complainant, testified that she had heard the complainant screaming in a frightened manner.

10. S, the complainant's sister, told the jury that the complainant arrived at her house at around 9 p.m. that evening. She was crying profusely. The complainant and R left at around 10 p.m and went to a Garda station and made statements. Under cross examination, R gave the following evidence:

> *"Q. … Just going back to what A.C. told you when you met her at [S]'s the next day, she had indicated that he didn't do anything because he couldn't get a hard on?*
>
> *A. Well, that was my terminology like.*

Q. Yes. You mean in terms of he couldn't get an erection?

A. Exactly.

Q. Yes. But she said that she thought he couldn't get a hard on because of all the drink?

A. Yes. I mean that's not part of the conversation that, like, really I mean she was it wasn't like sorry

Q. I'm just reading from your statement here.

A. Yes, yes.

Q. Just in terms of what was said to you?

A. Yes, exactly. No, I understand that.

Q. Yes. "She said that he sat on her face and that was when she got really upset. She said that this was when she bit him on his balls. She then kicked him in the face and that was when she escaped she told me"?

A. Yes.

Q. That sounds very, very graphic?

A. Yes.

Q. Yes. And it was definitely that she bit him on his balls not on his penis or anything else?

A. Yes.

Q. All right. And that she did that in the context of him being over her face?

A. Yes.

Q. All right. I think she described that [B.F.] kept saying, this was later, that he was only having the buzz and that he didn't seem to have a clue mentally about what he had done; is that right?

A. Yes."

11. The appellant was later arrested and was interviewed a number of times while in detention. He denied emphatically that he attempted to rape or otherwise sexually assaulting the complainant. He admitted being in the bed with her in the bedroom of his accommodation in Palmerstown but contended that he had been fully clothed at all times, that he had been asleep beside the complainant, and that he remembered waking up and "hugging" into her as she slept, following which *"[s]he just went beserk. She started kicking and pushing me. She legged it out of the room then."* His response to her account when it was put to him was that it was *"all lies"*. The contents of the interviews with the appellant were placed in evidence by the prosecution.

The Grounds of Appeal

12. The appellant appeals against his conviction on the following three grounds:

(i.) The trial judge erred in law and in fact in failing to grant a direction on the attempted rape count;

(ii.) The trial judge erred in law and in fact in charging the jury on the relevance of the evidence of fresh complaint adduced by the prosecution;

(iii.) The verdict of the jury finding the appellant guilty of attempted rape was perverse, inconsistent with the verdicts delivered on the other counts, against the evidence and the weight of the evidence.

13. At the opening of the oral hearing on this appeal the Court was informed by counsel for the appellant that ground no (ii.) was no longer being relied upon.

Ground No (i.) – The Failure to Grant a Direction

Submissions on Behalf of the Appellant

14. At the close of the prosecution case, counsel for the appellant applied for a direction to acquit on all counts of the indictment. In relation to count 2 (attempted rape) it was submitted that in so far as there may have been an attempt to enter the complainant's vagina, this attempt may have been by the appellant's hand and not his penis. The appellant referred to the evidence given by the complainant that the appellant was unable to achieve an erection and had his hand on his penis and that it may have been his hand rather than his penis.

15. The appellant submits that the trial judge erred in failing to direct a verdict of not guilty in circumstances where it is clear on a reading of the evidence of the complainant that she is not in a position to state that the appellant made an attempt 'to put his penis in her vagina' (as per particulars of the offence). The appellant submits that the complainant's evidence is confused and suffers from a lack of clarity as to whether the appellant attempted penetration by his penis or his hand. The appellant relies on the second limb of Lord Lane's test in *R v. Galbraith* [1981] 2 All ER 1060 in submitting that the evidence of the complainant is not sufficient to prove the prosecution case beyond reasonable doubt. It was submitted that the complainant's evidence, taken at its highest, is to the effect that she cannot say whether the appellant's penis or his hand was involved in the attempt at penetration of her vagina. The mental element of attempted rape is the same as the mental element for the full offence, namely an intent to penetrate the vagina with the penis absent a reasonable belief that the victim is consenting, as recognised in *The People (Attorney General) v. Thornton* [1952] IR 91.

Submissions on Behalf of the Respondent

16. The respondent submits that there is no substance to the appellant's contention that there is a lack of clarity as to whether the attempted penetration involved the appellant's penis or his hand. The respondent submits that the evidence given was clear. The appellant had his trousers down. He had succeeded in getting A.C.'s tights and knickers down. He was lying on top of her face to face and he *was "trying to use his hand to put his penis inside me".* The complainant then went on to give evidence that he flipped her over, *"then he continued to do what he was doing, that didn't work ... I am presuming that because he didn't have an erection he couldn't put his penis inside me at that point, so then he tried to have anal sex with me."*

17. In relation to the respondent's submission that the involvement of the penis is a necessary ingredient of the offence, the respondent replies that this does not assist. In fact, the respondent submits, what is necessary to establish an attempt is proof of conduct showing that the perpetrator is intending to commit the substantive offence and that the conduct is sufficiently advanced to the stage where the perpetrator is trying to perpetrate the offence and not merely involved in preliminary acts or preparation. In this case, the respondent submits that if A.C.'s evidence on the issue was accepted by the jury, it is difficult to conceive that they could have arrived at any conclusion other than that the appellant was trying to rape her.

Analysis and Decision

18. We agree with counsel for the respondent that the trial judge was correct to refuse the application for a direction. Viewed at its height there was clear evidence on which a jury, properly instructed, could have convicted. It was ultimately a matter for the jury as to whether they could be satisfied beyond reasonable doubt that the appellant's conduct as described in evidence constituted an actual attempt to insert his penis into the complainant's vagina without her consent, knowing that she did not consent to it or being reckless as to whether she did or did not consent to it; as opposed to merely preliminary acts or preparation for doing so. However, it was open to the jury on the evidence before them, not least the express testimony of the complainant that *"trying to use his hand to put his penis inside me",* to arrive at a conclusion, to the standard of beyond reasonable doubt, that what in fact occurred was attempted rape.

19. In the circumstances we dismiss ground of appeal no (i.) without hesitation.

Ground No (iii.) – The Alleged Perversity of the Verdict .

Submissions on Behalf of the Appellant

20. The appellant submits that no fair minded jury, having regard to the evidence before it could reasonably have found that the incident in count 2 (attempted rape) did occur but the incident in count 3 (sexual assault, particularised as the accused person attempting to put his penis in the complainant's anus) did not. A similar point was made in respect of count 4, alternatively count 5, which counts, it was acknowledged, were put forward as alternatives to each other (count 4 being sexual assault, particularised as the accused person attempting to put his penis in the complainant's mouth and count 5 being actual oral rape), though it was not pressed as strongly as in the case of count 3.

21. The appellant emphasises the following extracts from the complainant's oral testimony:

"A. …And then at that point I mean that's when he tried to put his penis into my vagina but he wasn't erect so that wouldn't work. He

> *Q. So, just describe how that happened?*
>
> *A. I think that was soon after he pulled my tights down. I know he was trying to use his hand. At one point I did think his penis did go in a bit but that may have been his hand, I don't know."*

He also emphasises this statement:

> *"A. Well, he was trying to use his hand to put his penis inside me. Then that's it was around that time that he turned me over."*

He finally emphasises the following:

> *"A. He just grabbed my arms and flipped me and I think that's when I banged my head off the wall.*
>
> *Q. And at that stage did anything happen?*
>
> *A. That's when he turned me over then he continued what he was doing, that didn't work. Then*
>
> *Q. Well, what didn't work exactly?*
>
> *A. Well, because he I'm presuming because he didn't have an erection he couldn't put his penis inside me at that point so then he tried to have anal sex with me. That didn't work either. That's when he turned me back over, just flipped me over, and that's when he sat on my chest.*
>
> *Q. How did he go about trying to have anal sex with you?*
>
> *A. Well, he had tried to put his penis inside me but again it was the same problem."*

22. The appellant relies on *The People (Director of Public Prosecutions) v. Maughan* [1995] 1 IR 304 as authority for the proposition that an inconsistent jury verdict should be set aside where it is established that no reasonable jury could properly have reached that verdict. In that case the trial judge had clearly directed the jury that a charge of handling stolen property was an alternative to charges of burglary and false imprisonment. The jury however, proceeded to convict the accused on all counts. On appeal it was held that no reasonable jury which had applied its mind properly to the facts of the case could have convicted the appellant on all three counts and the conviction was quashed.

23. In *The People (Director of Public Prosecutions) v. Sweeney* [2007] IECCA 44, the Court of Criminal Appeal stated that:

"it would be appropriate to intervene only where there are manifest inconsistencies, in other words if the verdicts were necessarily inconsistent… Inconsistent verdicts only arise if verdicts are necessarily inconsistent. If there is a possibility, even if it is an unlikely view of the evidence on which the verdict can be justified, the court should accept it."

24. The appellant also points to a number of decisions of the English Court of Appeal (Criminal Division), including *R v. Durante* [1972] 1 WLR 1612; *R v. Ahmadzai* [2009] EWCA Crim 2031, and *R v. Dhillon* [2010] EWCA Crim 1577. The appellant submits that these cases show that where the defence proves a logical inconsistency, for which there is no explanation, between different verdicts in the same case, the conviction is unsafe and must be quashed.

25. The appellant submits that in all the circumstances, his conviction is unsafe on the basis that it is inconsistent with his acquittal on count no 3. While it is well established that a jury might accept part of a witness's evidence and reject other parts, the appellant submits that the verdicts in this case are logically inconsistent and defy rational explanation and accordingly must be set aside. There is a real problem, says the appellant, when you are dealing with a single incident or event, giving rise to a number of possible charges, and in respect of which (in the absence of other independent evidence) the establishment of credibility and reliability on the part of complainant is necessary for conviction on any or all of those charges, if the jury have concluded that credibility and reliability is established in respect of one count and convict, while concluding that it is not established on another count and acquit, unless there is some clear and satisfactory line of reasoning as to why that might be.

26. Very properly, counsel for the appellant has also drawn to our attention a decision of this Court, in *The People (Director of Public Prosecutions) v Nadwodny* [2015] IECA 307. In an ex tempore judgment in that case delivered by Mahon J, we applied the jurisprudence of the former Court of Criminal Appeal as stated in *The People (Director of Public Prosecutions) v Tomkins* [2012] IECCA 82 which emphasised that there is a high threshold to be crossed in claims of perversity and that an appeal court should only quash a decision as being perverse where serious doubts exist about the credibility of evidence which was central to the charge, or where a guilty verdict, even by a properly instructed jury, was against the weight of the evidence. Moreover, in any assessment of a perversity claim a court must look at all the evidence which was before the jury and not just selected portions of it.

Submissions on Behalf of the Respondent

27. In written submissions, counsel for the respondent simply submits that the defence explored perceived inconsistencies in the prosecution case. The respondent submits that the verdicts reached by the jury were not necessarily inconsistent and there is no logical inconsistency in the verdicts of the sort identified by the English Court of Appeal in *R v. Dhillon,* and the jury was entitled to take the view that the evidence did not sufficiently prove further sexual assaults in the specific terms set out in count 3, or for that matter in count 4 or count 5.

28. In oral submissions counsel for the respondent urged upon that the English Court of Appeal in *R v. Dhillon* should not be taken as having laid down any hard and fast rule concerning the approach to inconsistent verdicts in a case where the various alleged offences took place in the course of a single sexual encounter.

29. It was submitted that the correct approach for this Court is to examine whether there was evidence before the jury which could have supported the verdict actually delivered and now under appeal. If there was then the verdict should not be interfered with. To do so would be to usurp the function of the jury. Moreover, even if an unexplained inconsistency exists between the verdict of conviction under appeal and a verdict of acquittal on another count arising out of the same incident, in circumstances where there was clear evidence capable of supporting the verdict of conviction, and no obvious reason as to why there should have been a verdict of acquittal on the other count, the court should not disregard the reality which is that, viewed from an intellectual perspective, the verdict that in fact requires to be explained and rationalised is the verdict of acquittal rather than the verdict of conviction.

30. However, counsel for respondent again sought to emphasise that he was not accepting that there was necessarily any inconsistency in the verdicts delivered. The jury were told that they had to consider each count separately, and in this particular case there was "plenty" that would have supported a jury taking a different view with respect to the attempted rape count on the one hand, and the sexual assault count charging attempted anal intercourse on the other hand. It can often be the case with respect to a multi-faceted account that a witness may compelling with respect to part of it, but less compelling with respect to other parts of it. The jury in this case heard the complainant give her evidence first hand and were therefore best placed to make those kind of judgments. This court should be very slow to infer an irrationally inconsistent approach by the jury to the different counts.

Analysis and Decision.

31. The threshold that requires to be crossed before an appeal court in this jurisdiction would be justified in setting aside a jury's verdict of conviction on the grounds of inconsistency with another or other verdicts, and/or perversity, is a high one.

32. There is a distinction to be drawn between inconsistency and perversity. They are different legal concepts and the typically arise in different, albeit sometimes related, circumstances. A perverse verdict of conviction is one in which there was no, or no sufficient, evidence capable of supporting the verdict returned. Inconsistent verdicts, on the other hand, arise where, having regard to the evidence before the jury, the same verdict ought of necessity to have been rendered on two or more charges on the same indictment.

33. In the case presently under consideration it is clear that there was evidence, and indeed arguably strong evidence, capable of supporting the conviction on the count of attempted rape. In our determination perversity simply does not arise for consideration in those circumstances, and we dismiss in limine this ground of appeal in so far as it is based on alleged perversity.

34. However, it seems to us that the true nature of the complaint underpinning this ground of appeal is alleged inconsistency between the verdict convicting the appellant of attempted rape on the one hand and the verdicts of acquittal on the other counts on the indictment, but most particularly the acquittal of the appellant in respect of the alleged sexual assault comprising attempted anal intercourse charged in count 3, on the other hand.

35. We consider that the case of *R v Dhillon* [2010] 2 Cr App R 1 is helpful in this context. That having been said it is readily distinguishable on its facts from the present case. In the *Dhillon* case the defendant was charged with a number of sexual offences, all of which were said to have occurred during a single sexual encounter with the complainant. Counts nos. 1 – 4 on the indictment each alleged sexual assault, but allegedly committed in four different ways, including digital penetration of the vagina (count no. 1) and of the anus (count no. 2), respectively; touching of the complainant's breasts (count no 3), and licking the complainant's vaginal area (count no 4). The defendant admitted that the activities reflected on counts nos. 1, 3 & 4 had occurred, but contended that

the complainant had consented to them. He denied that the activity particularised in count 2 had occurred. The defendant was convicted on counts nos. 1 & 3, respectively but was acquitted on counts nos. 2 & 4, respectively. He successfully appealed against his conviction on the grounds that the verdicts were logically inconsistent.

36. Giving judgment in the matter for the court, Elias L.J., reviewed a great number of authorities from the courts of England and Wales and distilled from them at para. 33 the following principles, of which we approve:

> (i.) the test for determining whether a conviction can stand is whether the verdict is safe;
>
> (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;
>
> (iii.) even where there is a logical inconsistency, a conviction may be safe if the court finds 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;
>
> (iv.) the burden of establishing that the verdict is unsafe lies on the appellant;
>
> (v.) each case turns on its own facts and no universal test can be formulated.

37. It was further observed that:

> *41. Generally, therefore, in sex cases where it is alleged that different sexual incidents occurred on separate occasions, verdicts will not be inconsistent simply because a jury convicts on some counts and acquits on others, because there is likely to be an obvious legitimate chain of reasoning to explain the verdicts. The jury may be sure that a witness has reliably recalled one incident but remain unsure about another; or they may consider that some incidents are exaggerated or fabricated but not all. There have been numerous cases of this nature where challenges on the basis of inconsistent verdicts have unsurprisingly failed: e.g. R v Bell (unreported 15 May 1997, BAILII: [1997] EWCA Crim 1200) and R v VV [2004] EWCA Crim 355.*
>
> *42. This case does not, however, fall into that category. Here the various alleged offences are simply different facets or acts in the course of a single sexual encounter. In these circumstances, if the jury is unsure of the complainant's evidence with respect to one count on the grounds that it may be unreliable or lacking credibility, it is likely to be more difficult than it would be with respect to chronologically separate encounters for a jury to be sure that the evidence on the other counts is reliable and credible.*

38. In the present case we agree that at first glance there would appear to be a logical inconsistency between the verdicts delivered, at least in so far as there was a verdict of conviction on count no 2, and a verdict of acquittal on count no 3. However, on closer scrutiny of the evidence that was actually before the jury, and of the instructions given to the jury, we have also been satisfied that possible logical explanations exist for the different verdicts that were reached. Moreover these explanations are premised on findings that a reasonable jury, properly considering the whole of the evidence could have arrived at.

39. To elaborate on what we have just stated, we would observe that while all charges in the present case arose out of a single sexual encounter that the prosecution maintains was uninvited and unwelcome, the charges giving rise to the allegedly inconsistent verdicts differ in quality and definition and they involve different acts, although they share in common the alleged attempt by the appellant to penetrate the complainant with his penis, albeit in a variety of different ways.

40. They also exhibit the feature of temporal proximity within the continuum that formed that sexual encounter, in that the attempted anal penetration is said to have followed on immediately from the attempted vaginal penetration, and the attempted oral penetration is said to have followed on immediately or almost immediately after the attempted anal penetration. Moreover, in the case of both the attempted vaginal penetration and the attempted anal penetration, actual penetration was said to have been unsuccessful due to the circumstance that the appellant could not achieve and/or sustain an adequate erection.

41. All of that having been said, the evidence with respect to the attempted vaginal penetration differed from that in respect of the attempted anal penetration in that the complainant gave evidence that in respect of the former the appellant *"was trying to use his hand to put his penis inside me"*, evidence that was capable of the interpretation that he had used a hand in an attempt to guide and direct his flaccid or possibly semi-erect penis towards the complainant's vagina. This was strong evidence of the existence of more than preparatory acts, and of an actual attempt at penetration. There was no such evidence in relation to the alleged attempted anal penetration. The jury had, however, been properly directed with respect to the attempted rape count that in order for them to convict of the inchoate offence charged on count no 2, i.e., the attempt to commit a substantive offence, in this instance vaginal rape, they would have to be satisfied beyond reasonable doubt that the accused had done more than simply engage in preparatory acts and they were enjoined by the trial judge *"to examine the physical acts, that is the evidence of the physical acts of the accused regarding the alleged attempt in order to see if those acts are sufficiently proximate to amount to an attempt to commit the offence of rape."* While count no 3 was not charged as an inchoate offence, it was particularised as such. The same was true of count no 4.

42. We consider that the jury may well have felt obliged to approach these latter counts, in the same way as they had been enjoined to approach the attempted rape count. The difference, however, was that there was strong evidence of an actual attempt at penetration involving more than preparatory acts in the case of the attempted rape of which the appellant was convicted, compared to the complainant's mere assertion without more that there had been an attempt to penetrate her anally. That, reasonable possibility, could explain the conviction for attempted rape and the acquittal on count no 3.

43. Moreover in so far as the alternative counts charged as counts 4 and 5, respectively, were concerned there was the assertion that the complainant, in seeking to resist being penetrated orally by the appellant, had bitten the appellant on his testicles. The defence had strongly urged upon the jury that the complainant's account of having bitten the appellant on the testicles was inherently unlikely. It had been suggested to them that if the appellant had truly been attempting to penetrate the complainant orally with his penis against her will, he would surely have been bitten on the penis. However, the complainant claimed to have bitten him on his testicles. In those circumstances the jury may have been left with a reasonable doubt on counts 4 and 5, which, if that were the case, would explain the acquittal on those counts.

44. We also feel that the point made by the respondent that a witness may be compelling with respect to part of his/her account,

but less compelling with respect to other parts of it, is a point well made. As was rightly observed, the jury, having heard the evidence first hand, is always best placed to judge issues of reliability and credibility. Moreover, a jury is perfectly free to regard part of a witness's evidence as being credible and reliable while harbouring a reasonable doubt in respect of other aspects of it. While we agree with the observation in the *Dhillon* case that, where the alleged offences took place in the course of a single sexual encounter, it may be more difficult to rationalise and offer a possible explanation for a seeming inconsistency on that basis, we think counsel for the respondent is correct in commenting that the English Court of Appeal did not intend to lay down a hard and fast rule in that regard. On the contrary, the fifth principle distilled from their review of the authorities emphasises that each case turns on its own facts and no universal test can be formulated.

45. Having concluded that possible explanations exist for the ostensibly inconsistent verdicts returned, we are satisfied that the jury's verdict convicting the appellant of attempted rape is safe notwithstanding the other verdicts returned. We therefore reject ground of appeal no (iii).

Conclusion

46. Having seen fit to reject both of the appellant's complaints we must dismiss the appeal.