THE COURT OF APPEAL

Record No. 199/2016

Birmingham J.
Mahon J.
Edwards J.

Between/

The Director of Public Prosecutions

Respondent

- and–

D. McG

Appellant

JUDGMENT of the Court delivered on the 23rd day of March 2017 by Mr. Justice Mahon

1. The appellant was tried by a jury at the Central Criminal Court in relation to thirty eight counts of sexual crimes involving his step children, M and L committed between 2001 and 2010, and was found guilty of all but three of the counts on the 21st April 2016.

2. Counts one to thirteen related to M. These included one count of sexual assault contrary to s. 2 of the Criminal Law (Rape Amendment) Act 1990; six counts of oral rape and six counts of anal rape contrary to s. 4 of the Criminal Justice (Rape Amendment) Act 1990. The appellant was acquitted of one of the sexual assaults counts, one of the oral rape counts and one of the anal rape counts. He was found guilty of the remaining ten counts by majority verdict.

3. On 20th June 2016 the appellant was sentenced to terms of imprisonment of twelve years in respect of each of the s. 4 offences, five year terms in respect of the sexual assaults committed against L and a three year term in respect of the single count of sexual assault committed against M. All sentences were directed to run concurrently and to date from 21st April 2016. He was also ordered to undergo twelve months of post release supervision. The appellant has appealed against both his conviction and sentence. This judgment relates to his conviction appeal only.

4. The appellant and his family, including his wife and her four children moved to Ireland from South Africa in 2001. The complainants' are the two younger children who were aged five and ten years at that time. Over the period of the abuse the family lived in four different locations in Co. Cork. M's abuse took place in three of the locations while he was aged between ten or eleven years and seventeen years. L's abuse took place in two of the locations when she was aged between six years and twelve years.

5. M gave detailed evidence as to the abuse perpetrated on him. He described how the appellant on occasion called him into a bedroom and offered him money to show him his private parts and allow him be touched by the appellant. Other sexual favours for which he was paid money by the appellant included acts of oral rape and anal rape. M was also shown pornographic dvd's and magazines by the appellant In the course of this abuse M gave evidence as to instances of self harm and one attempt to hang himself.

6. L's account of the sexual abuse perpetrated on her related to instances of sexual assault when the appellant touched her vagina and digitally penetrated her. She also related to a number of occasions when she was subjected to oral rape. She also gave evidence of being paid money by the appellant and of instances when she was photographed by him. L did not allege that the appellant had shown her pornographic dvd's or magazines by the appellant.

7. Three grounds of appeal are promoted on behalf of the appellant. They are:-

> (i) the refusal of an application to sever the indictment which resulted inter alia in the appellant facing trial in respect of two separate complainants;
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> (ii) the refusal of an application to discharge the jury when prejudicial evidence unconnected with the case was given in its presence;
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> (iii) the jury verdicts were perverse and inconsistent as between one another.

The refusal to sever the indictment

8. At the commencement of the trial, the appellant sought to have the indictments severed in respect of the counts relating to the two complainants. It was argued on behalf of the appellant that the evidence relating to the counts in respect of one complainant could not be cross admissible as regards that of the other, and vice versa. It was submitted that the probative value of such evidence did not outweigh its prejudicial effect because, inter alia, there was insufficient similarity or nexus between the accounts of both complainants. It was submitted on behalf of the respondent that while it was accepted that the evidence of one complainant could not corroborate that of the other, such evidence could nevertheless be deemed cross admissible.

9. In her ruling refusing the application to sever, the learned trial judge stated as follows:-

> *"Now, in this case, the subject matter of this trial, there are some differences in the proposed evidence to include the taking of photographs and videos of the second named complainant, L. However, having considered all of the submissions and read the case law which was open to me, I am satisfied that there are sufficient aspects of similarity in the proposed evidence to enable the evidence of the complainants to be admissible or, as Mr. Justice Hardiman states in the decision of DPP v. McCurdy, terms the evidence to be cross admissible in order to show a system or to rebut*

accident.

In considering the proposed evidence, I am influenced by the decision of Mr. Justice Barron and in particular his analysis of the principles applicable in these types of categories of cases where he stated that the rules of evidence should not be permitted to offend common sense. I have also considered the decision of DPP v. J.C. [2015] 14th November, where the Court of Appeal considered in that case the evidence which included allegations of abuse alleged against the accused man by his extended family by marriage and in that particular case the aspects of which were considered, it seems, by the Court of Appeal, included that the allegations were made against the accused that he had abused members of his extended family, that is, his extended family by marriage. They occurred for the most part in the residence of the accused. At the time most of the counts appeared in the same boundaries of time and, in particular, the matters alleged are all quite similar. The Court went on to say "in other words..." this is, I should say, a quotation from the trial judge's decision in that case,

> *"In other words, the allegation that the accused coerced or forced or made the complainant put the complainant's hand down his penis and in my view the instance may not have all been exactly the same, but there is sufficient striking similarity to allow the counts to proceed before the same jury and on the same indictment, so I refuse the application to sever the indictment."*

As I say, that was a quotation from the trial judge's ruling in the decision of JC.

In this case I do not consider the genders of the complainants to be of significance. The following matters appear to me to be areas of similarity;

> *(i) first of all that the complainants are the accused man's stepchildren;*
>
> *(ii) secondly, both were minors at the time of the alleged offending;*
>
> *(iii) thirdly, as regards the incident of sexual assault as alleged by M, this involved the touching of his private parts and as regards the instance of sexual assault with regards to the second complainant, L, these involved instances of touching her private parts, specifically her vaginal area and her breast area and included digital penetration;*
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> *(iv) four, there is an overlap in time as regards the alleged offending;*
>
> *(v) five, the alleged instances are alleged to have occurred in the family home or homes of the accused man and his stepchildren;*
>
> *(vi) six, there was the offering of money as ascertained by both complainants in their proposed statements of evidence;*
>
> *(vii) seven, as regards the oral - allegation of oral intercourse regarding the boy, M, this is alleged to have commenced when he was aged fourteen years of age, as regards the oral intercourse regarding the girl, L, this is alleged to have commenced when she was eleven years of age; and finally the secret nature of the alleged offending.*

While there is no allegation of anal rape alleged by L, I am satisfied to refuse the application nonetheless to sever, as to sever those counts in relation to alleged offending of anal rape would be entirely artificial and in that regard also I rely on the different nature of the allegations alleged in the L.G. decision where there were two separate complainants. They were of different ages. The allegation in relation to one complainant was that of rape and indecent assault and the allegation in relation to her younger sister was that of a single incident of indecent assault. I note the issue here in this instance is whether the offences were committed at all and consequently the proposed evidence is cross admissible to seek to establish that they were committed on the prosecution's case and therefore the evidence is admissible because, to quote Mr. Justice Barron:-

> *"The evidence is admissible because there is an inherent improbability of several persons making up exactly similar stories, (B), it shows a practice which would rebut accident, innocent explanation or denial.*
>
> *And it is, of course, in order for the evidence to be admissible it is necessary that the probative value of the evidence outweighs the prejudicial effect and I am satisfied that this is so in this instance.*
>
> *In considering the issue of the potential of collusion, I do not believe that that falls within a consideration of the admissibility of the evidence in and of itself. But it is a matter, if relevant for a jury's consideration if it should arise. In any event, in this particular instance however, there is only a submission as regards collusion. There is no evidence of actual collusion and therefore I am satisfied that this is a matter for consideration if it should arise for the jury and I refuse the application to sever the indictment."*

10. In his written submissions to the Court the appellant lists what he describes as the dissimilarities between the evidence relating to the two complainants. These are stated to be:

> (a) The gender difference between the complainants.
>
> (b) The difference in ages between both complainants during the currency of the respective offending, being in the case of M between the ages of ten / eleven and seventeen, and in the case of L between the ages of six and twelve years.
>
> (c) The difference with respect to the variety and sequence of the offending.
>
> (d) The fact that the sexual assaults in respect of L involved touching of her chest and digital penetration which was absent with respect to those counts involving M.

(e) The fact that allegations of anal penetration were confined to the counts involving M.

(f) The fact that the instances of oral rape involving M were alleged to have continued to the point of ejaculation whereas in the case of L the accused was alleged to have departed prior to ejaculation.

(g) The fact that certain alleged circumstances surrounding the offences were different as regards each complainant. By way of example whilst there was extensive reference to photographing and videotaping the offending involving L, the same was totally absent from M's account.

(h) M made a reference in his statement to being brought by the appellant in the boot of a car to a house which the appellant was assigned to watch over as part of his duties as a security person. Here he stated that he had been shown pornography before being anally raped. L made no reference in either of her statements or subsequently in her evidence to being abused at such a location or in such a manner and similarly made no reference at any stage to being shown pornographic material.

(i) L referred in her first statement made in 2010 to an incident in which she claimed to have been sexually assaulted by the appellant while they were driving from one location to another in Co. Cork. This apparently happened in a van that the appellant was using to move items from a house in the first location to one at the second location. Evidence of this incident was not led but it was outlined in the book of evidence which was before the learned trial judge when she was considering the application to sever the indictment. No allegation of abuse of this nature was made at any stage by M.

(j) L referred also in her first statement to have been sexually assaulted on a number of occasions in an apartment in which the appellant was apparently living for a time while the family were based in a particular location. She stated that on occasions she would be collected from school and brought to this apartment by the appellant where she would do her homework. She claimed that the appellant would sexually assault her here while she was using a computer. No allegations were made by M regarding abuse taking place at this location or in this manner. Again, evidence of these incidents were not led but was outlined in the book of evidence which was before the learned trial judge as she was considering the application for severance.

11. The learned trial judge referred to the decision of Barron J. in *DPP v. K(B)* [2002] 2 I.R. 199. In that case the appellant had been convicted of sexual offences committed against children in a residential facility run by a Health Board. The court held that the joint trial of all the counts created an unfair prejudice, and therefore allowed the appeal. The court was satisfied that the manner in which the alleged offences were committed differed to the extent that similar - fact evidence did not arise. Barron J. summarised the principles emerging from a number of cases which he considered in the course of his judgment as follows:-

(i) The rules of evidence should not be allowed to offend common sense.

(ii) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.

(iii) A category of cases in which the evidence which can be admitted is not closed.

(iv) Such evidence is admitted in two types of cases

(a) to establish that the same person committed each offence because of the particular feature common to each, or

(b) where the charges are against one person only to establish that offences were committed.

In the latter case the evidence is admissible because:-

(a) there is the inherent improbability of several persons making up exactly similar stories;

(b) it shows a practice which would rebut accident, innocent explanation or denial."

12. Reliance is placed by the appellant on the decision of this court in *DPP v. Shannon* [2016] IECA 242, (which post dated the appellant's trial). *Shannon* is said by the appellant to (together with the Supreme Court decision in *DPP v. McNeill* [2011] 2 I.R. 669) cast a doubt on the extent to which the principles outlined in B.K. still represent the law in this jurisdiction. An important point to note is that *Shannon* was not concerned with sexual offences but rather was concerned with the criminal damage to artwork in different locations.

13. It is not correct to say that B.K. does not represent the law on the use of evidence of previous misconduct, or of misconduct on another occasion, as system evidence in this jurisdiction. It does, though perhaps now, subject to a qualification.

14. As was discussed in *Shannon,* one nuance to that decision was that *B.K.* had ostensibly displaced the established test governing the admissibility of misconduct evidence propounded by Lord Herschell in *Makin v Attorney General for New South Wales* [1894] A.C. 57, and previously adopted into Irish law in The *People (Attorney General) v Kirwan* [1943] IR 279, in favour of a test which balances probative value against prejudicial effect as advocated by Wilberforce LJ and Cross LJ in *DPP v Boardman* [1975] AC 421.

15. The Herschell test allowed such evidence to be admitted if (i) it is relevant to, and sufficiently probative of, an issue in the proceedings, (ii) its admission is necessary, and (iii) there is sufficient proof of the commission of the acts of misconduct. However that was all subject to the following qualifications. Misconduct evidence would not be admissible for the purpose of inviting the jury to infer from it that the accused is a person who, by reason of his disposition or bad character, is likely to have committed the offences charged. Further, a trial judge has a discretion to exclude misconduct evidence which would otherwise be admissible if its probative force is outweighed by its prejudicial effect. Further, in any case where misconduct evidence is admitted and there is a risk that the jury may draw the inference that the accused is likely, by reason of his other criminal conduct or character, to have committed the offences upon which he or she is charged, the trial judge should instruct the jury as to the limited purpose for which the evidence has been admitted and warn them not to draw such an inference.

16. It was noted in *Shannon* that the *McNeill* decision suggests that the Herschell test approved in *Kirwan* remains the law as to the

correct test. The remarks of O'Donnell J in the Supreme Court in *McNeill* concerning the admissibility test propounded in *BK* were obiter dictum, as were the remarks of Edwards J in *Shannon*, and neither judgment has expressly overruled *BK* on the issue as to the correct test. Both judgments do, however, acknowledge the existence of an issue that remains to be definitively determined.

17. However, even if *BK* is found, in due course, and in another case, to have propounded the wrong test as to admissibility, there is no reason to believe but that in all other respects, and in particular concerning how misconduct evidence may legitimately be used to establish evidence of system, and to rebut accident, innocent explanation or denial, particularly in the context of the trial of an accused for alleged sexual offences, *B.K.* will continue to represent good law.

18. In delivering the judgment of the Court in *Shannon* Edwards J. stated:-

> *"At this point we are not primarily concerned with whether the trial judge was right to have ruled in principle that system evidence was capable of being admitted in support of the Shelbourne Hotel case, because that aspect of his ruling was overtaken by events when he later granted directions on Counts No's 2 and 3. However, we reiterate that we are satisfied that in so far as his ruling concerned the National Gallery case, it was one that was legitimately open to him to make. The discretion was properly exercised because, as counsel for the prosecution pointed out, the evidence was relevant in terms of potentially rebutting the defence of accident. There were also some striking similarities between the two incidents rendering it inherently probable that the accused had committed the offence charged. It was therefore also relevant and probative on that account."*

19. In *Shannon* this court expressed its satisfaction that the learned trial judge in that case correctly exercised his discretion not to sever the indictment and to allow proposed evidence of the Shelbourne Hotel incident to be relied upon in the case involving The National Gallery incident, and vice versa, because in each instance the proposed evidence in controversy which was properly to be characterised as "system" evidence, was potentially relevant to an issue or issues in the proceedings, and it was sufficiently probative. Edwards J. stated:-

> *"The discretion was properly exercised because, as counsel for the prosecution pointed out, the evidence was relevant in terms of potentially rebutting the defence of accident. There were also some striking similarities between the two incidents rendering it inherently probable that the accused had committed the offence charged. It was therefore also relevant and probative on that account."*

20. In *DPP v. JC (No. 1)* [2015] IECA 343, the appellant was charged with a number of counts of indecent assault or sexual assault of the nieces and the younger sister of his former wife and on his own son and daughter. An application to sever the indictment was refused by the learned trial judge. In the course of his judgment, Sheehan J. stated:-

> *"While the trial judge did not refer in detail to the appellant's submissions in the course of his ruling and while the prosecution does not seek to describe all complaints as having a striking similarity, it is nevertheless the case that the similarities were such as to properly allow the jury to consider the evidence in one case as supportive of that in another. The trial judge's ruling demonstrates that he approached the application for severance carefully and took into account the relevant legal principles. Indeed it could be said that severing the indictment would have resulted in the jury not getting the full picture. This is particularly relevant when one considers the final submission made on behalf of the respondent. While it did not form part of the trial judge's ruling it is germane that the evidence of the appellant's wife regarding his admission that he had abused SW is evidence that was relevant not only to SW's complaint but was also relevant evidence in respect of all other counts on the indictment. This Court holds that this piece of evidence provides strong support for the correctness of the judge's ruling. The Court therefore holds that the trial judge properly exercised his discretion when he refused to sever the counts and accordingly this ground of appeal fails."*

21. In his text book *Sexual Offences* (2nd Edition), Prof. O'Malley noted the following:

> *"The one recurring term in the jurisprudence on severance is that the decision on ordering separate trials is very much within the judge's discretion. An appeal court will not overrule a trial judge's decision to refuse severance, "unless it can be seen that justice has not been done, or unless compelled to do so by some overwhelming fact" (ref. R v. Flack [1969] 1* WLR 937*)".*

22. In *R. v. Christou* [1997] AC 117 a judgment of the House of Lords states:-

> *"How discreet or interrelated are the facts giving rise to the accounts, the impact of ordering two or more trials of a defendant and his family, on the victim and their families, on press publicity; and importantly whether directions the judge can give to the jury will suffice to secure a fair trial if the accounts are tried together. In regard to the last factor, two re-trials are conducted on the basis that the judge's directions of law are to be faithfully applied."*

23. In the instant case there are indeed striking similarities in the allegations made against the appellant by the two complainants. The nature of the sexual offending is, while not precisely similar, broadly so. Its dissimilarity may simply be explained by the fact that one complainant was male, and the other was female. Importantly however, both were children. There is also the fact that both complainants were the stepchildren of the appellant, and that the locations in which the sexual abuse took place were, for the most part, the family home at the time. Another similarity is the allegation by both complainants of being offered money as an inducement to facilitate sexual abuse.

24. The differences between the two complainants were their ages at the time the offences were committed (although both were children at all times), the gender of the complainants, the fact that one complainant only was shown pornographic material, and one complainant only was photographed by the appellant. However these are differences which in the overall context of the allegations are not of great significance. Repeated incidents of sexual abuse by an abuser are unlikely to be precisely similar in form or in nature and to expect them to be flies in the face of common sense and, indeed, also, the experience of the courts.

25. It is further submitted on behalf of the appellant that there was an inherent risk of collusion in this case, as both complainants are siblings. Reference was made to an Australian decision, *Hoch v. R* [1988] 165 CLR 292, and the comments of Mason C.J., when he stated:

> *"In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view - viz. joint concoction - is inconsistent with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility."*

26. The risk of collusion is almost always present in sexual offence cases where siblings or close friends are involved. However, in this case, there are important differences as between the detail of the allegations given by the two complainants, such as, for example, the allegation by one complainant only of being shown pornographic material and the allegation by one complainant only of being photographed. Such differences are unlikely to have been present if the complainants had colluded to give evidence designed to support each other.

27. It is contended on behalf of the appellant that the refusal to sever the indictment rendered the trial of the appellant manifestly unfair in that it exposed him to what is referred to as the obvious and significant prejudice of allowing the jury to infer that because he may have committed sexual offences against one complainant, he was therefore more likely to have done so against the other. It was also submitted that the refusal facilitated the jury finding corroboration in respect of the evidence of each complainant in relation to the evidence of the other where none in fact existed in law as was accepted by the prosecution.

28. In her charge to the jury the learned trial judge stated:-

> *"The evidence of each complainant does not corroborate the other complainant: corroboration is some piece of independent evidence that is independent - that is independent of the testimony of a complainant which of itself points to the involvement of an accused in the commission of a crime or crimes. This cross admissibility does not mean that the evidence is corroboration; it is not corroboration, it is not such evidence, there is no corroboration in this case, and I just wanted to make that clear to you."*

29. This, in the view of the court, acted as a strong reminder to the jury that they should not treat the evidence of one complainant as corroborating the evidence of the other.

30. The court is satisfied that the refusal to sever the indictment was a decision properly made within the discretion of the learned trial judge. Equally the court is satisfied that the collusion concern is without foundation. Grounds one and two of the appeal are therefore dismissed.

The refusal to discharge the jury
31. It is submitted on behalf of the appellant that the learned trial judge erred in refusing an application to discharge the jury following the introduction of prejudicial evidence.

32. On the second day of the trial, in the course of the examination of M, a reference was made by him to "accusations" having been made against the appellant. This apparently related to a complaint against the appellant made by an older sister, and who was not in any way involved in the trial. The relevant extract from the transcript is as follows:-

> *"Counsel: Ok. And you indicated you think you were sixteen, how did things get on in W?*
>
> *"M: They got on ok for a while. Everything seemed to stop for a while, because accusations were made against him and .." [emphasis added]*

33. Prosecution counsel immediately intervened in an effort to prevent anything more being said on this issue, and succeeded to the extent that no further reference was made to it. It was accepted that the prosecution had never intended to refer to any such accusations and that the offending reference was made by M without advance warning.

34. The appellant contended that the damage had been nevertheless done, and that the effect of the reference to "accusations" by M was so prejudicial as to make it impossible for the appellant to receive a fair trial thereafter. An application was made to discharge the jury. The learned trial judge refused the application, ruling as follows:-

> *"I am not satisfied to discharge the jury, it's not a matter which in my mind would led to a jury being discharged. It has been said time and time again that juries are robust in dealing with this - with any cases and of course that would include in dealing with cases of this particular type. And it is also the position that there are two complainants in the case and as Mr. O'Leary has indicated difficulties can arise vis-à-vis evidence given in any case of a sexual nature, particularly as regards this type of case. So I am not disposed to discharge of the jury."*

35. It is long accepted that a jury should only be discharged in the last resort and only in circumstances where the damage done by the introduction of prejudicial evidence cannot be reasonably undone by suitably charging the jury or otherwise.

36. In *DPP v. Fahey* [2008] 2 I.R. 292 it was stated:-

> *"…the discharge of a jury should be the last resort and accomplished only in the most extreme circumstances: juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant or should not have been given before them."*

37. The Court is satisfied that the reference to the "accusations" was, while unfortunate and potentially prejudicial to the appellant nevertheless sufficiently brief and lacking in detail as not to warrant a discharge of the jury in the circumstances. It occurred at a relatively early stage in the trial and was not again referred to. It is unlikely to have featured to any significant degree in the minds of the jurors.

Verdicts were perverse and inconsistent
38. It is submitted on behalf of the appellant that the evidence of L made it impossible for the jury on the basis of such evidence to have been satisfied of the appellant's guilt beyond a reasonable doubt.

39. In relation to the evidence of L, the appellant points to inconsistencies in the detail of sexual assaults suffered by her as between statements made to the gardaí in October 2010 and in December 2013. Furthermore, in December 2013 she stated for the first time that she had been videotaped and photographed by the appellant. Also in December 2013 she alleged for the first time that she was offered money to perform sexual acts. Reference is also made to the inconsistency as to L's age when it is alleged she was subjected to oral rape by the appellant. Finally, there is reference to the inconsistency in L's evidence to the effect that she was photographed on the one hand, in one location, and on the other hand, in a number of locations.

40. In relation to the highlighted inconsistencies in the evidence of L, the learned trial judge ruled as follows:-

> *"Now, those last two matters, the inconsistence vis-à-vis the age when the oral allegations of rape commenced and the locations where the complainant asserts that she was photographed or video recorded in my mind are entirely matters for a jury's consideration. It has been repeated time and time again in this jurisdiction by way of our jurisprudence that the questions of reliability and credibility are quintessentially matters for a jury. The question is whether the complainant is consistent as regards her core allegations."*

41. The learned trial judge then went on to consider in detail the timing of the allegations made by L, and the manner in which she gave evidence in relation thereto. She concluded her ruling thus:-

> *"As stated, I must consider the evidence as a whole and I have done so. I have carefully considered the test as set out in the decision of R. v. Galbraith and I am satisfied that any inconsistency which may exist is a matter entirely within the remit of a jury and this is not a situation where I should withdraw the charges from the jury and I refuse the application."*

42. In relation to M, the appellant contends that the verdicts returned by the jury were perverse and inconsistent as between each other. In particular, the appellant was convicted by a majority verdict in respect of the vast majority of counts, but was acquitted in respect of three counts. It was submitted that there was no logic for the jury's acquittal of the appellant in respect of the three counts, while convicting him of the other counts, given the similar nature of all the alleged offending.

43. The application for a direction which led to the ruling from the learned trial judge was made only in respect of counts relating to L. No similar application was made in respect of the counts relating to M. Counsel for the appellant stated as follows:-

> *"I am not making an application in relation to the counts in relation to M because whatever matters that I will raise in relation to the evidence and credibility of that witness I accept are matters for the jury…"*

44. The Court is satisfied that the learned trial judge's refusal to grant a direction in respect of the counts against L was correct. Any issues relating to inconsistency or reliability of evidence was a matter for the jury. Equally, the Court is satisfied that the verdicts returned in respect of the allegations made by M were not perverse or inconsistent. It was open to the jury to reach different verdicts in relation to the different counts on the evidence presented, and indeed the fact that they did so suggests that they paid particular attention to the evidence relating to each of them.

45. All grounds of appeal are therefore dismissed.