Case Nos: 2014/05615/C4, 2014/05994/C4, 2015/02454/B1,2015/02558/B1, 2015/03825/B1

Neutral Citation Number: [2016] EWCA Crim 550

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURTS AT SHREWSBURY, INNER LONDON, SNARESBROOK AND CAERNARFON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2016

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE HALLETT
Vice President of the Court of Appeal Criminal Division
and
LORD JUSTICE TREACY

- -

Between:

	Regina **-and-** **(1) David Fanning**	**Respondent** **Appellant**
	Regina **-and-** **(2) Stuart Robert John Kerner**	**Respondent** **Applicant**
	Regina **-and-** **(3) Tomas Osianikovas and Kasparas Smilginis**	**Respondent** **Applicants**
	Regina **-and-** **(4) Victor Lucas De Jesus**	**Respondent** **Appellant**

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Mrs D White for **Fanning**
E D Ellis for **Kerner**
Joanna Hardy for **Osianikovas**

Sue Rodham for **Smilginis**
P Smith for **De Jesus**
Sasha Wass QC appeared for **Critchley** where the argument on inconsistent verdicts was heard, but is considered in a judgment that will be delivered separately.
Sarah Whitehouse QC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 8 & 9 March 2016
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Judgment **Lord Thomas of Cwmgiedd, CJ:**

This is the judgment of the court to which we have all contributed.

Introduction

1. These appeals were heard together with the appeal of Critchley because each raised the issue as to the proper approach on an application for leave to appeal where it is contended that the verdicts of the jury were inconsistent. We have adjourned the case of Critchley which also raised an issue of fresh evidence and directed further inquiries to be made.

THE APPROACH THE COURT SHOULD TAKE

(a) The function of a jury

2. The consideration of the approach to the setting aside of the verdict of a jury must begin with the constitutional position of the jury in a criminal trial. As Sir Patrick Devlin explained in his Hamlyn Lectures in 1956 (published as *Trial by Jury*), trial by jury developed in a way that, although questions of fact were for the jury and questions of law were for the judge, rules were established which delineated the jury's function to determine issues of fact.

> "The first and most important rule is that a verdict must be supported by some evidence."

3. However, the limits of judicial intervention have always been carefully circumscribed. If, for example, a jury decides to acquit in a case where an acquittal is contrary to the law, no judge can set aside the verdict.

4. Expressions of this and similar principles relating to the constitutional position of the jury are to be found in many cases. The two most relevant to the issues before the court are the judgments of:

i) Lord Goddard CJ in a five judge constitution of this court in *R v Hopkins-Hudson* (1950) 34 Cr App R 47. The trial judge had given leave to appeal as he disagreed with the verdict and thought it might be the result of a compromise:

> "… it has been held from an equally early period in the history of this Court that the fact that some members or all the members of the Court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of Guilty which has been found by the jury."

ii) Lord Bingham CJ in *R v Martyn W* (transcript 30 March 1999), to which we refer in more detail at paragraphs 13.ix) and 29 below:

> "The jury is one of the oldest and most highly valued of our legal institutions, esteemed by the public and almost all of the legal profession, for the fairness, open-mindedness, common sense, practical judgment and breadth of experience which jurors bring to their important task. But the jury is not a precision instrument. It delivers its decision ordinarily in one or two words; it gives no reasons; it provides no explanation. While jurors ordinarily listen with obvious attentiveness to judicial directions, no one can be sure what they make of those directions in the course of their deliberations. It may be that if their thought processes were subjected to logical analysis, flaws would be found. If, however, a flawless process of reasoning were required, a jury would be a strange body from which to require it. As Evans LJ pointed out in R *v Van Der Molen* [1997] Crim LR 604, 605, the court must be very careful not to usurp the role of the jury."

5. It was only after the enactment of the Criminal Appeal Act 1907 which established this Court that there was a formal power to "allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported by the evidence…. " (see s.4). Prior to that time, where the verdict was contrary to the evidence, the courts, in Sir Patrick Devlin's words, "could find ways of getting round it". In 1966 the power of this court was amended to allow an appeal against conviction where the court thought the conviction was "unsafe or unsatisfactory". These provisions were consolidated in the Criminal Appeal Act 1968 which was further amended in 1995 to the present power which rests solely on the unsafety of the conviction.

(b) The approach applied by the court in R v Stone (1954) and subsequent cases

6. Apparent inconsistency in verdicts appears to have been relied on as a ground for challenging a jury's verdict since the establishment of this Court. In *R v Hunt* [1968] 2 QB 433, (1968) Cr App R 580, after the amendment of the powers of the court so that it could allow an appeal where the court thought the verdict unsafe, a number of cases decided between 1947 and 1961 were examined in argument. Lord Parker CJ, (sitting with Davies LJ and Brabin J) in giving the judgment of the court dealt with them in short order:

> "In the course of his argument the court has been referred to a great number of cases dealing with apparently inconsistent verdicts, in some of which the verdict has been upheld and in others in which it has been quashed. They are, of course, by their very nature cases in which the two counts being compared and which are said to be inconsistent are closely linked either on the facts or by reason of motive or in regard to the nature of the defences, but the principle, as it seems to this court, in every case is whether the inconsistency is such that it would not be safe to allow the verdict, which prima facie is entirely a proper verdict, to stand."

He then continued:

> "There is a useful passage in regard to the approach that the court should make which was given in the unreported case of *R v Stone* (13 December 1954). Devlin J said there:
>
> > "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.""

7. The judgment of the court (Lord Goddard CJ, Cassels and Devlin JJ) given by Devlin J in *Stone* is only reported in [1955] Crim LR 120. The transcript which must have been extant in 1968 cannot now be found. It can be surmised from his Hamlyn Lectures (where the issue was discussed only in relation to special verdicts) that his view was based on the constitutional position of the jury and the control the judges imposed by requiring a verdict only to be supported if there was some evidence upon which

reasonable jurors could act (see pages 61-3 and 75-78).

8. Although the view expressed by Devlin J in *Stone* was not formally adopted by Lord Parker in *Hunt,* it was formally adopted in *R v Durante* [1972] 1 WLR, (1972) 56 Cr App R 708, [1972] Crim LR 656. Edmund Davies LJ (sitting with Stephenson LJ and Browne J) set out the passage from the judgment of Devlin J in *Stone* and said at 714:

> "We do not know whether this Court of Appeal has ever previously formally adopted the view expressed there by Devlin J. that the burden is on the defendant to show that verdicts on different counts are not merely inconsistent but are so inconsistent as to demand interference by an appellate court. Be that as it may, for our part we are satisfied that it is right and we now formally express our approval and adoption of that proposition."

Edmund Davies LJ also referred at page 714 to a judgment he had given some months earlier in *R v Drury* (1972) 56 Cr App R 104, [1972] Crim LR 333 where, sitting with Stephenson LJ and Waller J, he had said:

> "This is a most puzzling case. It gives rise once more to the question of how the inconsistent verdicts of juries are to be regarded in this Court. We reject as too bold the proposition that the simple fact that a jury has returned inconsistent verdicts, acquitting on some count or counts and convicting on others, means that in every such case this Court is obliged *ex necessitate* to quash the convictions. There are cases which, in our view, can arise when it would be proper for this Court to say that, notwithstanding the inconsistency, the conviction or convictions must stand. It all depends upon the facts of the case."

9. A good example of the proper application of Devlin J's test is *R v Segal* [1976] RTR 319, [1976] Crim LR 324. A motorist charged with driving at a dangerous speed and driving in a dangerous manner was convicted of driving at a dangerous speed, but acquitted of driving in a dangerous manner. The sole issue at the trial which lasted 6 days was the credibility of the police officer and the appellant as to the speed at which the appellant was driving. Scarman LJ in giving the judgment of the court said:

> "By their verdict of guilty on the count of driving at a dangerous speed it is plain that the jury did reach the view that the speed was dangerous, and it is also plain by their verdict that on the broad issue of who was telling the truth the jury preferred, and indeed accepted, the evidence of the police officer, at least so far as that evidence was concerned with the speed at which the car was being driven.

> As a matter of common sense and justice the jury might seem to have reached a very reasonable conclusion. They brought in a verdict of guilty of dangerous speed. They felt, or this is a fair interpretation of what they may well have felt, that really in those circumstances it was quite unnecessary, and perhaps indeed unfair, to bring in a verdict of guilty of driving in a dangerous manner since that verdict added nothing to the guilt of the appellant, who in their view was to blame for driving too fast. Nevertheless, as [counsel for the appellant] has submitted, those verdicts are as a matter of legal logic inconsistent.
>
> …
>
> Inconsistent? Yes, in law. Unsafe, unsatisfactory or lacking in common sense? No, a perfectly understandable approach, in the view of this court. This is not a puzzling case. In *R v Drury* the court was puzzled. In this case we are not; and certainly the existence of a formal logical inconsistency does not lead us to doubt the safety of the verdict on speed.
>
> At the end of the day it is for this court to make up its mind under section 2 of the Criminal Appeal Act 1968 whether the verdict of guilty in all the circumstances was safe and satisfactory. We have reached the unhesitating conclusion that, although it is formally inconsistent with the verdict of not guilty on driving in a dangerous manner, it is nevertheless a safe, satisfactory and sensible verdict once the jury had decided that they preferred the evidence of the police officer to the evidence called for the defence. That is enough to dispose of the appeal."

10. The test in *Stone* as formally adopted in *Durante* was then followed for some time. For example:

i) In *R v McKechnie* (1992) 94 Cr App R 51, the court (Watkins LJ, Auld and Judge JJ) in allowing the appeal on the basis of inconsistency of some of the verdicts applied *Stone* and *Durante* without qualification. It treated what was said by Eveleigh J in *R v Andrews Weatherfoil* [1972] 1 WLR 118, (1972) 56 Cr App R 31 about inconsistent verdicts in the same trial as *obiter,* as the case concerned verdicts in different trials.

ii) In *R v McCluskey* (1994) 98 Cr App R 216, the court (Watkins LJ and Henry and Pill JJ) in a reserved judgment applied the decision in *Stone* and *Durante,* as did the court in *R v Cilgram*, [1994] Crim LR 861 (transcript 10 June 1994).

iii) In *R v Malshev* [1997] Crim LR 587, the court (Auld LJ, Newman J and Judge

Martin Stephens) applied the test in *Durante.*

iv) In *R v Bell* (Transcript 15 May 1997) Rose LJ in giving the reserved judgment of the court dismissing the appeal on the basis of inconsistency said:

> "... unless there is a logical inconsistency, the question of whether or not the jury's verdicts can sensibly be explained does not generally arise. There have recently been a number of appeals to this court based on allegedly inconsistent verdicts, and it is perhaps therefore worth emphasising that it is axiomatic that, generally speaking, logical inconsistency is an essential prerequisite for success on this ground: see *Durante* at page 714 [which we have in substance set out at paragraph 8 above] and *Warner* transcript 17 February 1997."

11. The test set out by Devlin J was also followed in Australia – see the judgment of Gaudron Gummow and Kirby JJ in the High Court in *Mackenzie v R* (1996) 190 CLR 348 at 367.

> "Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test: ……
>
> Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense: see *Mercer v Commissioner for Road Transport* (1936) 56 CLR 580 at 595. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted; *R v Wilkinson* [1970] Crim LR 176. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury in *Hayes v Queen* (1973) 47 ALJR 603 at 604-5. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt: *R v Andrews Weatherfoil* (1971) 56 Cr App R 31. Alternatively, the appellate court may conclude that the jury took a "merciful" view of the facts upon one count: a function which has always been open to, and often exercised by,

juries: *R v Hunt* [1968] QB 433 at 436. The early history of New South Wales was affected by English juries which, in the face of clear evidence, declined to find the value of goods stolen sufficient to attract the punishment of death, thereby affording to the offender the alternative punishment of transportation *Castles on Australian Legal History*. Australian decisions have acknowledged that the role of the jury continues to be ameliorative in this respect. In *R v Kirkman* (1987) 44 SASR 591 at 593, in the Supreme Court of South Australia, King CJ (with the concurrence of Olsson and O'Loughlin JJ) observed:

> "[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty."

We agree with these practical and sensible remarks."

12. Although examples can be found of the simple application of *Stone* and *Durante* as in *R v RG* [2002] EWCA 224 (Crim), *R v AC* [2002] EWCA Crim 1299, *R v VV* [2004] EWCA Crim 355, *R v B & Q plc* [2005] EWCA Crim 2297 and *R v Lewis, Ward & Cook* [2010] EWCA Crim 496, a more complex approach was gradually developed.

(c) The development of the more complex approach

13. The test to be applied where the verdicts were said to be inconsistent as established in *Stone* and formally adopted by this court in *Durante* was clear and straightforward in application and accorded with the constitutional position of the jury. However, in a

series of cases a more complex approach to alleged inconsistency in verdicts was developed and then yet further gloss was applied. It is useful to examine what happened, for, as we explain in our conclusions, it points to an important issue as to the work of this Court and the development of the Criminal Law.

i) It appears that this development began in an unreserved judgment in *R v Trundell* (transcript 28 June 1991). It was an appeal from a trial of a solicitor which had lasted 71 days, a time that was "inordinate". The summing up alone had taken 10 days. The grounds of appeal were that the summing up was inadequate, the judge had misdirected the jury on the evidence and the verdicts were inconsistent. The court (Watkins LJ, Tudor Evans and Rougier JJ) severely criticised the summing up. The court thought that the jury's endurance had been strained almost unbearably and their ability to follow the evidence and understand it was open to serious doubt. The court was not therefore surprised that the verdicts were said to be inconsistent. The court stated it had been referred to the leading cases on inconsistency and that it felt driven to the conclusion that the contrary verdicts were more likely than not to have arisen from confusion as there was no other rational explanation for them. It was not necessary for the court to have done anything more than to apply the test in *Stone,* but Watkins LJ added:

> "Two verdicts being shown to be logically inconsistent may not be by itself be a reason for quashing the verdict, but if the only explanation for inconsistency must or may be that the jury was confused and/or adopted the wrong approach, the verdict complained of is unsafe. Thus, if in a many count indictment it is demonstrated in relation to two or several counts that the minds of the jury were or may have been in a confused state and/or they adopted the wrong approach, convictions may very well have to be quashed regardless of the number of them."

ii) This passage was then given some authority some two years later in *McCluskey* (to which we have referred in paragraph 10.ii) above. Henry J in giving the judgment of a court presided over by Watkins LJ referred to the passage we have set out from *Trundell* on the basis that it added something to the decision in *Stone* and *Durante.* Professor Sir John Smith subsequently commented, after referring to the test set out by Devlin J in *Stone*:

> "It appears that the unreported case of *Trundell* (June 28, 1991) may have taken Devlin J.'s proposition in *Stone* further for, according to Henry J. the court said [setting out the passage cited above].
>
> Perhaps it would have been better if this had been left unreported because it is not one of the clearer pronouncements of the Court. Do they mean "must" or do they mean "might"?

> If "might" is intended then "must" is superfluous. What is to be done where there are two possible grounds for the inconsistency, (a), which is "material" and (b), which is not? If the burden is on the appellant, it appears that he has to satisfy the Court that (a) is the explanation and, on one interpretation of *Trundell*, not merely the more probable but the *only* explanation. But how can the verdict be safe if there is a 50/50 chance that it resulted from confusion or a wrong approach on the part of the jury? It is submitted that a better view would be that the conviction is not safe unless the court is satisfied that the verdict is *not* based on the confusion or wrong approach of the jury; and that, once the verdicts are shown to be inconsistent, the burden of persuasion is on the Crown, not the appellant."

iii) Professor Sir John Smith's comment was set out in the report of *R v Harrison* [1994] Crim LR 859, (transcript 17 June 1994) where Hobhouse LJ, sitting with Tudor Evans and Rix JJ, in giving the judgment of the court applied the formulation adopted from *Trundell* in *McCluskey* rather than the test set out in *Stone* and *Durante.*

iv) In *R v Aldred & Butcher* [1995] Crim LR 160 (transcript 23 June 1994), the court (Hobhouse LJ, Tudor Evans and Ebsworth JJ), although not referring to *McCluskey, Trundell* or *Harrison* stated that the appellant needed to show, in a case of alleged inconsistency in the verdicts, that the jury had approached the matter in a seriously defective way; that the jury were shown to be confused and self-contradictory to such an extent that the verdicts become unsafe and unsatisfactory.

v) In *R v Campbell* (transcript 26 January 1996), Colman J in giving the judgment of the court (Pill LJ, Colman and Maurice Kay JJ) after stating that the law was investigated and explained in *Durante* referred to cases such as *Harrison* where logical inconsistency was discussed and then added another gloss:

> "There is, however, a broader category of case where, although the verdicts are strictly not logically inconsistent in the sense described they are nonetheless such as to suggest that they jury cannot rationally have applied its mind to the evidence. If the differing verdicts suggest that this has happened or may have happened, the verdict of guilty may be regarded as unsafe. Whether this does follow obviously depends upon the coincidence of the factual matters in issue in relation to the different counts in each particular case."

vi) In *Van der Molen* [1997] Crim LR 604 (transcript 20 February 1997), the court

(Evans LJ, Hidden J and Judge Brian Walsh QC) although citing *Durante* and *Hunt* referred to and adopted the tenor of the approach set out in the formulations in this line of cases, including *Campbell*.

vii) Although this line of cases was not referred to in *Bell* which, as we have said at paragraph 10.iv) above, followed *Durante,* the formulation in this line of cases appears to have been further developed in *R v Clarke and Fletcher* (transcript 30 July 1997). The court (Hutchison LJ, Laws J and Judge Allen), stated it was seeking to follow *Durante* and set out what it described as well settled law in the following terms:

> "to succeed the appellant must show, first, that the verdicts are logically inconsistent and, secondly, they are so inconsistent as to demand interference by an appellate court – i.e there is no way that the logically inconsistent verdicts can sensibly be explained."

After referring to *McCluskey,* the judgment continued:

> "We approach the present case on the basis that it is for the appellant to show (1) that verdicts are logically inconsistent and (2) that they cannot sensibly be explained in a way which means that the conviction is not unsafe. Thus an appellate court will not conclude that the verdict of guilty is unsafe, if not withstanding that it is logically inconsistent with another verdict, it is possible to postulate a legitimate train of reasoning which could sensibly account for the inconsistency."

The court stated that this formulation was in accordance with the approach in *McKechnie,* to which we have referred at paragraph 10.i). However, all Auld J was doing in his judgment in *McKechnie* was to apply *Durante.* The judgment went on to accept that the verdicts were logically inconsistent and that there was no proper or legitimate explanation for that inconsistency.

viii) When the second of the passages cited from the judgment in *Clarke & Fletcher* was referred to by Buxton LJ, sitting with Maurice Kay and Moses JJ in the subsequent case of *R v G (Steven)*, [1998] Crim L R 483 (transcript 23 January 1998), Professor Sir John Smith remarked:

> "One may perhaps be permitted to speculate as to how "a legitimate train of reasoning" can lead to logically inconsistent verdicts. Is not there something wrong with the reasoning if it concludes in a logical inconsistency?"

G (Steven) was, as is apparent from the passage we set out at paragraph 27.ii) below, more concerned with a point made in *Bell* that verdicts were not logically

inconsistent simply because the differing verdicts depended on the evidence of the same person. The court made clear that in such cases those promoting the appeal should ensure that "*Bell* and the instant case were before the court and should be in a position to explain why *Bell* should not apply."

ix) The formulation in this line of cases was then adopted in *Martyn W* by Lord Bingham CJ, who after referring to *Cilgram, Bell, Clarke and Fletcher and G (Steven),* said:

> "The cases to which we have referred in our view make quite plain the proper approach. In a case other than the *Cilgram* type of case (which is in a class of its own), it is ordinarily for an appellant to show a logical inconsistency between the verdicts criticised and then to demonstrate that it is not possible to postulate a legitimate chain of reasoning which could explain the apparent inconsistency. The court will not interfere with the verdict of the jury unless those tests are satisfied."

x) In *R v Rafferty and Rafferty* [2004] EWCA Crim 968, the Court (Rose LJ V-P, Crane and Hunt JJ) emphasised adherence to Buxton LJ's observation in *G (Steven)* that *Bell* and *G (Steven)* should be before any court considering inconsistent verdicts.

xi) The formulation developed in this line of cases was thereafter applied in very many cases – see for example *R v Hayward* [2000] Crim LR 189 (transcript 25 November 1999), *R v Rogers (Ian)* [2004] EWCA Crim 489, *R v Chohan* [2007] EWCA Crim 3175 (at paragraph 6), and *R v Cross* [2009] EWCA Crim 1553 (paragraphs 3-4) where another formulation was put forward. No one appears to have heeded the comment on *Rogers* by Professor Ormerod at [2004] Crim LR 747:

> "The ultimate question for the Court of Appeal is whether "no reasonable jury properly directed could have arrived at the conclusion which was in fact reached". This derives from *Stone*, *per* Devlin J. The test is not always clearly expressed, resulting in confusion as to whether the courts are using this test to determine whether there was in fact a logical inconsistency, or whether any inconsistency that has been shown to exist is sufficient to render the conviction unsafe. The consensus seems to be that the test relates to the latter. If the inconsistency can only be explained on the basis that the jury were confused, the conviction will be unsafe."

xii) The formulation developed in this line of cases was then further refined.

Eventually the position arrived at was clearly summarised by Elias LJ in *R v Dhillon* [2010] EWCA Crim 1577, [2011] 2 Cr App R 10 at paragraph 33:

> "(1) The test for determining whether a conviction can stand is the statutory test whether the verdict is safe;
>
> (2) 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;
>
> (3) 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;
>
> (4) The burden of establishing that the verdict is unsafe lies on the appellant;
>
> (5) Each case turns on its own facts and no universal test can be formulated."

He added at paragraph 38:

> "A key issue is what amounts to a logical inconsistency. In *R. v Durante* at 714 Edmund Davies L.J. described the test as being whether the verdicts were such that "no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the two differing conclusions". In other words, there is no rational explanation to justify the jury's conclusion. However, since the facts are within the purview of the jury, and they do not reveal them, it must follow that if the apparently inconsistent verdicts could be explained by findings of fact which were properly open to the jury on the evidence, even if they might appear to be surprising findings, then no successful appeal could be maintained."

xiii) Some further additions to Elias LJ's summary have since been made:

a) By Jackson LJ in *R v Dobson* [2011] EWCA Crim 1856 where at paragraph 31 he qualified proposition 3:

> "The explanation for inconsistency referred to in proposition 3 must be an explanation which falls within the parameters of the case as summed up

by the judge"

b) By Pitchford LJ in *R v RB* [2013] EWCA Crim 2301 at paragraph 34:

> "We would with respect add two riders to this analysis which we are sure the court in *Dhillon* recognised. The first concerns Elias LJ's paragraph 33.3. If the court identifies an explanation as to why logically inconsistent verdicts may have been returned, it will act on that explanation to dismiss the appeal only where it is a satisfactory explanation which justifies the conclusion that the verdict is safe. This seems to us to be a necessary implication. The second was recognised by the court in *R v J* [2010] EWCA Crim 1768 at paragraph 19, when Aikens LJ acknowledges the observation of Rose LJ in the unreported case of *R v Bell* that there may be rare cases where although there is no logical inconsistency the particular facts and circumstances of the case render the verdict unsafe. Rose LJ said this:
>
> > "…there are, of course, exceptional cases, of which *Cilgram* provides an example, where a verdict may be quashed because, although there is no logical inconsistency, the particular facts and circumstances of the case render the verdict unsafe. However, it is to be noted that in *Cilgram* this Court, differently constituted, expressly rejected the submission that, where a complainant's credibility is in issue and her evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts in relation to some of the complainant's allegations.""

14. It appears from the most recent cases that this is now the approach that is followed and not the original test in *Stone* and *Durante.* For example, it is striking that although *Durante* was cited in argument in *R v Formhals* [2014] 1 WLR 2219, [2013] EWCA Crim 2264 the court did not refer to it and proceeded on the basis of *Dhillon* (see paragraph 28).

Our conclusion

15. In *Stone,* Devlin J set out a clear test in cases where inconsistency between verdicts is advanced as a ground of appeal. That was applied in *Hunt* (1968) and formally adopted in *Durante* (1972) as the determinative test for setting aside a conviction as unsafe (and, as it was between 1966 and 1995 unsatisfactory). It is a test that is clear; it can be applied by this court without any further elaboration

16. It also accords with and does not usurp the constitutional position of the jury. As is apparent form the judgment of Scarman LJ in *Segal* (which we have set out at paragraph 9), the passage in the judgment of Lord Bingham in *Martyn W* (which we have set out at paragraph 4.ii)) and the judgment of the High Court of Australia in *McKenzie* (which we have set out at paragraph 11) 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 that constitutional position whilst providing the necessary safeguard for a defendant.

17. It is not clear why in the line of cases beginning with *Trundell*, to which we have referred in paragraph 13, a much more elaborate formulation evolved. Few if any of the judgments were reserved and it seems from a reconsideration of many of them that the court was either seeking to explain their reasoning in relation to the specific facts of a case or to summarise their understanding of the law without in any way seeking to change it.

18. It is essential for the sound development of the Criminal Law and to prevent over complication that it should rarely be necessary for a court to reformulate or add a gloss to well established law (as was the case in relation to inconsistent verdicts after the decisions in *Stone, Hunt* and *Durante).* However where a court thinks it necessary to summarise the law or to add a gloss that might assist in the decision in a particular case, its judgment should not be treated in subsequent cases or in the textbooks as a new formulation of the law, unless the court makes it expressly clear in the judgment that a change or development of the law is being made. In 1994 it was possible for Professor Sir John Smith to say, as he did in respect of *Trundell* (see paragraph 13.ii) above) that it would have been better if a case had not been reported; today each decision of this court is made available electronically. It is therefore of the greatest importance that the observations we have made in this paragraph are given the necessary attention.

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. In any event, as Professor Sir John Smith pointed out in his commentary on *Harrison,* it is difficult to see how a legitimate chain of reasoning can justify a logical inconsistency.

Cases are fact specific

20. It should be unnecessary for us to emphasise, although each case is fact specific, the test as 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 argument for such a distinction only arises when attempts are made to reconcile decisions of this court which of necessity arise on different facts. Even in cases involving what was described by Miss Whitehouse as a single sexual encounter such as *Dhillon,* attempts were made to explain the difference between what happened in that case and *Van der Molen* and *R v O'Brien* [2003] EWCA Crim 995.

21. We think any such approach is misplaced. It must be recalled that the jury will have seen and heard the witnesses and had a proper opportunity to judge their state of mind, their emotions (which may not always be logical) and, in some cases, the effect drink or drugs may have had on the behaviour of those concerned. All of these are factors that a jury is best placed to assess. The test in *Stone* and *Durante* takes this properly into account by permitting the court only to intervene if the appellant demonstrates that he has met the threshold there set out.

22. It is 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 927. The test set out in *Stone* and *Durante* should simply be applied without further elaboration to each case without comparison to other cases. It follows that it will rarely be necessary to refer to any case other than *Durante* which conveniently sets outs Devlin J's test.

23. Although the approach we have set out needs no further elaboration, it is necessary to mention three matters.

The burden lies on the appellant

24. The burden of showing that the verdicts cannot stand is upon the appellant. In his commentary on *Harrison,* Sir John Smith also suggested that the burden of proof should be on the Crown. This suggestion was described in *R v Cova Products* [2005] EWCA Crim 95, [2005] Crim LR 667 at paragraph 28 as having "much to commend in it".

25. However it was rejected by Lord Phillips CJ in *R v Mote* [2007] EWCA Crim 3131, [2008] Crim LR 793 at paragraph 49-50:

> "50. We question whether it is helpful to adopt a staged

> approach to the burden of proof in this way. The starting point is that the burden is on an appellant to persuade the Court of Appeal that a verdict is unsafe. Where he seeks to do this by showing that acquittals on some counts are inconsistent with convictions on others he has to persuade the court that the nature of the inconsistencies is 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."

Credibility

26. It appears to have been suggested on occasions as a consequence of the decision in *R v Grizzle* [1991] Crim L R 553 (transcript 15 March 1991) and *Cilgram* 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.

27. However in a series of decisions later in that decade, that suggestion was rejected. It became 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 in the indictment and not to be sure of the credibility or reliability of the complainant on another count. This has been said on numerous occasions, but it is important, in the light of the arguments before us, to emphasise that this is now well established. Two citations will suffice:

i) In *R v Angel* (transcript 25 June 1992), Lloyd LJ said:

> "Thus where evidence is given by a witness for the Crown on one count and the defendant is acquitted on that count, we often hear it argued that the jury must have disbelieved the witness and therefore should have acquitted on another count which also depended on that witness' evidence. It cannot be said too strongly that that line of reasoning is fallacious; there may be all sorts of reasons (valid reasons) why the jury may have been convinced by the witness on one count taking all the evidence into consideration, but not convinced on another. A jury is not to be treated as having rejected a witness' evidence altogether just because it is not convinced of the defendant's guilt on a particular count. Where that happens, as it does happen from time to time, there is nothing irrational in the jury convicting on one count and acquitting on another. Unless it can be said that the verdicts are irrational or self-contradictory, this court will not interfere in such a case."

ii) In *G (Steven)* (to which we have referred at paragraph 13.viii)) 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 in each count."

28. More recently this approach was emphasised in *R v C* [2008] 1 WLR 966, [2007] EWCA Crim 2581, by Sir Igor Judge PQBD, in giving the judgment of the court at paragraph 40:

> "The verdicts of a jury are not to be treated as inconsistent simply because the jury is sure about some parts of a complainant's evidence, but unable to be sure to the requisite standard about others. Here the jury was sure about the reliability of the complainant's evidence, where it was provided with a measure of independent support, but unprepared to be sure where it was not. This was an entirely rational approach, properly seeking to give the benefit of any doubt to the defendant. The verdicts are not logically inconsistent."

The directions to the jury

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. This applies to cases where there may be multiple counts involving the same complainant or cases where there are specific counts and specimen counts. As was explained by Lord Bingham in *Martyn W:*

> ".. 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."

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. This was the position in *R v Beach & Owens* [1957] Crim LR 687, *The Times* (30 July 1957), *Cova Products* and *Chohan.* In the latter case it was contended on behalf of the appellant on the appeal that, given the way in which the prosecution had conducted the case, it should not have been open to the jury to convict him if his co-defendant was acquitted, even though there was clear evidence on which he could have been convicted. The prosecution made clear that if that point had been raised by the appellant at trial, then they would have made clear that it was their case that the jury could indeed acquit the co-defendant and convict the appellant on the evidence. In giving the judgment of the court, Thomas LJ said:

> "If it was in truth to be said that this was a case where the appellant could not be convicted if [the co-defendant] was acquitted, then the jury should have been directed in that way. However, we have been told that had that point been raised before the jury the prosecution would have made it very, very clear that their case was that, on the evidence before the jury, it was open to the jury to convict the appellant and acquit [the co-defendant].
>
> It seems to us very important to bear in mind the passage in the judgment of Lord Bingham CJ [in *Martyn W*]. If an issue of this kind arises, it must be dealt with at trial, before a direction is given to the jury. Everyone prizes the institution of the jury. If the jury proceed to give a verdict on the evidence and are told that the verdicts do not have to be the same, it simply is not open to someone to come to this Court hereafter and complain that a verdict which is open to the jury on the evidence and which was arrived at in accordance with the judge's directions (which were not objected to) is one that is perverse."

These observations in *Chohan* were specifically related to the unusual circumstances of the case. As was made clear in *R v Winson* [2009] EWCA Crim 746, the observations have no application to the generality of cases.

II: THE SPECIFIC CASES

(1) FANNING

31. The appellant David Fanning was tried on an indictment containing eleven counts of indecent assault and six counts of rape in the Crown Court at Shrewsbury. On 3 November 2014 he was convicted by a majority of 11 to 1 of nine counts of indecent assault contrary to s.14 (1) of the Sexual offences Act 1956 (counts 1-9). He was acquitted of the counts of rape and two of the counts of indecent assault (counts 10-17).

32. He appeals against conviction with the leave of the single judge on the one ground that the verdicts are arguably inconsistent.

The factual background

33. The complainant, whom we shall call X, was the daughter of a family friend. X and her sister would go to Fanning's home to be cared for by Fanning's wife whilst their mother was at work. X claimed the abuse began when she was 4 with Fanning touching her bottom over her clothing. It developed into his touching her naked vagina, digital penetration of her vagina, getting her to masturbate him and penetration of her mouth with his penis (counts 1-9). X further alleged that he raped her on a regular basis, from the age of 8 to 10 and on one final occasion when she was aged 13 years (counts 10 to 14 and 17), that he had indecently assaulted her by inserting a hammer (count 15) and a screwdriver (count 16) into her vagina when she was four. All of the abuse, save for the touching over her clothing, was said to have happened in the detached garage of the house.

34. There were three witnesses to whom X made complaint.

i) The first was the complainant's boyfriend who was told by X sometime in 2011 that she had been sexually abused by Fanning.

ii) The second was a friend whom X told about the abuse at the beginning of 2013.

iii) The third was the complainant's mother. She was told a few weeks before the matter was reported to the police in May 2013. The prosecution also relied on evidence of a remark allegedly made by Fanning sometime before the

complainant's tenth birthday to the effect that Fanning had said that 'X could help him in the garage anytime'.

35. Fanning denied any inappropriate behaviour in interview and in his evidence. The defence emphasised a number of inconsistencies in X's account. In one Achieving Best Evidence ("ABE") interview she said that he started to rape her when she was seven or eight; in another interview she said it was when she was about five. On one occasion she said she believed his wife knew nothing of the abuse, yet on another occasion she said she thought his wife must have known about it. She also admitted having what she called flashbacks about the abuse to explain why some of her allegations surfaced in a later ABE interview.

36. Further, the defence relied upon X's documented history of psychiatric problems which involved her imagining having heard a voice telling her to make what she accepted would be an untrue allegation of sexual abuse.

37. The judge reminded the jury that the "central issue in this case is the question of the assessment that you (the jury) make of X's evidence" but emphasised they must consider the individual counts separately. He then gave the jury specific directions on the law as it applied to each count and reminded them of the evidence on each.

The submissions

38. Fanning argues that the verdicts are inconsistent and that there is no logical explanation for the inconsistency that amounts to a legitimate chain of reasoning, within the parameters of the case, as presented by the prosecution and summed up by the Judge.

39. The complainant's evidence was central to the prosecution case. The jury could only convict of counts 1 to 9 if satisfied she was a reliable and accurate witness, yet they rejected her evidence of sexual abuse in counts 10, 15 and 16 all of which allegedly occurred within the same time span. Fanning contends that such an approach is unjustifiable and illogical; the jury could not have come to the conclusion that the complainant was telling the truth about, for example, digital penetration, but not penile penetration.

40. In our judgment this ground fails. The verdicts are not inconsistent and can stand together. There is nothing unreasonable or illogical in the approach adopted by the jury; applying their minds to the evidence they could have arrived at the verdicts they did. With the exception of counts 15 and 16 the jury drew a distinction between allegations of indecent assault said to have occurred when the complainant was aged 5 to 8 (counts 1 to 9) and allegations of rape which occurred when she was 8 to 13 (counts 10, 11, 12, 13, 14 and 17). Counts 9 and 10 may have overlapped in time in that they were said to have occurred in the same year, but different considerations applied to count 10. The

Judge directed the jury that in order to convict on the rape allegations they would have to be sure they occurred during the year when the age of the complainant was specified. X was not consistent on when the rapes began and understandably vague on dates. As far as counts 15 and 16 are concerned, the jury may well have had doubts about allegations not mentioned in the first ABE interview and which only surfaced as a result of her "flashbacks".

41. For those reasons, we dismiss the appeal.

(2) KERNER

42. The applicant Stuart Kerner was tried on an indictment containing eight counts in the Crown Court at Inner London. On 5 December 2014 he was convicted of two counts of sexual activity with a child whilst in a position of trust (counts 5 and 7). On counts 1 to 4 (inclusive), 6 and 8 he was acquitted. Those counts were allegations of either sexual activity with a child or sexual activity with a child by a person in a position of trust. The difference between those charges arose from the fact that sexual activity with a child was charged where the complainant was aged 15; sexual activity with a child in a position of trust was charged where the complainant had attained 16 years.

43. His application for leave to appeal has been referred to this court by the single judge.

The factual background

44. Kerner is a teacher with over 20 years' experience with, *inter alia*, responsibility for ethics. The complainant, C, was a pupil at his school. It was acknowledged that she had behavioural problems and that she had told significant lies about herself and was an attention seeker. For example, she falsely claimed over a period of time to have been involved in a road traffic accident and that a heart defect had been discovered. She had obtained free school meals after falsely complaining that her mother had not provided food or money. There was evidence that C had formed an attraction towards the applicant and had engineered events so as to be close to him.

45. The eight counts on the indictment represented sexual activity which C said had taken place over a period between March 2011 and November 2012. Count 5 represented an incident at the end of February 2012 which C asserted was the first occasion upon which full vaginal intercourse had taken place. She also said that anal sex took place on that day. Count 7 represented events on 3 October 2012, an occasion when C said she had visited Kerner's home for the first time and sexual relations took place.

46. The defence advanced was that no sexual activity had ever taken place between the pair. The counts on the indictment which reflected matters recorded in C's diary represented a

fantasy on her part.

The summing up

47. The judge directed the jury to return separate verdicts in relation to each count having considered the evidence in relation to each count separately. If the jury was not sure on any count that Kerner had intentionally touched C as alleged, they should acquit. She went on to say that a central issue was whether C was a truthful and reliable witness. In the light of evidence which had been given about C's character and honesty, the judge gave the following direction:

> "It is open to you to find the defendant guilty even if you conclude that there is no corroboration or supporting evidence of C's allegations if you are sure she is telling the truth and is a reliable witness. If, on the other hand, you retain some reservations as to whether C is a truthful and reliable witness, and therefore are not prepared to rely solely on her evidence, you will then want to look to see if there is any corroboration or supporting evidence which, despite any reservations you might have about C and the quality of her evidence, nevertheless drives you to the conclusion that you can be sure that the defendant is guilty."

The issues on counts 5 and 7

48. Counts 5 and 7 were different from the remaining counts which depended solely on the word of C.

49. The events relating to count 5 were alleged to have taken place at the school during the school day at a time when C should have been in class. Examination of the electronically maintained school attendance records showed that there had been a suspicious alteration of the records as to C's attendance for the material time. At the same time the applicant had free periods. Kerner and C were the only two realistic candidates for having altered the records. C would have needed to acquire a password in order to do so; Kerner had the password.

50. In relation to count 7 records showed that C and Kerner were away from school at the material time. C was able to give a detailed description of the layout of Kerner's house which she said she had attended, contrary to Kerner's denial. Cell site analysis of the applicant's phone, of which C would have been unaware at the time she gave her account, showed a picture of movements of that phone consistent with C's account of having been picked up by Kerner near the school and then driven some distance to his home where sexual activity took place, before being returned to the school.

51. The judge put the competing arguments as to the significance of the supporting evidence fully and fairly before the jury. Mr Ellis' attempt on behalf of Kerner to portray that evidence as having been "neutralised" was wholly misconceived.

Our conclusion on the alleged inconsistency of the verdicts

52. The primary ground of appeal advanced on behalf of Kerner is that there is a logical inconsistency between the verdicts on counts 5 and 7 and the remaining counts.

53. Our conclusion is that no such inconsistency exists; the verdicts can stand together. There is nothing unreasonable in the jury's conclusion. As the judge foresaw in her direction to the jury, counts 5 and 7 might be viewed in a different light from the remaining counts which depended wholly on the word of C. In the case of counts 5 and 7, there was the supporting evidence which we have identified.

54. We conclude that the jury's verdicts represent close attention to the judge's direction and that they were only prepared to find allegations against the applicant proved where there was supporting evidence. There is thus a clear distinction between counts 5 and 7 and the other counts which leads us to reject the main ground of appeal.

The other grounds of the application for leave to appeal

55. There are subsidiary grounds of appeal.

56. The first of these asserts that by reason of a failure by the school to retain full child protection records and a failure by the police to carry out a DNA sweep of Kerner's car and home, the trial was rendered unfair. We reject that submission. The absence of some records was raised during the trial by the defence and the jury were reminded of the issue in summing up. In any event the jury were well aware of the issues surrounding C's credibility. It is impossible to see how any additional records could have improved Kerner's position further. Again the issue of a failure by the police to subject the applicant's car and home to DNA analysis, sometime after the alleged events, was raised at the trial and commented on by the judge in summing up. Both of those were matters for the jury's consideration in deciding whether it could be sure that guilt on any count was shown. No arguable unfairness arises. We note that there was no suggestion at the trial that it should be adjourned or halted by reason of the absence of this material.

57. A further ground submits that there must be a lurking doubt as to the safety of the convictions. In this context, matters going to the credibility of C were raised, and reliance was placed on comments made by the judge at the time of verdict and in passing sentence. We are not persuaded that there is any arguable ground. The evidence as to

C's credibility was fully before the jury, and the views of the trial judge are, with respect, irrelevant. The decision in the case was for the jury not for the judge.

58. We deprecate the use of the phrase "lurking doubt" as it represents an invitation to this court to substitute its view for that of the jury. The question for this court is whether by reason of the matters raised the convictions are unsafe. For the reasons given, we dismiss this application.

(3) TOMAS OSIANIKOVAS AND KASPARAS SMILGINIS

59. On 30 April 2015 in the Crown Court at Snaresbrook the applicants Tomas Osianikovas and Kasparas Smilginis were tried on a 4 count indictment, each count alleging rape of the same complainant, DS. They were both convicted (by a majority of 10 to 2) of count 1 (oral rape), but were acquitted of counts 2 (oral rape), 3 (vaginal rape) and 4 (vaginal rape).

60. Their applications for leave to appeal against conviction and in Smilginis' case an application for an extension of time of six days and his application in respect of sentence have been referred to the full court by the single judge.

The evidence relating to count 1: the allegation of oral rape in the park

61. The complainant (DS) and Smilginis had had sexual relations on occasions in the few days before the night of 14/15 October 2014 on which the rapes were said to have taken place. On that night both Smilginis and Osianikovas were out drinking with DS in a street where there were groups of other young people. DS drank a large amount but it was not alleged she lacked the capacity to consent.

62. They ended up near a park in east London. DS claimed the applicants threatened her, grabbed her and forcibly lifted her into the park. Osianikovas demanded oral sex from her and said "Suck or die". She could not remember if sexual intercourse occurred with Smilginis but he assisted Osianikovas in the oral rape. Afterwards she said that Osianikovas insisted they go to Smilginis' house. They both forced her to do so.

The evidence relating to counts 2, 3 and 4: the allegations of rape at Smilginis' flat

63. As they walked for several minutes through residential areas to Smilginis' address, DS did not seek help or assistance. After they reached the flat, she claimed both men raped her in the flat – Osianikovas first forced her to have oral sex after he and Smilginis had taken her clothes off. They then had oral and vaginal sex in turn with her in the bedroom. She said it was without her consent; she had not resisted as there was no point.

64. She told the jury she woke after midday on 15 October 2014. There was a row with Smilginis because he had handed her a blanket bloodied during a previous sexual encounter between them. She said she was 'furious, embarrassed and humiliated' but denied that this was why she had alleged rape. She accepted shouting at Smilginis that she would make a statement against him and agreed she had wanted to put them in jail for years.

65. She claimed that Osianikovas had chased her to the bus where he had tried to grab her bag as she was going through the door.

DS' complaint to the police

66. DS bought a can of beer on her way home. When she got home, V her flat mate described her as looking strange, agitated and dirty. There was mud on her clothes. Her eyes were bulging. She was shaking and she was scared. V saw no beer can.

67. DS told V that she was raped in the park by Smilginis and by one of his friends called Tomas. When DS undressed, V noticed bruises. DS told her that she had been hit by the men. She gave DS her mobile phone to call the police. They came.

68. PC Hill found a distressed and angry DS. DS admitted she had 'fancied' Smilginis but insisted he had raped her with Osianikovas. DS claimed both men threatened her. Smilginis told her "We are going to fuck you together."

69. DS volunteered to the jury at trial that she had exaggerated and lied to V about the use of repeated violence and the presence and use of a knife. She also accepted telling lies to PC Hill about her bag being snatched at the bus stop.

The defence of Osianikovas and Smilginis

70. Osianikovas and Smilginis did not give evidence. They had given an account in interview. In that account Osianikovas claimed:

    i) The idea of group sex came from DS two days before the date of the alleged offences. In the park he asked DS if she would perform oral sex on him and she agreed to do so. Smilginis was maybe two or three metres away from them. They stopped having intercourse because some police officers arrived. He also stated that DS and Smilginis had sexual intercourse on the street during which he, Osianikovas, had held DS's breasts.

    ii) At Smilginis' home, DS agreed to their request for oral sex; this became group

sex. He questioned Smilginis as to whether he really wanted to be in a serious relationship with DS because in his opinion she was a 'slut' and a 'whore'. Both he and Smilginis had oral and vaginal sex with her.

71. Smilginis said in his interview that after they came back from the park he had had vaginal sexual intercourse with her in the room first. He stopped the sex after 5 minutes because she bled as she had done on a previous occasion. He had gone to have a smoke and a shower. When he returned to the room Osianikovas was in his underwear. He was later told by Osianikovas that Osianikovas had had sex with her after he had gone to sleep. He denied that he had had sex with the complainant in the park as suggested by Osianikovas.

72. Both applicants stated that the complainant had woken after lunch and had started to touch Smilginis' penis and said in Russian that she wanted him; it was his case that Smilginis rebuked her. She threatened them with an allegation of rape.

The direction to the jury

73. The jury was specifically directed to consider whether

> "in the context of this particular case, this particular drink-fuelled night, consent was freely given by [DS] to each of the acts of penetration that are the subject of the counts on the indictment. If you are sure, it was not, you must secondly decide whether you are sure that the defendant had no reasonable belief that it had been given
>
> …
>
> There are four counts and there are various permutations. When you consider each count, please go through it in these stages. Did the penetration amount to rape? If you are not sure because, for example, you are not sure about the absence of consent, then you will acquit both defendants on that count".

The submission on inconsistency

74. Both Osianikovas and Smilginis contended that conviction is unsafe in that:

i) There was an inconsistency in the verdicts returned by the jury and the verdicts of the jury were perverse. This was a case where the allegations should be treated as a single sexual encounter.

ii) If the account of DS was accepted by the jury as to the events outside and inside the park (in particular the threats made to her life and her evidence that she was forcibly carried into the park), then it was impossible to see how the jury could logically have reached the decision either that she consented to the sexual acts at the house, or that the appellants could have believed that she was consenting.

iii) DS was inconsistent throughout the ABE interview as to her actions about screaming and "playing with them". The jury had clearly not believed her account as to events at the house.

Our conclusion on the alleged inconsistency

75. We have set out at paragraphs 20-21 our view that cases should not be classified on the basis that they are or are not what was described as a single sexual encounter. This application would in any event demonstrate why such a classification would be artificial.

76. The question we have to ask is whether the jury's verdicts were inconsistent so that they could not stand together on the basis that the verdicts were not verdicts a reasonable jury could have reached applying their minds to the evidence.

77. There were, as the judge reminded the jury, several different permutations in what was undoubtedly a drink fuelled series of events where Smilginis and the complainant, DS, had had sexual relations a matter of days earlier. A jury had the advantage of seeing DS and the other witnesses in relation to what the judge described as a drink fuelled night. It must be recalled that people often do not behave logically when in drink, particularly when engaged in sex. The jury were pre-eminently in the best position to make an assessment of what happened. In our judgment they were entitled reasonably to conclude on the evidence that in respect of the rape in the park, DS had not consented to oral sex with Osianikovas, a man she had not had sexual relations with before and both defendants knew this; but after their return to Smilginis' flat the jury could not be sure she had not consented to sex with Smilginis, the man she had had sexual relations with before, and thereafter consented to sex with Osianikovas in the course of the drink fuelled evening at the house.

78. This application on this basis therefore fails.

Osianikovas' application in relation to the admission of a passage in his interview

79. It was submitted that the Judge erred in law in exercising his discretion under s.78 of PACE 1984 by permitting the following passage from his interview to be put before the jury:

"Let's stop doing it because police is here" We stopped that

> oral sex when the police officers came up to us the officer said "We were called that there was something because the lady is asking for help"

80. It was submitted that, as the police officer was never traced, the assertion that there had been cries for help could not therefore be challenged. It followed that allowing this passage to be before the jury was so prejudicial as to cause the trial to be unfair. No direction that it was not evidence would suffice. DS did not say she asked for help and the prosecution relied heavily on it in the closing address to support the fact that she must have been screaming and distressed.

81. The judge rejected these submissions. He said he would direct the jury (as he did) that this was not evidence that DS had cried for help. He considered that the passage might assist the jury as it might shed light on the explanation given by Osianikovas.

82. We can see no basis for concluding that the judge erred in the exercise of his discretion under s.78; he made clear that it was not evidence that DS had cried for help and he was entitled to form the view of the value of the passage that he did. Allowing this passage to be included in what was put before the jury could not in any event conceivably have had any effect on the safety of the conviction. We refuse leave on this ground.

Osianikovas' application in relation to the summing up

83. It was argued on behalf of Osianikovas that the judge's summing up failed to deal adequately with the defence case as set out in cross-examination and as accepted by the complainant. Many hours of cross-examination were reduced to a few lines. The weight and authority of the court ought to have been behind the cross-examination by featuring a summary of it in a neutral summing up of all the evidence.

84. The jury were considering their verdicts for over 12 hours and from the questions asked throughout the duration of their retirement they were clearly concerned about count 1. This suggested the jury were troubled by the case. The way in which the case was summed up and questions were answered caused prejudice to the applicants.

85. We have considered the summing up and the way in which the judge dealt with these matters. We can see no basis for any justifiable complaint. We refuse leave on this ground.

Smilginis' application in respect of the admission of text messages

86. It was submitted on behalf of Smilginis that the Judge erred in preventing cross-examination of the complainant on text messages. This was because the text messages

demonstrated the strength of the defence case that the complainant was an insecure and volatile woman who acted in temper and spite. The text messages to another male were also examples of her hate for men and her reaction on disappointment. They did not fall within s.41 of the Police and Criminal Evidence Act 1999 and the judge should have permitted them to be used in cross-examination.

87. The judge refused to permit cross-examination on the basis that the text messages were irrelevant as the identity of the other party was unknown, the context was unknown and what the defendant sought to extrapolate was speculative. This was a judgment which the judge was entitled to reach. We see no merit in this ground and refuse leave.

88. The ground of appeal set out in Smilginis' application in respect of the summing up was not pursued at the hearing.

89. We therefore refuse leave on each of the grounds set out; the convictions are safe.

Application for leave to appeal against sentence by Smilginis

90. In the light of the jury's verdicts it was submitted that the sentence was manifestly excessive. As the Judge had sentenced Smilginis on the basis that there had been threats of violence, threats to kill and a physical carrying of the complainant to the park to enable the oral rape by Osianikovas to take place, that basis for the sentence could not stand as it must be inconsistent with the jury's verdicts on counts 2, 3, and 4.

91. We have rejected the contention that the verdicts were inconsistent. The judge was entitled to form the view he did and on that basis, the sentence was not manifestly excessive. The application for leave to appeal is refused.

(4) DE JESUS

92. De Jesus was tried on an indictment containing three counts of rape at the Crown Court at Caernarfon. On 6 August 2015 he was convicted on count 2 but acquitted on counts 1 and 3. The trial judge granted a certificate for appeal.

The factual background

93. The counts involved the same complainant, W. She had been 13 and 14 when the offences were said to have occurred. De Jesus was about three years older. It was said by W that the pair had been in a consensual sexual relationship and counts 1 and 2 had occurred whilst that relationship subsisted. Each of those allegations related to intercourse which had begun consensually but where W said De Jesus had continued

after she had clearly told him to stop. On each occasion, according to W, De Jesus had continued until ejaculation, on the second occasion into a condom.

94. W gave evidence that after the first incident she had asked De Jesus why he had continued despite her request for him to stop. De Jesus had apologised and said that he thought it was all right to carry on because W had initially consented to intercourse.

95. She said that on the second occasion De Jesus had carried on after she had asked him to stop and had been aggressive towards her as he continued for several minutes. When confronted, De Jesus justified his actions on the basis that W had consented at the outset and that he knew she was not going to be sick as she had claimed when she asked him to stop.

96. After the second incident W broke off the relationship, but some weeks later de Jesus said he wanted to make amends and invited W to his house to talk. Her evidence was that on this occasion she was subjected to a forcible rape in a bedroom although she had made her lack of consent clear.

97. At trial De Jesus' case was that they had never had sexual intercourse on any occasion.

98. In summing up the judge directed the jury that they would have to determine which of the two young people was telling the truth. He told them that they should consider the case for and against De Jesus separately on each count, saying that the evidence was different and therefore their verdicts need not be the same. He commented that the central issue was the credibility of the two main witnesses.

The submissions

99. The grounds of appeal urge that the verdicts are logically inconsistent and that there was no legitimate train of reasoning to explain the verdicts. The jury must have been confused or adopted a wrong approach. At the very least in a case which was heavily dependent on W's credibility, the court should conclude that the jury must have strayed outside the evidence, and should intervene.

100. We note that there were three separate incidents here. Although as we have said at paragraphs 20-21, there should be no differentiation as a matter of law between a single event and a series of events, the potential for different verdicts is greater than if the court is trying a number of counts arising from a single episode.

101. We do not consider that this is a case where the verdict on count 2 is inconsistent with the verdicts on counts 1 and 3. Examination of the evidence shows good reasons why a

careful and reasonable jury might well have differentiated between the counts.

102. Count 3 was the most serious count and involved an allegation of rape from the very outset. However, it is clear that W had given accounts to the police and to a psychologist which were inconsistent with one another in a number of important respects, and upon which defence counsel had placed considerable reliance. The judge in summing up had taken the jury through the account to the psychologist in detail and had commented upon those inconsistencies telling the jury to consider them "very, very carefully" in determining whether W had given a truthful and accurate account. In our judgment there was ample explanation for the verdict on count 3.

103. Turning then to the verdicts on count 1 and 2, we note that the judge had directed the jury that, in addition to proving the absence of consent on the part of W, the prosecution had also to prove that the appellant did not reasonably believe that she was consenting. The jury was reminded of W's evidence as to the first occasion to the effect that De Jesus, when taxed by her, had said that he thought it was all right to carry on because she had initially consented to the intercourse. It seems to us that it was open to the jury to conclude that on this occasion De Jesus may have entertained a reasonable belief as to consent so that they could not be sure of guilt on count 1. In relation to count 2 which was an offence alleged to have been committed in a similar way, it seems to us that the jury may well have concluded, after the first occasion, that De Jesus could not reasonably have believed in W's consent.

104. There therefore appear to us to have been bases upon which the jury could reasonably have distinguished between the three counts and arrived at different verdicts on each as the judge had indicated they could. In those circumstances the appeal against conviction must fail and it is dismissed.