THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 117

Record Number: 45/18

APPROVED

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

C.M.

APPELLANT

JUDGMENT of the Court delivered on the 24th day of April 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. The appellant pleaded guilty to a count of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997. The appellant pleaded not guilty to a count of rape contrary to section 2 of the Criminal Law (Rape) Act, 1981. The trial commenced before the Central Criminal Court on 13th December 2017 and concluded on 19th December 2017 when the jury returned a verdict of guilty in respect of the count of rape.

Background

2. The appellant and the complainant had been in a relationship for approximately 4-5 years at the time of the offences. On the 28th of April 2016, the complainant had returned to

her flat and had fallen asleep on the couch. The appellant was not residing at the flat at that time. The complainant woke up later that night to find herself being assaulted by the appellant.

3. The complainant was punched to the face and body and struck with a sweeping brush. The appellant told her to go to the bedroom and then caught her by the hair and dragged her to the bedroom. He punched her while she was on the bed and began to strangle her. He indicated he was going to break her windpipe.

4. The following morning the appellant was still in the flat and the complainant had fallen asleep in the bedroom. The appellant went to purchase Lucozade for the complainant and on his return, got into the bed with the complainant. He began to rub her leg and asked her for sex; the complainant refused. He then got on top of the complainant and attempted to remove her shorts, he succeeded and then inserted his penis into her vagina. The complainant turned her head away and cried and the appellant told her to shut up. In the aftermath, the appellant left the flat and shortly thereafter, the complainant contacted An Garda Síochána.

5. The appellant was arrested and he initially denied being present in the complainant's flat on the night in question. As the interviews proceeded, the appellant accepted that he had been in her presence and that he had assaulted her but denied raping her.

6. The appellant's trial commenced before the Central Criminal Court on 13th December 2017 and concluded on 19th December 2017 when the jury returned a verdict of guilty in respect of the count of rape.

Notice of motion

7. Following his conviction, on the 31st January 2018, a notice of appeal was filed and 83 grounds of appeal against conviction were filed on the 6th February 2018 by the

appellant's previous legal team. The appellant has brought a motion to adduce three additional grounds of appeal in substitution for the 83 grounds originally filed.

Timeline

31st October 2018: A notice of change of solicitor was filed.

7th November 2018: The transcripts of the trial were made available.

3rd February 2020: The notice of motion was filed.

8. The appellant's present solicitor swore two affidavits on behalf of the appellant in which he avers, *inter alia*, that the proposed new grounds are addressed in the general sense in certain of the original grounds of appeal. We do not intend to set forth the 83 grounds of appeal, we refer to the three new grounds on which the appellant now seeks to rely in substitution for the original grounds filed.

Proposed grounds of appeal

9. The appellant seeks to rely on three new grounds of appeal:-

(1) The learned trial judge failed to properly direct the jury in his explanation of the presumption of innocence and the legal burden on the prosecution in a criminal trial and specifically the phrase "*Beyond a reasonable doubt.*" The learned trial judge described the civil standard in terms of which version is more likely or probable but then, in explaining the criminal standard, once again made reference to "*probability*" as a part of the test.

(2) The learned trial judge failed to properly instruct the jury in relation to the legal concept of the "*Benefit of the doubt.*" The learned trial judge omitted to direct the jury that where two views on any part of the case were possible on the evidence, then the jury should adopt that which is favourable to the accused unless the other view has been established beyond a reasonable doubt;

(3) The learned trial judge misdirected the jury in respect of the Lucas warning, specifically in telling the jury that "*where lies have been told by an accused person ...these can be regarded as independent confirmation ...of the essence of the prosecution case.*"

10. Firstly, we have considered whether the three grounds upon which the appellant now seeks to rely are in effect subsumed into the original grounds filed. We are not satisfied that there is any correlation between these grounds and the original grounds. Therefore, we must assess whether the appellant should be permitted, at this remove to rely on grounds of appeal which were not the subject of the original grounds of appeal. In this regard, while the submissions filed on behalf of the appellant do not address the issue as to whether leave ought to be granted to add new grounds of appeal, oral submissions were made at the hearing. We now propose to address this preliminary issue but in order to do so, we must consider each of the three new grounds in turn.

The legal principles

11. It is well settled that an appellate court will be reluctant to allow new grounds to be relied upon on appeal unless such is necessary in order to ensure that justice is done. It is incumbent on the counsel at trial to raise any issues which may arise in the course of trial and in accordance with the principles stated in *The People (DPP) v. Cronin (No. 2)* [2006] 4 IR 329, an explanation will be called for as to why such issues were not canvassed at trial.

12. In *Cronin (No. 2)*, the Supreme Court emphasised that it is not normally open to an appellant to raise a new point on appeal which was not raised in the course of trial by the defence or raised by way of a requisition concerning the trial judge's charge. Such an approach is particularly deprecated in situations of tactical strategy. The Court stated at p. 346: –

> "...[C]ases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so."

13. An appellate court will consider whether there is any suggestion of error on the part of the previous legal team in circumstances where the point was not raised at trial and will assess whether there is any risk of injustice to an appellant as a result of the point not been taken at trial. In this regard the now oft quoted passage of Kearns J. at p. 346 is apposite : –

> "It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken."

Ground 1

(1) The learned trial judge failed to properly direct the jury in his explanation of the presumption of innocence and the legal burden on the prosecution in a criminal trial and specifically the phrase "Beyond a reasonable doubt." The learned trial judge described the civil standard in terms of which version is more likely or probable but then, in explaining the criminal standard, once again made reference to "probability" as a part of the test

14. In his charge to the jury, the trial judge charged the jury as follows on the legal burden and standard of proof required in the case at hand:-

> "So --and further to that also, Mr Foreman, ladies and gentlemen, there is the very different requirement by way of proof between the two types of cases. If are you suing your builder or suing the other driver who hit your car in the rear and gave

you a whip lash as well as bad damage to your car, all that you have to do to win the case is to persuade the civil court that's hearing it, be it the district, the circuit or the High Court that your account of events is the more likely or probable one. If you succeed a hundred percent or if you even succeed substantially by way of getting 60 or 70 percent, that is the basis upon which damages will be calculated in the case but here, ladies and gentlemen, there's no such example of that in this particular case and you are required to --if you are going to return a verdict of guilty against CM later today, you are required to be convinced beyond all reasonable doubt of the guilt of --on the part of Mr M of raping [the complainant], his former partner and girlfriend.

This does not mean you have to be persuaded to a degree of mathematical certainty because very few things in this life are capable of that degree of proof beyond, not to sound fatalistic, our eventual demise and very limited other things but you have to be persuaded to a high degree of conviction that the case has been proved by the prosecution beyond all reasonable doubt. And what does that proof beyond reasonable doubt mean? As I say, it's not mathematical certainty, but a useful example for you to consider is if you were faced with a very, very important personal decision in your own life, something of the nature of changing the school that one of your children are studying at because he or she isn't doing too well with a particular teacher or teachers or if, on the other hand, you were making an alternative very difficult personal decision such as buying a new house with all the difficulty and extra expense that that may entail, you would most naturally look into matters enormously carefully and discuss it with your spouse or partner or friends and it would only be if you were brought to a state of mind that this was so clearly and undoubted the proper thing to do that you would, in all probability, proceed with buying the house or changing the kids' school. So it is today, you have to be

persuaded on the rape charge brought against Mr M not as a mathematical certainty, but to a degree of proof beyond reasonable doubt on the basis that I've indicated to you that he is guilty. Even if you have strong suspicions that he may have done it but you retain a nagging doubt in your mind as to whether or not the prosecution have proved the case to the required high standard of proof, then your duty is and must be to acquit, you but that does not, of course, mean that you cannot, as I will tell you later in the course of my remarks, that you cannot form the view that the case has been proved both as regards the occurrence of rape and as regards the proof being potentially capable of being found by you as capable of proving the matter beyond reasonable doubt.

So, those primarily are the matters that I want to air with you by way of an introduction to my remarks. It's not good enough for the prosecution to get a conviction for rape later today that their case may, in your estimation, may be the preferred view of the case, that you may think that guilt is more likely than innocence, that would be all right for civil cases but it's not all right in the very serious charge of rape that is brought against Mr M today but if-- the mere fact that you might find the prosecution case more cogent or more persuasive is not enough. Your minds must conscientiously be brought the significant further distance as enabling you to feel individually and collectively that the rape has been proved beyond all reasonable doubt for you to convict. If your state of mind falls short of that your duty, and it is a paramount factor in the fairness of our criminal justice system, is to acquit. You can of course convict but only if you're persuaded by the evidence that you've heard to the required high degree."

15. Counsel for the prosecution raised the following requisition:-

"Judge, just a few matters in relation to the legal principles that apply. In reality, the Court has covered an awful lot of this in terms of the charge the Court has given regarding the burden of proof but I think it probably is important that the Court would refer to the fact that Mr M presently is presumed innocent and is entitled to the presumption of innocence"

16. The trial judge then recharged the jury as follows:-

"I may, in the course of earlier in the trial, you'll remember I said the fact that he --Mr M didn't give evidence cannot be held against him and I repeat that to you because he's perfectly entitled to challenge the prosecution to come and prove the rape against him, it's the one count that we're all concerned with today and accordingly it's entirely the situation that the prosecution have to prove his guilt of rape beyond all reasonable doubt if they're to have a conviction of rape.

The other matter that Ms Burns very properly reminded me of is that whilst I dealt at some length with you about the need to prove the case beyond all reasonable doubt I didn't actually add the extra word that he is presumed today, as he appears in the particular part of court he's in, he is presumed to be an innocent person in the eyes of the law and it's only if the prosecution evidence and anything else that has taken place in the trial brings you to a state of mind that you're persuaded beyond all reasonable doubt of his guilt of rape that you're entitled to convict. If anything falls short of that he's entitled by reason of his presumption of innocence to a finding of acquittal on the matter."

Submissions of the appellant

17. The appellant submits that the trial judge's charge on the concept of "beyond reasonable doubt" lacked clarity and the use of the word "*probability*" in the charge may have conflated criminal and civil standards. The appellant refers to *The People (DPP) v.*

Okda [2019] IECA 201 where the Court held that a conviction was unsafe where the trial judge had failed to properly direct the jury on the issue of presumption of innocence, at para. 37:-

> "We are satisfied in the light of this jurisprudence, and indeed approaching the matter from first principles, that the failure to instruct the jury at all concerning the presumption of innocence was fatal flaw, one that renders the trial unsatisfactory and the appellant's conviction unsafe. Similarly, while the jury were told about the prosecution's burden of proof, the fact that the presumption of innocence was never mentioned by the trial judge meant that the jury could not have been expected to appreciate that the prosecution's burden of proof is the corollary of that presumption, and that the two things are inextricably linked, and this represents a further fatal flaw. We note the submission made by counsel for the respondent, in respect of this and the other complaints listed in additional ground no 1, that there is no evidence that there was any lack of understanding or confusion on the part of the jury. That may be so, but in our view the deficiencies identified are so fundamental that we are not prepared to wholly discount these as possibilities."

18. The appellant submits that the nature of this case, where the prosecution case is largely predicated on the evidence of the complainant, means that it is necessary that the jury be properly informed as to the correct legal test to be applied.

19. The appellant submits that the recharge did not cure the deficiencies present in the case.

Submissions of the respondent

20. In relation to the presumption of innocence, it is accepted that this was not mentioned during the initial charge to the jury but it is submitted that in his subsequent recharge following requisitions, the trial judge dealt sufficiently with any defect arising in the charge.

21. The respondent submits that *The People (DPP) v. Okda* [2019] IECA 201 can be distinguished from the present case as in *Okda*, the jury were not charged at all on the issue of the presumption of innocence prior to returning their verdict whereas in the present case the presumption was dealt with adequately in the recharge to the jury.

22. In relation to the phrase "in all probability", the respondent submits that the singling out of this phrase out of context does not accurately reflect the balance of the judge's charge which emphasised multiple times the applicable standard of proof.

23. The respondent refers to *The People (DPP) v. McDonagh* [2012] 1 IR 49 which highlights the importance of looking at the totality of the charge.

Discussion

24. It is contended on behalf of the appellant that the trial judge failed to properly direct the jury in terms of his explanation of the fundamental principles, namely; the presumption of innocence and the standard of proof. Specifically, it is said that by the use of the word *"probability"*, the trial judge's charge lacked clarity and served to conflate the civil and criminal standards of proof.

25. Reliance is placed on the recent decision of this Court in *The People (DPP) v. Okda* [2019] IECA 201, where the appellant's conviction was quashed as a result of the failure to properly direct the jury in terms of the presumption of innocence. However, we observe in the *Okda* case, the jury were not instructed in any terms regarding the principle of the presumption of innocence. The present case is entirely different in that respect in that following the trial judge's charge, counsel for the prosecution raised a requisition in terms of the presumption of innocence, following which the trial judge properly recharged the jury and directed the jury on the presumption of innocence in the following terms: –

> "...whilst I dealt at some length with you about the need to prove the case beyond all reasonable doubt I didn't actually add the extra word that he is presumed

today, as he appears in the particular part of court he's in, he is presumed to be an innocent person in the eyes of the law and it's only if the prosecution evidence and anything else that has taken place in the trial brings you to a state of mind that you're persuaded beyond all reasonable doubt of his guilt of rape that you're entitled to convict. If anything falls short of that he's entitled by reason of his presumption of innocence to a finding of acquittal on the matter."

26. It is quite clear therefore, that the trial judge properly directed the jury in terms of the presumption of innocence.

27. The second issue concerning this new ground of appeal is that the trial judge failed to direct the jury in sufficiently clear terms regarding the standard of proof in a criminal trial and that the trial judge conflated the civil and criminal standards.

28. The first point to be made regarding this aspect of ground 1 is that following the trial judge's charge, the only requisitions raised by most experienced senior counsel for the defence at trial related to the issue of lies and the definition of recklessness. Indeed, it appears to this Court that senior counsel was quite satisfied as to the charge given by the trial judge in that following the aforementioned requisitions, counsel said: –

"They're the only matters that I would raise."

29. No requisition was raised on this issue by the prosecution or the defence following the trial judge's recharge.

30. The second point to be made regarding this aspect of this ground is that on a perusal of the judge's charge, it is the view of this Court that the trial judge addressed the issue of the standard of proof in a most comprehensive and clear manner emphasising repeatedly where the burden of proof lay and the high standard of proof applicable in a criminal trial.

31. The singular mention of the word "*probability*" does not bear the meaning canvassed by the new legal team. The word *"probability"* was clearly used by the trial judge in seeking

to indicate that a particular course of action might be taken by a person approaching an important decision, but the word was not used in order to describe or explain the standard of proof. There can be no doubt but that even the most casual observer of the trial would have been under no illusion as to the applicable standard of proof.

Conclusion

32. A requisition was raised concerning the presumption of innocence by counsel for the prosecution following the trial judge's charge to the jury. The trial judge then proceeded to recharge the jury in very clear terms on this issue and no requisition was raised following the recharge.

33. No requisition was raised regarding the standard of proof and indeed following the charge, counsel for the appellant at trial limited himself to two requisitions unconnected to this particular ground. This ground was not the subject of some 83 grounds of appeal which were filed following the trial. Written submissions were filed on behalf of the appellant on 11th December 2019, which submission referred to this and the additional two grounds of appeal. The notice of motion seeking leave to produce additional grounds of appeal was filed on the 3rd February 2020, in excess of two years after the trial had concluded and in excess of one year from the date when the transcripts of the trial became available.

34. As is clear from the jurisprudence, a failure to raise a requisition does not in and of itself preclude an appellate court from considering a new ground of appeal, but in the present case, where the trial judge clearly addressed the presumption of innocence in his recharge to the jury and where no requisition was raised by his previous legal team, no explanation has been offered and where this ground was not included in the original grounds of appeal, this Court must be highly sceptical of any application to add the ground at this remove from the trial. It could be said that this proposed ground of appeal is a classic example of a 'trawl'

through a transcript for a ground of appeal which of course, is precisely what is deprecated by this Court.

35. Of course, if there were any question that a refusal to permit leave to rely on an additional ground would have the consequence of causing an injustice to the appellant, this Court would permit of such leave. However, it is absolutely clear that there is no question of this in the present case.

Ground 2

(2) The learned trial judge failed to properly instruct the jury in relation to the legal concept of the "Benefit of the doubt." The learned trial judge omitted to direct the jury that where two views on any part of the case were possible on the evidence, then the jury should adopt that which is favourable to the accused unless the other view has been established beyond a reasonable doubt;

36. In the course of his charge to the jury, the trial judge referred to the concept of the benefit of the doubt as follows: -

> "It's not good enough for the prosecution to get a conviction for rape later today that their case may, in your estimation, may be the preferred view of the case, that you may think that guilt is more likely than innocence, that would be all right for civil cases but it's not all right in the very serious charge of rape that is brought against Mr M today but if --the mere fact that you might find the prosecution case more cogent or more persuasive is not enough. Your minds must conscientiously be brought the significant further distance as enabling you to feel individually and collectively that the rape has been proved beyond all reasonable doubt for you to convict. If your state of mind falls short of that your duty, and it is a paramount factor in the fairness of our criminal justice system, is to acquit. You can of course

convict but only if you're persuaded by the evidence that you've heard to the required high degree.

...

You have to have that proved to the required high degree of proof that is needed, or else Mr M is entitled to the benefit of the doubt on the basis that the case has not been proved beyond reasonable doubt.

...

If you accept her evidence and if you also have regard to what was stated by Dr R...whilst it, of itself, would not be of particular probative value and if you also evaluate carefully the three transcripts of interviews had by the guards with Mr M, in particular the third one, there is evidence upon which you are capable of returning a verdict of rape but you must be very careful; suspicion or a preference for the prosecution is not enough and it is only if your minds are conscientiously brought the further distance of being persuaded beyond reasonable doubt that this was rape and that this was effected by Mr M on [the complainant] on the occasion that you then may and should convict in the matter. If things fall short of that it's your duty to favour --to give him--not to favour him but to give him his entitlement of the benefit of the doubt if the case falls short of proof beyond reasonable doubt on the individual and careful evaluation of everything you've heard by each of the 12 of you."

Submissions of the appellant

37. The appellant takes issue with the trial judge's explanation of "benefit of the doubt" in that the trial judge did not direct the jury on the precise meaning of "benefit of the doubt" and the jury were never told that where two views on the case were possible, the jury should adopt the view favourable to the appellant. The appellant refers to *The People (AG) v. Byrne*

[1974] IR 1 in support for the contention that the "two views" principle must be explained to the jury. The appellant refers to the dicta of Kenny J. :-

> "It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt."

Submissions of the respondent

38. The respondent submits that the trial judge highlighted the entitlement to the benefit of the doubt in the specific factual context of this case.

39. The respondent further notes that no requisition was raised by counsel for the appellant on this issue.

40. The respondent relies on *The People (DPP) v. Kiely* (unreported, Court of Criminal Appeal, 21st March 2001) in asserting that a failure to specifically refer to the benefit of the doubt in the precise "two views" terms will not necessarily be fatal so long as the charge as a whole conveys to the jury the meaning of "beyond a reasonable doubt". The respondent notes that in *Kiely*, McGuinness J. stated as follows:-

> "…the main issue before the Court was whether it was sufficient for the judgment in his charge to tell the jury that they must be "satisfied" of the guilt of the accused and the principal ratio of the judgment was that the correct standard to be adopted was that of proof "beyond reasonable doubt". The standard of beyond reasonable doubt must be clearly explained to the jury. The explanation should include a contrast between the civil standard of proof on the balance of probabilities and the criminal standard, and should also include an explanation of the principle of the "benefit of the doubt""

41. The respondent submits that the totality of the charge should be considered on the evidence before the jury on the core issue which, in this case, was one of credibility and therefore, it is argued that the charge does not render the verdict unsafe.

42. The respondent further submits that it should be borne in mind that the charge to the jury is an oral presentation and its accuracy should be assessed on the basis of the impact it can be expected to have had on the jury at the time in the courtroom and not on the basis of a clinical parsing of words as they appear on the transcript.

43. The respondent further submits that *Okda* should be distinguished on the basis that the totality of the charge in the present case was appropriate in terms, *inter alia*, of the burden of proof and on the evidence in the case. Further, the absence of a requisition becomes especially important as three sets of requisitions were received and acted upon. Indeed, a tactical decision on the part of the defence not to requisition on the issue cannot be ruled out, in particular in light of the fact that senior counsel for the appellant had himself dealt with "two views" in his closing speech and which was supported by the learned trial judge (although this was in general terms).

Discussion

44. Firstly, we note that no requisition was raised on this issue by the appellant or the respondent. We attach considerable importance to the fact that experienced counsel in the court below are in the very best position to absorb the impact of a judge's charge.

45. Secondly, this ground did not constitute one of the 83 grounds of appeal originally filed but was the subject of the notice of motion.

46. Again, we fully accept that a failure to raise a requisition and indeed a failure to include a ground as part of the original grounds of appeal does not preclude this Court from considering a proposed ground of appeal. Prior to considering whether any injustice could

arise if we were to refuse to permit leave to add this ground, we observe that no explanation has been offered for the failure to raise a requisition on the issue.

47. It is clear from the extracts referred to in the earlier portion of this judgment when considering the proposed ground 1, that the trial judge referred repeatedly to the standard of proof. There can be no doubt, as we have said, but that the jury were fully aware that the burden of proof is registered with the respondent and that the standard of proof required was that of beyond a reasonable doubt.

48. It is also clear from the references to the transcript above that the trial judge advised the jury in very careful terms that the appellant was entitled to the benefit of the doubt. In that respect the trial judge stated as follows: –

> "So it is today, you have to be persuaded on the rape charge brought against Mr M not as a mathematical certainty, but to a degree of proof beyond reasonable doubt on the basis that I've indicated to you that he is guilty. Even if you have strong suspicions that he may have done it but you retain a nagging doubt in your mind as to whether or not the prosecution have proved the case to the required high standard of proof, then your duty is and must be to acquit, but that does not, of course, mean that you cannot, as I will tell you later in the course of my remarks, that you cannot form the view that the case has been proved both as regards the occurrence of rape and as regards the proof being potentially capable of being found by you as capable of proving the matter beyond reasonable doubt.
>
> So, those primarily are the matters that I want to air with you by way of an introduction to my remarks. It's not good enough for the prosecution to get a conviction for rape later today that their case may, in your estimation, may be the preferred view of the case, that you may think that guilt is more likely than innocence, that would be all right for civil cases but it's not all right in the very serious charge

of rape that is brought against Mr M today but if -- the mere fact that you might find the prosecution case more cogent or more persuasive is not enough. Your minds must conscientiously be brought the significant further distance as enabling you to feel individually and collectively that the rape has been proved beyond all reasonable doubt for you to convict. If your state of mind falls short of that your duty, and it is a paramount factor in the fairness of our criminal justice system, is to acquit. You can of course convict but only if you're persuaded by the evidence that you've heard to the required high degree."

49. Having concluded his introductory remarks, the trial judge then turned to a summary of the complainant's evidence. In this respect the trial judge was very careful to remind the jury in terms that their role was in relation to an adjudication on the issue of the offence of rape. He reminded the jury not to be coloured by matters such as the book of photographs which depicted the injuries to the complainant. In reminding the jury, the trial judge explained to the jury that the appellant was entitled to the benefit of the doubt in saying: –

> "But it is in no sense, as I've said to you on a number of occasions, a matter from which you can simply progress and say oh, well, if he assaulted her in such a cowardly and vicious fashion we can assume he may well have been capable of sexual impropriety as well. You have to have that proved to the required high degree of proof that is needed, or else Mr M is entitled to the benefit of the doubt on the basis that the case has not been proved beyond reasonable doubt."

50. In concluding his summary of the evidence, the judge then said: –

> "So, that is the effective matter, the effective summary of [the complainant] evidence, ladies and gentlemen. If you accept her evidence and if you also have regard to what was stated by Dr R ...whilst it, of itself, would not be of particular probative value and if you also evaluate carefully the three transcripts of interviews

had by the guards with Mr M, in particular the third one, there is evidence upon which you are capable of returning a verdict of rape but you must be very careful; suspicion or a preference for the prosecution is not enough and it is only if your minds are conscientiously brought the further distance of being persuaded beyond reasonable doubt that this was rape and that this was effected by Mr M on [the complainant] on the occasion that you then may and should convict in the matter. If things fall short of that it's your duty to favour --to give him--not to favour him but to give him his entitlement of the benefit of the doubt if the case falls short of proof beyond reasonable doubt on the individual and careful evaluation of everything you've heard by each of the 12 of you."

51. It follows because of the requirement that a jury must be satisfied of the guilt of an accused person beyond reasonable doubt before convicting, that the accused must be given the benefit of the doubt where a reasonable doubt exists. As a result of the charge to the jury, the jury must be under no illusion as to the meaning of "beyond reasonable doubt".

52. It is said that the trial judge failed to direct the jury of the precise meaning of the benefit of the doubt and failed to direct the jury in terms of *The People (AG) v. Byrne* [1974] IR 1 where Kenny J. stated as follows: -

> "It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt."

53. It is the position, nonetheless that where there is a failure to instruct the jury regarding the benefit of the doubt principle, where the charge as a whole is sufficiently clear, so that the jury are aware of the fundamental principles applicable in a criminal trial, namely; the presumption of innocence, the burden of proof and the standard of proof, the verdict will not

be set aside.

54. We have scrutinised the charge as a whole and it is readily apparent having done so that the trial judge directed the jury repeatedly in the course of his initial charge as to where the burden of proof lay and the standard of proof, moreover he also advised that the appellant was:-

> "...entitled to the benefit of the doubt on the basis that the case had not been proven beyond reasonable doubt."

55. This is a correct statement of the law in that it logically follows that where the jury must be satisfied of the guilt of an accused beyond a reasonable doubt, where there is such a doubt, the accused must in law be given the benefit of doubt.

56. The judge went on at a later stage to again remind the jury that it was only if they were persuaded beyond a reasonable doubt of the guilt of the accused that they should convict and otherwise they should give the benefit of the doubt to the appellant. In that regard the judge said: –

> "If things fall short of that it's your duty to favour--- to give him--- not to favour him but to give him his entitlement of the benefit of the doubt if the case falls short of proof beyond reasonable doubt on the individual and careful evaluation of everything you've heard by each of the 12 of you."

57. It is quite clear that the trial judge did not specifically instruct the jury in terms of the '*Byrne*' direction, in that he did not instruct the jury that where two views on any part of the case are possible on the evidence the jury should adopt that which is favourable to the accused unless the prosecution has proved the contrary beyond reasonable doubt.

58. However, the question for this Court is whether such an omission amounts to a miscarriage of justice in the present circumstances.

Conclusion

59. As we have already stated, this proposed ground was not the subject of a requisition. We attach considerable importance to the approach taken by an experienced counsel in the court below. The impact of a charge, in the experience of this Court, is always more forceful at the time of delivery than at the time of the perusal of a transcript. We do not have an explanation by the previous legal team as to why no requisition was raised on this issue.

60. However, when we peruse the transcript and consider the charge as a whole, we can readily understand why counsel did not raise a requisition regarding the issue of the appropriate explanation for the benefit of the doubt. It is quite clear that the trial judge explained to the jury the fundamental legal principles in a clear and concise manner.

61. Moreover, it is not the position that there was a failure to indicate to the jury that the appellant was entitled to the benefit of the doubt should the prosecution fail to come up to proof. The judge instructed the jury of this on two separate occasions.

62. We are satisfied that the charge when considered as a whole conveyed the meaning of the standard of proof and the relationship between that and the benefit of the doubt. We are not persuaded that the appellant should be permitted to litigate this ground of appeal.

Ground 3

(3) The learned trial judge misdirected the jury in respect of the Lucas warning, specifically in telling the jury that "where lies have been told by an accused person ...these can be regarded as independent confirmation ...of the essence of the prosecution case.."

63. This ground is concerned with the Lucas warning given by the trial judge in his charge to the jury. The trial judge charged the jury in the following manner:-

> "...counsel on both sides also agreed that it was appropriate that I give you what is called a Lucas warning. This refers to an English case of quite a few years ago by a well-known--and a judgment by a well-known English judge which has

been adopted by our most senior courts, the Court of Appeal, the Court of Criminal Appeal and I think probably the Supreme Court as well and it is applied here. In simple terms, what a Lucas warning means in law is that on occasions a person may make remarks in response to garda questioning that are patently untrue and in some circumstances these can be held to be capable of enhancing the prosecution case so that a prosecution barrister can say look, he gave untruthful and admittedly false answers to these particular questions but the law from the stage of that case called Lucas back in England, as far back as 1981, has taken a somewhat more tolerant approach to this particular type of question. It's--it can be the case, Mr Foreman, ladies and gentlemen, that where lies have been told by an accused person in the course of interviews by police or Gardaí, that these can be regarded as independent confirmation or corroboration or confirmation of the essence of the prosecution case that the suspect, in fact, committed a particular crime but it has been the development following that Lucas case that our courts have followed that to a significant degree and courts in Ireland are now a great deal more wary in attaching over much importance to what may have been said in the course of initial enquiries by the police.

And I'll simply, I think, give you a brief reading from one of the many recent Irish text books which encapsulates the main details in relation to the Lucas warning. After stating the fact that in certain circumstances lies that are told by an accused person, probably in the main in garda custody, can be capable of being viewed as corroboration or independent confirmation of his alleged guilt in the case, but a more enlightened view was taken as regards categories of exceptions that might be taken as regards courts proceeding to automatically assume that because lies were told to guards that therefore it must implicate the accused a great deal more seriously in the matter with which he is charged.

So, I'll just give you a brief reading from one of the more recent text books in that regard. This is what it says: "Lies of the accused may be capable of constituting corroboration. It was held in the case of R v. Lucas that where the accused's lies are capable of constituting corroboration the jury should be given a careful instruction in that regard. The lies should first be specifically identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. The jury should then be told that in order to constitute corroboration the lie must be deliberate. It must relate to a material issue and it must be clearly shown to be a lie by evidence other than that of the accomplice, who is to be corroborated. That is to say by admission or by evidence from an independent witness."

The only other sentence I'll read for you is an important one also: "Lucas also requires that the trial judge instructs the jury that it must be satisfied that the motivation for the lie is a ... of guilt and a fear of the truth. Having regard to the facts of the case, the trial judge should remind the jury, and this is the really important bit, that people lie for many reasons other than guilt, including shame, a desire to conceal disgraceful behaviour from their family, in an attempt to bolster up a just cause or out of panic or misjudgement or confusion."

So, I'm giving you that warning and it was one that Mr O'Loughlin had argued in favour of and that Ms Burns very properly and professionally agreed with. It's one, I'm telling you, that you must have regard to the fact that lies can be told for a whole variety of reasons that do not connote guilt and that it would be wrong for you to say in this case that they--that it is a matter that greatly corroborates or beefs up the prosecution case. Indeed, in the circumstances of the case, ladies and gentlemen, I think your primary evidence is that of [the complainant] and I think it was proper

that Ms Burns so said in the course of her concluding remarks to you a couple of days ago. So, what I'm saying to you is you must take any of the untruthful remarks that were made by Mr M in the early two interviews with the guards with considerable caution. You must have regard to possible reasons why he may have made them, out of shame, out of fear of how it would affect family relations or the like and you should be very, very hesitant, I suggest to you, to attach any significant probative force to these remarks. The case, very substantially, hinges on the evidence of [the complainant] and the--those degree of limited admissions or remarks that were made by the accused, particularly in the latter of the last of the three interviews in the case."

64. Counsel for the appellant at trial raised a requisition in relation to the Lucas warning. The trial judge stated that he did not think it was necessary to revisit the warning but nevertheless during his recharge he reiterated the following on the Lucas warning:-

"In the context of the Lucas warning, I think I've heard a little bit from both counsel but I think I've given you sufficient to give you an awareness of what that means, of the need for caution about undoubted lies that were told. It's not an automatic passport for a prosecution if lies were told at an early stage to obtain a verdict of guilty, but it can enhance the prosecution case but it is the fact of matters that variously senior courts in this country, in England and indeed elsewhere in America, courts have said that one has to be extremely careful because of these other reasons, embarrassment, concern about what members of your family back at home might think and a myriad of other causes may be a reason other than guilt for people to lie in the course of an interview."

65. The appellant submits that the trial judge misdirected the jury in relation to the potential effect of lies told by the appellant when he stated that these lies could be considered

as confirmation of the prosecution case. It is submitted that this overstated the reliance to be placed on the lies and also served to nullify the warning.

66. The respondent submits that a reading of the full transcript of the judge's charge is sufficient to establish that the trial judge made it clear to the jury that a lie could only potentially support the evidence and was not capable of taking the ultimate issue from the jury.

67. The respondent submits that the appropriate reminder issued to the jury (more than once) that they should not jump from an acknowledgement of lying to a determination of guilt. It is submitted that the charge, as a whole, was detailed and fair on this issue and should not be parsed and analysed with a view to finding some small detail or omission that contains a flaw of no significance.

Discussion

68. The primary focus of this proposed ground of appeal concerns the contention that the trial judge erred in instructing the jury that lies could be considered as confirmation of the prosecution case. However it is important, firstly, to look to see what was said by the trial judge on the specific issue when directing the jury on the issue of lies: –

> "It's --it can be the case, Mr Foreman, ladies and gentlemen, that where lies have been told by an accused person in the course of interviews by police or Gardaí, that these can be regarded as independent confirmation or corroboration or confirmation of the essence of the prosecution case that the suspect, in fact, committed a particular crime but it has been the development following that Lucas case that our courts have followed that to a significant degree and courts in Ireland are now a great deal more wary in attaching over much importance to what may have been said in the course of initial enquiries by the police."

69. The trial judge then proceeded to instruct the jury that lies by an accused may be capable of constituting corroboration and gave the jury the Lucas direction. Having done so, he then emphasised that lies may be told by an accused for a variety of reasons which are not indicative of guilt and said: –

> "…And that it would be wrong for you to say in this case that they--- that it is a matter that greatly corroborates or beefs up the prosecution case."

70. Following the trial judge's charge, the appellant's previous senior counsel raised a requisition concerning the Lucas warning. However, it is important to look to the proposed ground of appeal and the requisition raised by counsel at trial.

Proposed ground

71. It is contended that the trial judge misdirected the jury in terms of the Lucas warning, specifically in instructing the jury that: –

> "…where lies have been told by an accused person… these can be regarded as independent confirmation…of the essence of the prosecution case."

The requisition

72. Counsel at trial prefaced the requisition relating to the Lucas warning by indicating that what the trial judge had told the jury was more than adequate. It appears that this arose in response to a requisition raised by counsel for the prosecution wherein she asked the trial judge to direct the jury that whilst the jury is required to have regard to reasons why an individual might lie, if they are satisfied that the accused lied from a realisation of guilt then they are entitled to treat the lies as corroboration of the prosecution case.

73. In raising a requisition, counsel for the appellant at trial was concerned that if the judge were to instruct the jury that deliberate lies were capable of amounting to corroboration, whether the lies told by the appellant could be considered to be corroborative of the offence

of rape. Therefore, the first point to be made is that a requisition was not raised in terms of the ground which is now sought to be advanced.

74. Secondly, it is readily apparent on considering the charge as a whole on the issue of the Lucas direction that the trial judge was scrupulously fair to the appellant. To cherry-pick particular phrases or words from the charge is to ignore the charge as a whole. In that respect it appears to this Court that the appellant has unfortunately, been rather selective in extracting the words he now complains of from the charge.

75. In general terms and in advance of giving the jury the Lucas direction, the trial judge informed the jury that lies told to the Gardaí can be regarded as independent confirmation or corroboration or confirmation of the essence of the prosecution's case that the person in question committed a particular crime. He then proceeded to advise the jury that courts in this jurisdiction are warier in attaching too much importance to what may have been said by a suspect in custody.

76. Lies may be relied upon by the prosecution where the lies are capable of constituting corroboration and/or evidence of guilt. The practice has evolved of trial judges giving a Lucas direction or what is termed as, depending upon the circumstances, a modified Lucas direction.

77. O'Donnell J. in *The People (DPP) v Curran* [2011] 3 IR 785. at p. 808 explained the rationale behind the warning as follows: –

> "The admission, or proof, that an accused person has been telling lies can have a very potent impact upon a criminal trial. There is a natural tendency to assume that if it has been established that the accused was lying on a previous occasion, then there is no reason to believe that he or she is telling the truth when in court. In such circumstances it is necessary to remind the jury that they should not necessarily make the leap from an acknowledgement of lying to a determination of guilt. Human

> experience, and indeed the experience of courts, can show that while it may not be very creditable, persons who have been involved in incidents, and particularly those in which another person has lost their life, may not always be forthcoming about their role in the events, and in particular may seek to exculpate themselves by denying involvement or possibly asserting some other exculpation such as self-defence."

78. In the present case the trial judge gave an emphatic warning to the jury concerning the issue of lies. He informed the jury, *inter alia*, that lies are capable of constituting corroboration but that before doing so the jury must be satisfied that the lie was deliberate and must relate to a material issue. He then carefully instructed the jury that the jury must be satisfied that the motivation for the lie stems from guilt and fear of the truth. He then emphasised the importance of the following:-

> "... that people lie for many reasons other than guilt, including shame, a desire to conceal disgraceful behaviour from their family, in an attempt to bolster up a just cause or out of panic or misjudgement or confusion."

79. The trial judge then re-emphasised the position in a manner which was favourable to the appellant and in concluding his remarks on the issue of a Lucas direction, he repeated his direction by saying: –

> "you must have regard to possible reasons why he may have made, out of shame, out of fear of how this would affect family relations or the like and you should be very, very hesitant, I suggest to you, to attach any significant force to these remarks. The case, very substantially, hinges on the evidence of [the complainant] and the-- those degree of limited admissions or remarks ever made by the accused, particularly in the latter of--- the last of the three interviews in case."

Conclusion

80. We are satisfied in the present case, that counsel who appeared at trial for the appellant was most alert to the terms of the Lucas direction and indeed how could he not have been in circumstances where counsel for the respondent at trial raised a requisition concerning the Lucas direction in the terms we have outlined above. Counsel expressed himself satisfied with the direction given by the trial judge and was concerned that if the judge proceeded to direct the jury on terms as requisitioned by counsel for the prosecution, that the judge would direct the jury that the lies were of no significance all. However, the very experienced counsel indicated to the trial judge that he was not pressing the Court.

81. We are satisfied having reviewed the exchanges in the court below that the comments by counsel for the appellant arose in response to a requisition raised by counsel for the respondent. No requisition was raised in terms of the proposed ground of appeal.

82. As we have previously stated, this in and of itself would not preclude this Court from granting leave to add a ground of appeal which was not canvassed at trial but in the circumstances where senior counsel at trial clearly adverted to the Lucas direction and was satisfied as to its adequacy and where the motion to add this ground was filed in excess of two years after the trial, we again observe that the addition of this proposed ground comes about as a result of a trawl of the transcript.

83. However, notwithstanding our view in this respect, we have assessed the transcript to consider whether the refusal to permit the addition of this ground would constitute a miscarriage of justice. Having considered the charge as a whole in the context of the Lucas direction given by the trial judge, we are wholly satisfied that no such concerns arise and in fact we are of the view that the charge in this respect favoured the appellant.

Decision

84. In conclusion and for the reasons we have identified in this judgment we refuse leave to adduce the additional grounds set out in the notice of motion. We are not at all persuaded

in terms of *The People (DPP) v. Cronin (No. 2)* [2006] 4 IR 329 that there was an error or oversight of any kind, let alone one of substance. We are satisfied that no injustice will be caused to the appellant in dismissing the reliefs sought in the notice of motion in the circumstances of the case.

85. Accordingly, the appeal is dismissed.

Isabel Kennedy

26th June 2020