THE COURT OF APPEAL

UNAPPROVED JUDGMENT
Neutral Citation Number: [2020] IECA 131

[243/18]

The President

McCarthy J.

Ní Raifeartaigh J.

BETWEEN
THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JK

APPELLANT

JUDGMENT of the Court delivered on the 8th day of May 2020 by Birmingham P

1. On 8th June 2018, following a trial which had commenced on 30th May 2018 in the Central Criminal Court, the appellant was convicted of one count of attempted rape and four counts of rape. Subsequently, he was sentenced to a term of nine years' imprisonment for the rape offences, and a concurrent term of six years' imprisonment in respect of the attempted rape. The final year of the total net sentence of nine years' imprisonment was suspended. The appellant has challenged both his conviction and the sentence imposed. This judgment, however, deals with the conviction aspect only.

2. By way of background, it should be explained that the complainant was a young cousin of the appellant. Count 1 on the indictment, the charge of attempted rape, is alleged to have occurred in January 1984, at a time when the complainant was just short of her 8th birthday which would fall in February 1984. The appellant was 17 years of age at the time. Counts 2 to 5 on the indictment, the charges of rape, related to the period between October 1984 and the end of 1986. It is of some significance and worth appreciating that the present appeal concerned a retrial, an earlier trial having ended inconclusively.

3. To provide some context for the offending, the complainant's childhood was spent in the South East of the country. She grew up with her older brother, J, and her parents. The complainant's paternal grandparents lived some three or four miles away in another townland. In 1983/1984, her paternal uncle, JP, and his sons, C, and the appellant, JK, were living in the home of her paternal grandparents along with another aunt. The complainant visited her grandparents in the family homestead very frequently. It was the practice of JP, father of the appellant, to call for her every evening on his way home from work.

4. In January 1984, a 21st birthday was held, attended by many members of the extended family. The complainant was seven years old and she did not go to the party, nor did the appellant. They stayed behind in the family homestead. The complainant's evidence was that they were in the living room watching television and eating sweets. She was wearing pyjamas and was due to spend the night there in an aunt's room. There were two bedrooms upstairs, a larger bedroom shared by the appellant and his brother, C, and a small room used by the aunt. At approximately 9.30pm, the appellant told the complainant that he had a present upstairs for her. He lifted her upstairs to his room and onto his bed. He removed her pyjama bottoms and underwear. He took her hand and put it on his penis. He told her that this was "our secret" and that she was not to tell anyone. He then lay on top of her and attempted to insert his penis into her vagina, unsuccessfully. She was crying, looking for her father and mother.

5. There was no contact between the complainant and the appellant for about a year after that. The next contact was in the context of the appellant moving into the complainant's home. The complainant explained that it was her understanding that he had a falling out with their grandmother in the family home place, so the complainant's father took him in, the complainant's paternal grandfather, who had previously lived in the home, having died in January 1985. It was shortly after this that the appellant moved in. The complainant explained that from that time on, a situation developed where the appellant would babysit her brother, J, and the complainant most Friday nights while her parents went to traditional music sessions. She said that J would be allowed out on Friday nights to spend time with his friends from across the road. The appellant would turn the key in the backdoor. Then, the appellant would come back to the sofa where the complainant was, empty the contents of his pockets onto the mantelpiece in the sitting room and try to undress her. The complainant said that when her brother was trying to get back in the door, it would be locked. She said the appellant would start to strip the complainant and would then undress himself. He digitally penetrated her. There were also incidences of penile penetration. She said that activity of this nature occurred every Friday night for around a year to a year and a half, until her father fell out with the appellant and the appellant went to England in around mid-1986.

6. A number of grounds of appeal have been advanced. These are:

(i) That the trial judge wrongly admitted the evidence of J thereby breaching the principle of fundamental fairness that must apply in a criminal trial;

(ii) That the trial judge undermined defence closing speech by stating that a failure to supply an alternative motive for the complaint did not in any fashion constitute a reversal of the burden of proof, and further failed to supply any reasons for such a conclusion;

(iii) That the trial judge failed to give a corroboration warning in the first instance, and in so doing, failed to deal with all submissions made to him as to why such a warning should occur;

(iv) That the trial judge wrongly charged the jury as to the paucity of cross-examination on the issue of dominion/delay, on the apparent basis of a view taken by the trial judge that comment by defence counsel is confined to issues that are the subject of positive cross-examination;

(v) That the trial judge erroneously instructed the jury to disregard and treat as irrelevant defence counsel's comment that the complainant going to live with the father of the accused after the events complained of was inconsistent with her complaint;

(vi) That the trial judge erroneously instructed the jury that they must specifically take into account the fact that the accused's memo of interview had not been subjected to the scrutiny of cross-examination in circumstances where the memo broadly constituted mere denials and did not posit a coherent alternative narrative; and

(vii) That the trial judge wrongly received a verdict while a question raised by the jury was being addressed.

We shall address each of these issues in turn.

Grounds of Appeal

(i) That the trial judge wrongly admitted the evidence of J thereby breaching the principle of fundamental fairness that must apply in a criminal trial.

7. The background to this issue is that J, brother of the complainant, was not a witness at the first inconclusive trial. However, the prosecution wished to lead evidence from him at the

retrial. The circumstances in which they wanted to do that was that J had attended at the Four Courts for part or all of the first trial and was actually present in the courtroom for the closing stages. He heard counsel on behalf of the accused address the jury and comment on the fact that there had been no evidence from J who might have been expected to have relevant evidence to give relating to the fact that having been permitted to go and play with his friends across the road on Friday evenings, he was restricted in regaining access to his home. At the retrial, there was objection to J being permitted to give evidence, the basis of the objection being that J had attended at least a portion of the first trial, including defence counsel's closing speech, and on his own admission, had discussed the trial with the complainant.

8. In this Court's view, the evidence from J was, *prima facie*, relevant and admissible. He was a competent, and indeed, compellable witness. We do not see how it can be suggested that the fact that he attended a portion of the first trial rendered him incompetent to give evidence. It was, of course, open to the defence to cross-examine the witness about the circumstances in which he came to give evidence, that he did so, having discussed the case with the complainant, with a view to undermining the testimony. However, the fact that there was a basis for challenging the evidence with a view to undermining it, is not to say that the evidence should have been excluded. The issue was debated fully before the trial judge and it was approached by him in a very thorough and careful manner. We see no basis to disagree with his conclusions.

(ii) That the trial judge undermined defence closing speech by stating that a failure to supply an alternative motive for the complaint did not in any fashion constitute a reversal of the burden of proof, and further failed to supply any reasons for such a conclusion.

9. This ground of appeal arises out of a divergence of approach between prosecution and defence counsel in their closing speeches. Prosecution counsel had said:

> "[s]econdly, could there be something which motivates what is this statement which could, by any stretch of the imagination, make it reasonably possible that that is a false statement because, as she rightly identifies, I think on cross-examination, why would she come here simply for the purpose of telling a load of lies to get [Mr. K] into trouble? Motivation is always an important factor in cases. Let's face it, either things happened on these occasions or it has to be, the only alternative is, that it's reasonably possible that she is liar and she has invented it and made it up. And one thing that struck me in relation to the evidence in this particular case was that whatever about all of the other issues that were canvassed in the case, there appears to be nothing in the evidence that would suggest for one moment to a jury that in relation to these matters, of which she has given very specific and clear evidence, that they could have been motivated by some past dispute or ill will or anything like that in relation to [Mr. K]."

Defence counsel's closing speech referred to that section of the prosecution speech, commenting:

> "[a]nd I want to deal with this question of motive, because I'm greatly troubled by what has been put to you in that regard. And Mr. Owens has referred in it, in his closing to the effect, well why else would she make these things up if they weren't true? In fact, during the course of his Garda interview, that precise question is put to [Mr. K]. Why would she make up these allegations? And I take it from Mr. Owens is urging upon you is that if there is no alternative explanation proffered for the complainant to make such a complaint, then it must be true. I submit to you that if you adopt such reasoning and such an approach, you will fall into grave error."

Defence counsel strongly urged the jury not to fall into the error of putting a burden of proof on the applicant's shoulders as regards why the complainant might have invented the complaint.

10. Following on from defence counsel's comments, the prosecution asked the trial court, in the absence of the jury, to address the question of motive and invited the court to comment that the jury is entitled to have a look at motive and that this does not involve a reversal of the onus or proof. The trial judge's response was to make the following observation in the course of his charge to the jury:

> "[a]gain, just another matter, and really, it's just to clear up any confusion. By raising motive, the prosecution were quite entitled to raise motive in their closing speech to you. They set it out clear to you, the said why would Mrs. K lie? What's the purpose of it for doing it? They have brought it into the case. Now, that does not reverse the burden of proof. It is incorrect to say that it does, by raising the issue of motive, the prosecution are not reversing burden of proof. The burden of proof always remains with the prosecution to prove the charges beyond a reasonable doubt, and that doesn't shift from them. But there's nothing wrong with the prosecution, in their closing speech to you, raising the issue of motive."

The appellant submits that these comments from the trial judge undermined defence counsel. This Court cannot agree. In cases such as this, there are usually two alternatives: that the events, as described, happened, or that they were fabricated. Recognising that this is the reality of the situation, the defence will often point to a basis for concluding that the allegations were, or may have been, made up. The defence's task will be made easier if it is in a position to point to a credible explanation as to why allegations of real seriousness might have been made up. Sometimes, it will be suggested that a possible explanation is to be found in disharmony within the family. In other cases, though obviously much more rarely, it might

be suggested that what is involved is an exercise in blackmail. If it is the case that no explanation is suggested, then the prosecution is entitled to point that out. It speaks to a weakness in the defence's position and a strength in the prosecution's position as opposed to shifting the onus of proof onto the defence. In the particular case, counsel for the prosecution may have been prompted to comment in the way that he did by certain exchanges that took place between the complainant and defence counsel.

(iii) That the trial judge failed to give a corroboration warning in the first instance, and in so doing, failed to deal with all submissions made to him as to why such a warning should occur.

11. In the present case, the application for a warning was not put in particularly strong terms. The point was made that there was no corroboration. In making that point, counsel for the appellant anticipated that an argument might be advanced on behalf of the prosecution that the evidence of the complainant's brother, J, as to doors being locked on Friday nights, might be regarded as providing corroboration, and indicated that any such suggestion would be disputed. It was pointed out that the evidence went no further than saying that on a few unspecified occasions, the door was locked. It was suggested that there were differences between the evidence of the complainant and other witnesses to quite a significant extent. It was pointed out that J placed himself back in the house at 10pm, but that the complainant had indicated that as far as she was aware, he was out much later than that. Counsel also referred to the fact of delay and suggested that this fact provided a basis for a corroboration warning. There had been a request, which had not proved in any way controversial, for a delay warning. Reference was also made to the circumstances in which J came to give evidence on the retrial as militating in favour of a warning. Counsel on behalf of the prosecution submitted that this was not an appropriate case for a warning.

12. Having heard submissions on the issue, the judge adjourned the matter for consideration over the lunchtime interval. It was quite clear from his ruling that the judge was very conscious of the fact that he had a discretion to exercise and went about that task in a careful and conscientious fashion. In delivering his ruling, the judge first reviewed a number of the authorities in this area and then turned to the specific case on which he was asked to rule. He did so in these terms:

> "[n]ow, I want to make quite clear, I do not intend to make comment on the evidence whatsoever before the jury. It is not my practice to do so. But obviously, for the purpose of this exercise, the Court has to have some view on the nature of the evidence. Now, it is quite clear on the central issues which are in dispute in this trial, the complainant has been adamant in relation to those. She has not resiled in any way from them. Her evidence, in my view, has not been unreliable in relation to them. There is unreliability, possible unreliability on peripheral issues in relation to time, in relation to taking money, how the money was spent.
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> On one particular charge, count 1, it is very clearly defined as to an exact date, an exact occasion, and exactly what happened. And in relation to others, there is an allegation of a certain pattern of activity on a Friday night, and there is no doubt that on the prosecution case, the opportunity would have arisen to [JK] to abuse [Ms. K]. The parents were out. [JK] was babysitting. [J] was in and out, playing. That evidence is there. She said the door was locked, and…obviously, there are inconsistencies in relation to it, she cannot be specific as to how often it happened. She said it did not happen all the time, but it was a regular occurrence, in other words, a pattern of activity. So, there is none of the vagueness that the Court would be normally concerned with or unreliability on the central issue. And the peripheral issues, such as time and the taking of money and inconsistency as between one trial

and the other, in my view, are matters in the normal course to be taken into consideration by the jury in considering their weight. And I do not consider that there is any appropriate reason in this particular trial to give a corroboration warning."

13. In the Court's view, the starting point for consideration of this issue has to be the fact that the Oireachtas has removed the requirement for a mandatory corroboration warning. The decision on whether or not to give a corroboration warning is now solely a matter for the trial judge. He or she has a discretion to exercise, and an appellate court will be slow to intervene unless it is clear that the discretion has been exercised on a wrong basis. In the case of *DPP v. M (Otherwise J)* [2019] IECA 92, the Court of Appeal commented:

> "18. We have stressed before, and stress again, that whether or not a corroboration warning should be given is in the wide discretion of the trial judge in the first instance. It is obvious that a trial judge is well placed, compared to this Court, to make a judgment on the evidence, having regard to the run of the case on issues of credibility or reliability relevant to a decision as to whether or not a warning should be given.
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> 19. The inconsistencies here were of a type which is not uncommon, especially in sexual offence cases. In any event, all such matters were addressed in her charge. Before a warning could be triggered and the discretion of the trial judge interfered with by this Court, a great deal more than the supposed discrepancies here would be necessary."

In this case, it is clear the trial judge was very conscious of the fact that he had a discretion to exercise and went about that task in a careful and conscientious fashion. Consequently, the Court sees no basis whatsoever for interfering with same.

(iv) That the trial judge wrongly charged the jury as to the paucity of cross-examination on the issue of dominion/delay, on the apparent basis of a view taken by the trial judge that comment by defence counsel is confined to issues that are the subject of positive cross-examination;

14. This issue arises in circumstances where defence counsel, in the course of his closing speech, had addressed the question of delay in making a complaint and had indicated that the period of delay was 28 years. He did so having referred to evidence dealing with Mr. JK leaving the home or having been "run out of the house". He then observed:

> "[b]ut nothing, nothing emerges, and as she said herself, she kept her mouth shut, and, ultimately, the complaint emanates in 2014, the complaint to the Gardaí. That is 28 years, in my submission, long after any issue of dominion or control could be said to have been exercised over her."

15. Counsel on behalf of the prosecution took exception to these remarks. He did so because the statement of evidence of the complainant had referred to the fact that she had told her husband about the offences many years before she made her statement of complaint to Gardaí. In addition, a statement of evidence from the complainant's husband dealing with this had been served, though he was not in a position to give this evidence as the evidence did not fall within the doctrine of recent complaint. In these circumstances, counsel for the prosecution sought leave to reopen the prosecution's case in order to clarify that the complainant had disclosed the offences to her husband in 1999, and the judge refused that application, but decided to address the matter in his charge to the jury. He did so by making the following observation:

> "[n]ow, in fairness to [Ms. K], she was not examined in great detail about all of the issues of delay as to why or reasons were. She was cross-examined on some issues in

relation to dominion, but there was no detailed cross-examination on the issue of delay, and in my view, it is fair to point that out."

In the Court's view, the observations by the trial judge were measured and entirely appropriate. Quite simply, in the Court's view, the appellant has no legitimate ground of complaint here.

(v) That the trial judge erroneously instructed the jury to disregard and treat as irrelevant defence counsel's comment that the complainant going to live with the father of the accused after the events complained of was inconsistent with her complaint.

16. The background to this issue is that defence counsel, in his closing speech, had referred to the fact that there was evidence that the complainant had, at one stage, moved in to live with the father of the appellant. Counsel suggested that this was inconsistent with having been raped by the son of the person she was moving in with. The judge referred to this issue in the course of his charge to the jury. He did so in these terms:

> "[o]ne issue, and I'll just deal with it now. I consider it, and I do not intend to comment on the evidence at all, other than to assist you, it is not my practice. I am going to summarise the evidence literally. But the evidence in relation to [Mrs. K] going to live with her uncle, clearly, in the Court's view [JP] is gentleman, seen by [Mrs. K] and her father, [L], the brother of [JP], is obviously a gentleman. In my view, there is no issue in relation to this trial, it is not relevant that [Mrs. K] went to live in [JP]'s new bungalow from 12 years of age to 18 years of age."

The appellant protests that the trial judge's intervention, to the extent of advising the jury that this piece of evidence was not relevant, constituted an attack on the credibility of defence counsel. From remarks made by the trial judge in the absence of the jury, it is clear that the

judge was quite concerned by remarks made by defence counsel. In the absence of the jury, the judge commented that the appellant's father was "an absolute gentleman", and that:

> "to draw in the whole thing about her going to live with JP, and some issue, why did she go to live with him and you know, would there not be something funny about that. I mean every person is responsible for their own actions. I thought it actually was an insult to JP, the way it was dealt with.
>
> [. . .]
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> I thought that was way over the top and nasty."

At another point, in the course of an exchange with defence counsel, the judge commented "which I thought was absolutely unfair…straight up to you, absolutely unjust and unfair, you know".

17. These remarks in the absence of the jury were unusually direct and forceful, coming from a judge who is usually extremely restrained indeed. The Court is in no doubt, however, that the judge's remarks, in the presence of the jury, were quite measured, were not excessive and did not exceed the bounds of permissible comment.

(vi) That the trial judge erroneously instructed the jury that they must specifically take into account the fact that the accused's memo of interview had not been subjected to the scrutiny of cross-examination in circumstances where the memo broadly constituted mere denials and did not posit a coherent alternative narrative.

18. This issue arises in circumstances where the judge, in the course of his charge, having canvassed the issue in advance with counsel, told the jury:

> "[n]ow, another matter that I have to explain to you is different categories of evidence…you will have with you in your jury room the exhibit, the memo of interview with [JK] given to Garda [REDACTED] at [REDACTED] Garda station

> when he was arrested and questioned about the allegations on the indictment. And in law, that is called a mixed statement and it is evidence, members of the jury, it is evidence that you have to, you are bound to consider.
>
> Now, within that statement, there may be matters which the defence wish to rely on, the prosecution wishes to rely on. There may be expressions of opinion by [JK] is not evidence, that's a matter for you to determine. And you also bear in mind that the evidence has not been subjected to cross-examination and has not been given on Oath."

On behalf of the appellant, it is submitted that the trial judge, by drawing the attention of the jury to the fact that the appellant's memo had not been subjected to cross-examination, constituted, in the circumstances of the memo comprising a bare denial, an attack on the appellant's right to silence.

19. It was the case that the appellant did, in fact, exercise his right to silence on occasions during the course of the interview, and the memo that was put before the jury had to be edited to reflect this. What the trial judge had to say simply reflected the facts of that situation, what Mr. JK had to say in the Garda station was not on Oath and was not subject to cross-examination. The judge made the comments that he did, having canvassed with counsel what he proposed to say on this issue, having drawn attention to the decision of the Court of Criminal Appeal in the case of *DPP v O'Reilly* [2009] IECCA 30. In the Court's view, the judge's comment was a perfectly reasonable and proper one.

(vii) That the trial judge wrongly received a verdict while a question raised by the jury was being addressed.

20. This issue arose in circumstances where the jury raised an issue with the Court at 14.14 hours on 8th June 2018. The jury had, at this juncture, been deliberating for four hours

and 12 minutes on the day in question. It appears their concern was prompted by a point raised by the defence counsel in his closing speech. In any event, the jury asked whether there was any description of the front of the house where the complainant lived. The judge's response was to indicate that he could not provide any new detail, but that he would check the transcript. The Foreman of the Jury then indicated that their question was whether they could get more detail. The judge told them that they could not, but that he would canvass it with counsel, but that the evidence in the trial had finished. The trial judge also directed them on the majority verdict, doing so without objection from defence counsel. While the issue was being debated in the absence of the jury, the judge received a note from the Foreman indicating that the jury had reached a verdict.

21. The appellant has argued that the trial judge ought not have recharged on a majority verdict in circumstances where it was clear that the jury were not deadlocked but, in fact, still in the middle of their deliberations. Counsel submits that the trial judge should not have proceeded as he did without first answering the jury's question and affording time for further consideration. It is said that there was no indication that the jury were at an impasse or unable to reach a unanimous verdict.

22. This Court sees little substance in this point. The judge was correct in telling the jury that the evidence in the case had been completed. There was nothing objectionable in then proceeding to give the majority charge, as had always been planned.

23. In summary, the position is that we have not been persuaded to uphold any ground of appeal. None of the grounds argued have caused us to doubt the fairness of the trial or the safety of the verdict. Accordingly, we will dismiss the appeal and affirm the conviction.