THE COURT OF APPEAL

Record Number 139/21

Birmingham P.
Edwards J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND-

C.A.

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 28th day of November 2022 by Mr Justice Edwards.

Introduction

1. Following a five-day trial at the Central Criminal Court, the appellant was convicted by a majority jury verdict on the 18th of June 2021, of counts no. 2 and 4 on the indictment, relating to offences of sexual assault contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990, and of counts no. 3 and 5 on the indictment, relating to offences of rape contrary to section 4 of the Criminal Law (Rape)(Amendment) Act 1990. The offences occurred during a period between early 1998 and the 31st of December 1999.

2. The appellant was found not guilty by a unanimous jury verdict of count no. 1 on the indictment, which related to an offence of sexual assault contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990, which the complainant alleged had occurred during a period between the 1st of January 1997 and the 31st of December 1997.

3. The appellant was sentenced on the 23rd of July 2021 to 10 years' imprisonment in respect of count numbers 3 and 5, with the final 12 months suspended for a period of 12 months on condition, and to 3 years' imprisonment in respect of count numbers 2 and 4, with the final 12 months suspended for a similar period of 12 months on condition. The sentences were to run concurrently and were back dated to the 18th of June 2021 when the appellant was remanded in custody.

4. The appellant now appeals against both his convictions and sentences.

Evidence given at trial

5. The complainant gave evidence that the offences occurred at an address in Dublin 11 and in a cottage in Dublin 8.

6. The complainant told the jury that her parents had separated when she was very young and that she had spent most of her childhood at the address in Dublin 11. After the separation her mother had commenced a relationship with the appellant, who in due course moved in to live at the address in Dublin 11 with his two daughters from another relationship. The complainant described the sleeping arrangements in that house during her childhood where she and her sister L slept in one set of bunkbeds in a bedroom there, stating that she slept in the top bunk and her sister in the bottom bunk. She continued that when the two young daughters of the appellant moved in, they slept in a second set of bunkbeds in the same room. During cross examination evidence was given that when her sister K came home at the weekends, she would take L's bottom bunk bed due to a disability and that the rest of them would jump from one bed to the other. In response to a question in respect of the bed swapping, she stated *"Yes, we were like four girls in a room, you know? We always jumped from one bed to another but sometimes we'd be messing or if someone fell asleep in that bed, someone had to get into that bed."*

   The complainant agreed under cross-examination that she had never mentioned this before.

7. Her mother and the appellant slept in a bedroom to the rear of the house and her brothers slept in a boxroom to the front of the house.

8. She said that her mother worked night shifts when she was a child.

9. The complainant said that the appellant started sexually assaulting her when he moved into the house with his two daughters and that she was around seven years of age at that time.

10. The complainant stated that the appellant would come into the bedroom and put his hands down her pyjama bottoms and put his fingers inside her vagina. He would put his finger over his mouth and then over her mouth and tell her to 'shush'. It was put to the claimant during cross examination that she had never mentioned in her statement or in previous evidence about the appellant putting his finger to her mouth to which she replied *"there's an awful lot of stuff that's not in my statement that he done…[t]here's only the basics is in my statement. Not every detail is in my statement."*

11. She continued that it usually happened during the night and when her mother was working night shifts. During cross examination it was put to her that, having previously stated that what happened to her in the bedroom occurred when she was sleeping in the top bunk, it would have been impossible for a man of the appellant's short stature to reach into the top bunk, to which she replied that she had a six-year-old at home who could nearly reach the top bunk.

12. The complainant also stated that the sexual assaults also happened in the sitting room when the appellant was sure they were alone and where he would sit her on his lap and rub her back. He would then make her sit behind him and rub his back. He would then bring her hand around and put her hand down his trousers and around his penis and pull her hand back and forward.

13. The complainant stated that at some stage she, her mother, her sister, the appellant and his two daughters moved to the cottage in Dublin 8. Her two brothers remained living at the house in Dublin 11. She described how both she and her sister slept in an attic conversion which was accessed via a spiral stair, and that her mother, the appellant and his two daughters slept downstairs.

14. The complainant described that while residing at this location the appellant started making her give him oral sex by putting his hands down her trousers, and while she was kneeling on the floor, he would push her head down and put his penis in her mouth and then push her head back and forward. The complainant said that this happened while situated behind a half swing door leading to the kitchen and also on the sofa in the sitting room. He would then ejaculate into his hand. She stated that again, this would happen when no one was around or when her mother was in bed. She said the appellant would say to her mother *"Go on to bed."* The complainant agreed with counsel for the defence that she had not mentioned this before in her evidence.

15. She was unsure what age she was when they moved to the cottage or how long they lived there, but believed it was a good-few months.

16. The complainant was unsure as to her age when they moved back to the house in Dublin 11; however, she gave evidence that the offences continued, and that the appellant would make her give him oral sex in the sitting room where he could see anyone approaching through the sitting room window.

17. During cross-examination concerning the evidence she had given in relation to the offences committed in the house at Dublin 11, it was put to her that she had not previously mentioned the incidents where she claimed in her evidence that he would sit her on his lap, rub her back and put his hand down her trousers. She responded as set out in the following exchanges:

    Q. Okay. All right. Okay. And the other thing you told us then about when you lived in [Dublin 11] was you said that he'd sit you on his lap and then he'd rub you and sit you behind him?

    A. It's -- he used to put -- sit me up on his lap, yes, and he'd be rubbing up and down my back and all and then that's when he used put his hand down my trousers.

    Q. Okay. You don't mention that at all in your statement or in the previous evidence?

A. There's an awful lot that's not in my statement. There's loads of stuff that's not in my statement. When I went to make my statement, I just kind of got the basics out.

Q. Okay. But you knew that it was coming -- well, you knew that you would be here to give evidence in relation to what happened; yes?

A. I didn't think that -- I thought I would have had more another time like I thought I could have sat down and said an awful lot more. There's an awful lot that's not in my statement, what he done.

Q. Okay?

A. A very lot.

Q. Okay, but it wasn't mentioned at the last trial either?

A. It was.

Q. The sitting on his lap?

A. About -- yes, and on the stairs. Sitting me behind him on the stairs, making me rub his back and all.

Q. That was mentioned last week but that was the first time that it was mentioned. It wasn't mentioned in the trial -

A. Oh, well, he did. He used to do it.

Q. -- in 2018?

A. He did.

Q. Okay. Well, and again, I'm just putting to you?

A. I know you are, I know you are.

Q. I'm suggesting to you that the reason these things are being added is because none of it is true and that you're adding it to give credibility to yourself?

A. No, I wouldn't do that anyway.

Q. Okay. And insofar as then you say that he would -- you said to [Prosecution] he'd have you sit behind him?

A. Yes. That's where I'm on about the stairs. He used to do that to me on the stairs. He used to sit on the stairs in front of me, sit me up on the back step behind him for me to rub up and down his back and that was when he pulled my hand around and pulled my hand down his trousers.

Q. Okay. And --

A. And I think he used to do it on the stairs because we used to have a door where half of it used to be glass.

Q. And --

A. And he'd be able to see through it to see if anyone was coming up.

Q. Okay. Again, [Complainant], the first time that was mentioned was last Thursday, I think?

A. See because an awful lot more things come to me. There's all these little bits that keep coming up and are coming to me and coming to me.

Q. But you see the problem with that, [Complainant], is --

A. It's not in my statement.

Q. Well, yes?

A. I know it's not in my statement. Everything is not in my statement though.

Q. But it's not even that it's not in your statement; it wasn't said at the last trial either. It wasn't said in 2018 when you were giving your evidence either --

A. I probably didn't get a chance to say it.

Q. Okay. And you understand why I'm putting these things to you?

A. Oh, of course I do. No, course I do.

Q. Okay?

A. I was -- I didn't know what to expect either the last trial.

Q. Okay?

A. I felt like I was under pressure.

Counsel for the defence further asked:

Q. And this is a whole new set of facts that are being put before the Court in relation to [the appellant] *that he was never aware of"?*

A. Yes.

Applications

18. At the conclusion of the prosecution's case an application was made by defence counsel in reliance of *The People (DPP) v. PO'C* [2006] 3 I.R. 238 and *The People (DPP) v. C.C.*

[2019] IESC 94 requesting that the trial judge should exercise her discretion and stop the trial on the ground of unfairness, in circumstances where matters had been raised or stated by the complainant in her evidence, that had not been mentioned in her statement(s) to An Garda Síochána. Defence counsel drew the court's attention to paragraph 35 of *PO'C* which sets out that: -

> *"If a trial is delayed the appropriate remedy in which to raise that issue is by way of judicial review. However, an application for judicial review is made or not, the trial court retains at all times an inherent and Constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial, matters may arise, evidence may be given which renders the trial unfair or the process unfair."*

19. In relation to the complainant's evidence during the trial, counsel continued: -

> *"And insofar as anything is being put to her, that it's different from before, her response is, well, yeah, there's plenty of stuff that I haven't told anyone or that it's just coming back to me now. And I say that that's a fundamental unfairness in the process."*

20. Prosecution submitted that in respect of the PO'C application, and the defence's further reliance on C.C., that what had transpired during the giving of evidence was a standard situation which occurred in cases of this nature, in circumstances where the defence had failed to identify any critical witness who, or evidence that was missing which, might support the defence case. Counsel continued that even if the claimed additional details had been known about by the defence it was difficult to see how it could have availed them, because *"…it is one of the characteristics of cases of this type that they invariably occur in circumstances of secrecy and privacy."*

21. In relation to the defence's reliance on the cases of *PO'C* and *C.C.*, defence counsel submitted that the issue in the application was not of delay but of unfairness, in circumstances where the complainant in her evidence gave additional accounts in relation to sexual misconduct which she said had occurred but which were not in her statement in the Book of Evidence, and which she had also not mentioned at an earlier trial of the same matter. It was said that the fundamental issue was that the accused was before the court *"…and new allegations were being made against him, at the time of trial in circumstances, where it's some considerable time after a statement was taken and after the book of evidence was served, and after a previous trial ran."*

22. In refusing counsel for defence's PO'C application the trial judge held; -

> *"And in relation to the … complaint that it is an unfair process.*
>
> *It seems to me that there clearly are difficulties with the evidence, I am sure they will be highlighted by counsel in the closing speeches and indeed it will be I will also have to deal with those matters in my charge to the jury. But it seems to me that the issues which arise in this case, it's almost these are, as everyone knows,*

these are difficult cases in when there are historic complaints and they effectively boil down to the jury being asked to evaluate the and attempt to see if they can be satisfied beyond a reasonable doubt on the evidence put forward by the prosecution in relation to the allegations made. But these are there are while there are obviously matters on some perhaps could be described as contradictions or difficulties with the evidence, but these are ultimately I think [Prosecution Counsel] is right, it's a classic matter for which juries are required to consider all of the time. So I don't think there's anything unfair about this trial process. And I'm satisfied that all of the charges should go before the jury, so I refuse the … application ..."

Grounds of appeal

23. The appellant appeals his conviction on the following grounds: :-

    1. The trial judge erred in law and in principle in refusing the defence application for a directed verdict of not guilty on all counts at the close of the prosecution case.

    2. The trial judge erred in law and in principle in refusing the defence application at the close of the prosecution case to prevent the trial from proceeding further, pursuant to the principles enunciated in People (DPP) v PO'C [2006] 3 I.R. 238.

24. At the hearing of the appeal against conviction only ground no. 2 was pursued.

Submissions

25. The Court received both written and oral submissions from both sides for which it is grateful.

Discussion and Decision

26. We have no hesitation in rejecting the appeal against conviction. We are satisfied that the trial judge was right to reject the *PO'C* application. Counsel for the appellant very fairly accepted that she could not point to any specific prejudice arising from the fact that the complainant had mentioned additional instances of abuse in her evidence which she had not specifically mentioned previously. Counsel accepted that had the additional instances been known about at the time of the trial, it was not possible to say that the case would have been defended any differently.

27. It is unquestionably the case that the additional instances of abuse mentioned represented evidence of uncharged misconduct. However, we do not see that they would have prejudiced the accused any further than he was already prejudiced by the fact of having to face the counts that were already on the indictment, including the two counts of oral rape, and the counts of sexual assault, of which he was ultimately convicted. The additional instances were merely further examples of alleged sexual assaults of a similar character to those about which the jury already knew. They were again alleged to have occurred in private, and there was nothing about them that would have provided the accused with material which might have assisted his defence. As it was, the defence had an opportunity to make the point before the jury that the complainant had not previously mentioned these incidents, and to make much of that. This point was put to her in cross-

examination as might be expected. However, she provided an explanation for not mentioning them previously. The fact that she might provide an explanation when being so confronted was simply a hazard of the trial. There was nothing unfair about her having done so. We see nothing in what occurred that would have rendered the trial unsatisfactory or the conviction unsafe. The *PO'C* application was properly refused and we find no error of law in the trial judge's approach.

28. The appeal against conviction is therefore dismissed.

The appeal against sentence

29. Understandably, the focus of the appeal against sentence is on the sentences imposed for the two s. 4 rape offences, namely concurrent sentences of 10 years imprisonment with the final 12 months of those sentences suspended.

30. It is clear from the transcript of the trial judge's sentencing remarks that headline sentences of 12 years imprisonment were nominated, from which the sentencing judge discounted by two years to reflect mitigating circumstances and following which she further, in the exercise of her discretion, suspended the final 12 months.

31. Counsel for the appellant accepts that her client can have no complaint with respect to the headline sentence of 12 years, having regard to the guideline judgement of the Supreme Court in the case of *The People (DPP) v. F.E.* [2021] 1 I.R. 217.

32. However, what is complained about is the extent of the discounting from the headline sentence to reflect mitigation. Attention was drawn to the following passage from the sentencing judge's remarks on the 23rd of July 2021:

> *"He's now 75 years of age. While he has an absolute entitlement to plead not guilty to such charges and to maintain his innocence, if that's the stance he wishes to take, however the Court and the authorities of the appellant Courts have made it very clear that it effectively denies the sentencing Judge from the matter that might most assist in terms of mitigating factors, which would be a plea of guilty at an early stage which would save the victim, … in this case, from having to endure the ordeal of the trial and that's not available in this case. He was in a position of trust in respect of being her stepfather, living in the family home, not just with [his partner's, i.e., the complainant's mother's] children, but also his own two children who had – [his partner] had effectively welcomed. Not just [the appellant] but also his two children into her family home and into her family. He took advantage of and preyed upon a very young child on the -- in respect of the four offences and verdicts that were returned on the indictment and, so, as I said, while I set a headline sentence of 12 years, albeit there isn't a lot to go by way of mitigation, but bearing in mind the -- his age and circumstances and the likely age upon his -- eventual release from prison, I would propose to reduce that 12 years by a period of 2 years, with the final 12 months suspended, and his own bond of €100 to keep the peace and be of otherwise good behaviour."*

33. A case was advanced that there had been an insufficient discounting for mitigation. This was put forward on two bases. First, it was suggested that there had been an insufficient allowance for the appellant's age. Secondly, it was suggested that there had been insufficient allowance for the fact that the appellant had not otherwise come to Garda notice, i.e. he was of previous good character, that he had a track record of being a hard worker throughout his life, and that he had, subsequent to his abuses of the complainant, entered a new relationship and both his new partner and his two daughters were standing by him and were being supportive of him.

34. It is convenient to deal with the second point first. While it is the law that an accused is entitled to have his personal circumstances taken into account at sentencing, not every personal circumstance will provide substantial mitigation. Indeed, it will often be the case that where an accused faces sentencing for multiple serious offences committed over a lengthy period of time that factors such as previous good conduct, and a good work record, will offer only slight mitigation. In the case of rape offences, such matters (where there is no suggestion that what occurred was a once off incident, or an aberration, or that it occurred in some exceptional circumstances tending otherwise to diminish responsibility), cannot it seems to us serve to significantly mitigate the offender's culpability. That is not to say that such circumstances can provide absolutely no mitigation, or that they are not to be taken into account. However, in most cases their mitigating effect will only be slight.

35. We are satisfied that in the present case the sentencing judge did take account of those matters. However, we are equally satisfied that her scope for affording a discount on account of them was slight. We are satisfied that the appellant received appropriate credit for these considerations.

36. Returning then to the first point upon which counsel places reliance, we are satisfied that this is a more substantial point. Her case in regard to the appellant's age is that a 10 year sentence, albeit with the final year thereof suspended, imposed on a 75-year-old man was a crushing sentence. She contends that it was in effect a life sentence as there must be a significant prospect that the appellant could die in prison, but that even if he does not die in prison he is unlikely to live much beyond his eventual release date.

37. We should remark that there is a good deal of speculation involved in the case made on behalf of the appellant. There is nothing to suggest he is in bad health, and he might well live well into his 80's or 90's. That having been said we accept as a general proposition that many people do succumb in their 80s to nothing more than old-age.

38. While we think this is a finely balanced case, counsel for the appellant in her well-argued submission, has persuaded us that the trial judge did not afford the appellant sufficient allowance for his advanced age and the fact that a prison sentence for someone of his age will inevitably be more onerous and weigh more heavily upon such a person. We think that the failure to give a greater discount on account of the appellant's age was in the circumstances of this case an error of principle.

39. Having found an error of principle we must proceed to quash the sentences imposed at first instance for the two s. 4 rape offences, and proceed to resentence the appellant for those offences. In doing so, we take into account the fact that the appellant has recently moved into the training unit in Mountjoy prison where he is undergoing a sex offender's course. We are told that he is doing well and regard that as encouraging news.

Re-Sentencing

40. We will again nominate a term of 12 years' imprisonment as being the appropriate headline sentence. To reflect all of the mitigating circumstances in this case, the principal one being the appellant's advanced age, but also for what it is worth (and in truth they carry very little weight) his good work record and his lack of previous convictions; and further to recognise the support he continues to have from his new partner and his daughters, we will discount from the headline sentence by three years leaving a post mitigation sentence of nine years imprisonment. In addition, to leave him some light at the end of the tunnel, and to take account of the fact that with each passing year his sentence will become more onerous due to his significant age, we will further suspend the final two years of the nine year post mitigation sentence.

41. Accordingly, the final sentence is nine years imprisonment with two years suspended. The terms upon which the final two years are to be suspended will be the same as those that applied to the part suspension of the sentence in the court below.