THE COURT OF APPEAL

APPROVED
REDACTIONS IN PLACE TO PRESERVE ANONYMITY OF COMPLAINANT

Court of Appeal Record No. 184/21
Neutral Citation Number: [2023] IECA 46

The President
Kennedy J.
Ní Raifeartaigh J.

BETWEEN/

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

AND

B.McD.

APPELLANT

JUDGMENT of the Court delivered on the 24th day of February, 2023 by Ms. Justice Ní Raifeartaigh

Background

1. This is an appeal against conviction. The appellant is the father of the complainant and was convicted of one count of sexual assault following a trial conducted over four days in July 2021. The indictment contained 15 counts of sexual assault contrary to s.2 of the Criminal Law (Rape)(Amendment) Act 1990 and spanned a period of six years between 2006 and 2012. The complainant, M, was a child at the time of the alleged events but a young adult at the time of trial. The appellant was in his early thirties at the time of the alleged offences (and late forties by the time of the trial). The sole count of which the appellant was convicted related to a single incident which was alleged to have occurred between 1st May 2006 and 31st August 2006. It was alleged that he exposed himself to M and forced her to touch his private parts. The jury did not reach agreement in relation to the remaining counts. The trial at which the appellant was convicted was a second trial; a

first trial having had to be discontinued for reasons that are not of relevance to this appeal.

2. The original grounds of appeal were that:

   i. The trial judge erred in failing to accede to the application to withdraw the matter from the jury due to the tenuous nature of the evidence adduced before the jury;

   ii. The court erred in refusing to transfer the trial from the Circuit Court in question to the Dublin Circuit Court;

   iii. The jury verdict was perverse and contrary to the evidence;

   iv. The trial judge erred in failing to give a corroboration warning to the jury.

3. For reasons which will become apparent, it will not be necessary to deal with the second ground of appeal.

Ground 2: That the court erred in refusing to transfer the trial to Dublin

4. In written submissions, the appellant argued that in circumstances where there were ongoing child-care cases being heard in the local courthouse, which had achieved some local notoriety, there was a real and significant risk that the jury were not free from suspicion or taint of bias, given the nature of the allegations and the size of the local community. He cited caselaw concerning the question of objective bias. The Director responded that no application had been made to the trial judge to transfer the trial to Dublin. She further pointed out that the judge gave the jury panel a warning about not serving if they had any personal knowledge of the people involved or "*some awareness of the case*", that the child-care proceedings were heard in camera and that none of those involved were named in the media.

5. At the oral hearing of the appeal, the Court inquired of counsel whether an application for transfer had been made. Counsel for the appellant indicated that an application had been made at the first trial but not at the second. He accepted that there were no transcripts or other details before the Court in respect of this.

6. Following some exchanges with counsel, the Court indicated that in the absence of appropriate evidence concerning any application for transfer, it could not deal with this ground of appeal. It will therefore not be pursued further herein.

Grounds 1 and 3: That the trial judge erred in failing to accede to the application to withdraw the matter from the jury due to the tenuous nature of the evidence adduced, and that the jury verdict was perverse

7. The appellant submits that the case should have been withdrawn from the jury, and that the verdict was perverse, because the complainant's evidence was conflicting, vague and largely contradictory.

8. Counsel relies in particular upon the complainant's evidence concerning her age at the time of the first alleged incident of abuse (being the subject of the sole count on which the appellane was convicted). She had connected this incident to when a particular uncle had died; she said it was when she was 10 or 11, but the death certificate showed that the uncle in question had in fact died when she was 7 years old. Counsel accepts that inconsistencies should usually be left to a jury but submits that this "four- year" inconsistency was such an egregious inconsistency that the count and the case as a whole should have been withdrawn from the jury.

9. He also relies upon the complainant's responses to questions concerning this difficulty in her cross-examination. In this cross-examination, counsel pointed out to her that the date of her uncle's death was June 2006 (which of course clearly showed that she must have been seven years old), and asked her again what her age was, to which she replied, *"11 or 10"*. He repeated the question, and she answered that she was *"not great at maths".* He pointed out that she had done well in her Junior and Senior Certificates (and therefore by inference must have had some knowledge of maths or no particular mental or memory difficulty), and brought her through the computation of her age on the date of her uncle's death. He then put the question to her again and she responded: *"Maybe at that time I remembered details from that age"*. Later when he returned to the issue of age and the date of her uncle's death, she said *"I don't remember. It's called trauma; you block it out".*

10. Counsel submits that the difference between age 10 or 11, on the one hand, and 7, on the other, is very significant; and that her explanation for it was wholly unsatisfactory. This, he says, goes far beyond the normal range of inconsistencies which should be left to juries to deal with.

11. Counsel submits, further, that this problem was compounded by other inconsistencies and contradictions in the complainant's evidence which, cumulatively, should have led to her evidence being withdrawn from the jury. Those other inconsistencies and contradictions concerned matters such as whether one of her younger sisters was born at the time; how often the appellant had asked her to touch his penis; whether it continued after they had moved home to a different location: whether her father asked her to put her mouth on his penis; and whether a brother or uncle had come into the room during an incident. He also references a contradiction as between her evidence and that of a friend to whom she had made complaint as to when the alleged abuse came to an end.

12. The appellant complains that all of this was further aggravated by the fact that the first day of evidence was largely marred by technical errors and connection issues which left the jury unable to hear what evidence was being given clearly and properly.

13. The Director submits that, as regard technical or audibility issues, the issue raised by the foreman of the jury was that some members of the jury were having trouble hearing the judge rather than any witness. Prosecution counsel, rather than the foreperson, then raised the issue of whether any concern that any jurors may not have heard some of the complainant's evidence up to that point. The foreman confirmed that the jurors were hearing the evidence but said it was difficult to follow. The Director accepts there were times when counsel had to ask the complainant to repeat her answers but submits that ultimately all questions were answered and no issue was raised as to the jury's inability to hear her evidence. It may be noted that this particular issue was not alluded to during the oral hearing of the appeal.

14. The Director points out that the appellant was convicted on one count only. She submits that while there were inconsistencies and some difficulties in the complainant's evidence, there was insufficient reason to withdraw count 1 or any of the counts from the jury.

15. She also submits there was no application made to withdraw the case as a whole from the jury but rather an application to have certain particular counts withdrawn from the jury and/or an argument about the indictment. Counsel on behalf of the appellant submitted in reply that the application made at the close of the prosecution case was indeed an application to withdraw all counts from the jury.

16. The Court will proceed to consider Ground 1 despite the ambiguity about whether there was a formal application to withdraw all counts from the jury in circumstances where the formal words usually associated with such an application were not employed but there was clearly a discussion as to the sufficiency of the evidence on at least some if not all of the counts.

The evidence at the trial

17. It is necessary to examine the evidence given by the complainant before the jury before reaching a conclusion on the first and third grounds of appeal.

18. As noted above, counsel for the appellant placed particular emphasis on the complainant's evidence concerning the first incident in time. While she was giving evidence in chief, she was asked if she had a memory of the first time something inappropriate happened, and answered *"I remember like when my mum's brother died."* There were some questions about who the deceased was, and then she was asked if she was saying that something happened around the time he died, and she answered: *"I can't remember".* She was asked to describe the things that happened and she said: *"Like when I was down…he kissed me inappropriately…."Like the way he'd kiss my mum".* She clarified that this involved kissing on the month, that his tongue would go into her mouth, and it would be for a few minutes. When asked where this would happen, she said *"in the bedroom…sitting on the couch"*. She said this kissing with his tongue in her mouth

happened *"a few times".* Counsel went back to the '*very first time something happened'* and asked what happened and the reply was*: "I kissed him, like he kept on touching me inappropriately"*. She said that he would get her to touch him over his private parts, that it was for two minutes or more until white stuff came out. This was *"in his room and sometimes the couch"* in the sitting room. Counsel asked if she was talking about the first time anything ever happened and she answered: *"All these things happened at different times like"*. When asked about whether he touched her hand to put it on his private part or told her to do so, she said *"basically both".* The rest of her evidence in chief concerned alleged events after the first incident.

19. In cross-examination she was asked if she was saying that the only time the appellant asked her touch his penis was just after her uncle had died: she answered *"I don't know".* Counsel said it was important and he wanted a yes or no answer, to which she replied: *"Yes, but the thing is I can't remember exactly like".* It was put to her that her memory was very good about a lot of things, she answered: *"My memory isn't that great to be honest, it's kind of blocked"*. She was pressed on when precisely this incident took place and answered, "It was a good bit before it [her uncle's death] , but then agreed it was *after* his death, and then that it was *"not that long"* after, *"only a few days".* She was asked if, at the first trial, she had given evidence that it was the day after her uncle's death and she said, *"I can't really remember".* She was pressed on which answer was correct and she said that she was not changing anything and that it had been seven years and it was very upsetting.

20. She was also asked if she told the jury previously, and had also said in her statement, that this first incident happened when she was 10 or 11 years of age, and she accepted that she did. It was then pointed out that the uncle in question had in fact died when she was 7 years of age, to which she responded that she was not good at maths. She was also asked about whether this was the first time she was saying any abuse had happened and she said, *"As far as I remember yes".* Counsel returned to the discrepancy between age 10 and age 7 and she said *"I don't remember. It's called trauma, you block it out",* and insisted that she was telling the truth. She was asked about whether her parents had gone away to help organize her uncle's funeral, which she accepted; and whether she was changing the date of the alleged incident from the day after his death to a few days later in order to circumvent this difficulty. Again she insisted she was telling the truth.

21. In re-examination, prosecution counsel clarified with the complainant what she had said in her original statement to the Gardaí about the first incident: namely that *"it happened around the time [her uncle] died"* and that she remembered her mother and her aunt outside crying.

22. During her evidence in chief, the complainant also talked about other incidents, and she was cross-examined intensively about discrepancies between her evidence in chief and what she had said on previous occasions, whether in her statement or at the first trial. These included the matters listed at paragraph 11 above, including whether one of her younger sisters was born at the time; how often the appellant had asked her to touch his

penis; whether it continued after they had moved home to a different location and/or when she started secondary school: whether her father asked her to give him oral sex; and whether a brother or uncle had come in during an incident.

23. The jury also heard evidence from K, who was the complainant's friend at school, and to whom she made her first complaint. She described the terms in which the complainant had done so and her tearful demeanour at the time, and how they went to the school chaplain shortly afterwards, on the same day, at K's insistence. She described the complainant's reluctance to tell the chaplain and principal what had happened, and how she was fearful of her parents arriving at the school. The principal then became involved, and a social worker. K had never seen the complainant since that day. The school chaplain also gave evidence before the jury of what she had been told.

24. A Garda Sergeant gave evidence that they appellant was arrested on the 16th July 2013 and interviewed. He said that he was *"totally shocked"* by the allegations and that he was an innocent man. He said he was told off the record that the complainant *"might need psychological help"*, which he later clarified to mean not because she was affected by the alleged abuse because she was telling lies. He said that the allegations were *"total rubbish and lies",* and that she made them up because she was so friendly with his brother, who had temporarily split up with his partner. He said his daughter very upset and crying when his brother went back to his partner and she *"then came up with this story to the teacher"*. When questioned about the detail of her statement, he said she was telling lies and that she had picked up the information from other children; that she had seen a film of a father abusing his daughter; or that she might have picked it up from the sex education classes in the school. Throughout all the interviews, he maintained his innocence and insisted that he was shocked by the allegations.

The Court's decision on Grounds 1 and 3

25. It is useful to recall what was said by this Court (judgment delivered by Edwards J.) in *People (DPP) v. M* [2015] 3 JIC 2711, [2015] IECA 65 concerning the *Galbraith* test for withdrawing cases from the jury at the close of the prosecution case:

> *47 At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.*
>
> *48 On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.*

49 Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.

26. Having carefully considered the transcript and counsel's submissions, the Court is of the view that this was not one of those cases where the inconsistencies in the complainant's evidence, or as between her evidence and the remainder of the evidence, reached the high threshold for removing any of the counts from the consideration of the jury. There were undoubtedly inconsistencies and difficulties with aspects of her evidence, and counsel expertly and rigorously cross-examined her about those; the judge also drew the jury's attention to those inconsistencies and difficulties in his charge. Undoubtedly those contributed to the jury's decision to acquit the appellant in respect of all but one of the fifteen counts. Indeed, the jury's decision to acquit in respect of all but one of the counts shows that its members must have been very alive to these problems and yet were nonetheless convinced beyond a reasonable doubt in respect of the allegation underlying this particular count.

27. Counsel has laid great emphasis on the discrepancy of four years between the age the complainant estimated herself to be (10 or 11) at the time of the incident which she linked in time with the death of a particular uncle, and her actual age (7), which was established via the death certificate of the uncle in question. The inconsistency was primarily if not exclusively as between these two sources of evidence (her memory of her age at the time, as against the actual age as established by the death certificate); not inconsistencies in her own evidence. She consistently linked the event with her uncle's death. While it was a significant difference (four years), and one which doubtless merited attention during the trial and consideration by a jury, we do not consider it, nor her responses in cross-examination when questioned about it, to be a matter of such significance that it warranted withdrawing this or any other count from the jury. It was a matter for the jury to consider whether it raised a reasonable doubt about her credibility or whether it was the type of memory error that sometimes attends even reliable memories about events which take place during childhood, which are linked to an event (here, her uncle's death) rather than a chronological age or date. Likewise, the Court does not consider that when this factor is considered in combination with other aspects of the evidence (see paragraph 11 above where the individual matters are listed), it raised sufficient concerns about her evidence to warrant the withdrawal of any, some or all counts from the jury. Accordingly, we conclude that Ground 1 of the appeal should be rejected.

28. It follows from the above that Ground 3 of the appeal, namely the submission that the jury verdict was perverse, should also be rejected. In the Court's view, there was evidence upon which a jury was entitled to convict in respect of the sole count upon which it convicted the appellant. The complainant's evidence contained inconsistencies and difficulties, all of which were thoroughly explored in cross-examination and during counsel's closing speech, and which were again adverted to by the trial judge in his

charge; but they were not of such a degree that would warrant this Court reaching a conclusion that the jury verdict on the sole count on which the appellant was convicted was a perverse verdict.

Ground 4: That the trial judge's corroboration warning was inadequate

29. The appellant submits that the trial judge failed to give an adequate corroboration warning. He refers to the discussion in

30. *(People) DPP v O'Brien* [2011] 1 IR 273, [2010] IECCA 103, where the Court, upholding the warning given by the trial judge, inter alia pointed out that the trial judge had told the jury that neither the child's complaint to her mother, nor the contents of her interview with a psychiatrist, amounted to corroboration.

31. The appellant submits that although the trial judge "broached" the subject of corroboration, the use of the terms *"more likely,"* and *"implicated"* when defining corroboration weakened the impact of warning, and that trial judge failed properly to explain what corroboration meant.

32. It may be noted that counsel for the appellant had asked for a corroboration warning and this request was acceded to. However, there was no requisition to the trial judge in respect of the warning actually given.

33. The Director submits that the trial judge clearly explained the concept of corroboration evidence, said there was none in this case, and clearly explained that it would be dangerous to convict in its absence. She contends that the warning was more than adequate, and indeed, amounted to a strong warning.

34. It is necessary to have regard to the precise terms in which the trial judge directed the jury, which was as follows:

> *Now, the other point I want to say to you about the general law that applies, and this was highlighted by the speeches of counsel, is there is a particular warning I'm going to give you as a matter of law over and above the general principles that apply in all criminal trials. It is a case in all criminal trials the case has to be proved beyond all reasonable doubt and the burden is on the prosecution but there are circumstances where I am obliged to give you a warning that's stronger than that again and I think this is obvious from the circumstances of the case but* ***this is a case where effectively it's one person's word against the other****. The word of the complainant given by video link on oath to you here at trial as against the unsworn statements, but still the evidence, of the accused person given to the gardaí when he was questioned and this is an offence which is said to have happened in circumstances of privacy where no one else was there. The accused is saying it never happened in any place. The complainant is saying it happened in circumstances of privacy without anyone seeing it.*
>
> *So, it's a situation where there can only be two versions and each person has given evidence about that and that's a difficulty but just because two people are swearing*

two or giving evidence in two different directions, that of itself doesn't raise a reasonable doubt. Just because there's two accounts, just because someone says no that's wrong, that doesn't of itself raise a reasonable doubt. It's up to you to decide between the two versions whether you prefer the complainant's evidence beyond all reasonable doubt but I will just say that in making that kind of measure between the two, part of the general law that applies is that although the evidence is neutral, the measure by which you judge the evidence isn't neutral.

If you're going to come to a conclusion favourable to the prosecution you have to be satisfied of it beyond all reasonable doubt. If you're going to come to a conclusion favourable to the defence you only have to think it's a reasonable possibility that it's true and you come to that conclusion and that flows from the way that the onus of proof and the burden and the standard of proof operates. But all that being said, just because someone contradicts what the complainant says, it's up to you to decide whether that raises a reasonable doubt in your mind. Just the fact it's raised isn't sufficient. That's what you're here to decide. You decide that. Okay. But in the facts of this case, because the circumstances are such where they occurred in circumstances of secrecy, ***where it's just one person's word against the other and there's no supporting evidence in the case, you have to take particular care****.*

And it goes beyond that in this case because in this case, this is probably stating the obvious to you, but there were difficulties with the evidence given by the complainant and just but she herself said in evidence, she herself said that her memory was blocked by trauma. She said that her brain wasn't operating as clearly as counsel was cross examining was saying to her and on a number of occasions she responded to questions by saying insofar as I remember and then I suppose two particular points. It is the case factually she did give evidence on Tuesday when she gave evidence about oral sex being part of the offence part of the not the offence but part of her account of when the accused was said to have invited her to get into the bed so that he could have sex with her. She did say that and that's what she said on Tuesday. On Wednesday she couldn't remember saying that and that is a feature in the case. As well as that there is the problem with the timing and it is there. I mean whatever you say about the timing, the witness wasn't able to agree that if something happened in 2006 and she was born in 1999 that she was seven she'd be six or seven when it happened, I forget the actual dates, but she was seven when it happened. She couldn't agree with that. So, there were difficulties with the evidence and you have seen that and it's up to you to put weight on it and decide in the overall context of the matter but where there are those issues and where they're owe(sic) ***occurring in the context of just one person's account against another person's account, I do have to warn you that you have to be particularly careful before you move to a conviction in this case because experience has shown in circumstances where there are difficulties with the evidence and when there's no supporting evidence, perhaps supporting evidence is the wrong word,***

there's no evidence that directly supports the involvement of the accused in the crime other than the account of the complainant, experience has shown it to be dangerous to convict in those situations and that doesn't mean you can't convict but it means it's dangerous to do so and you have to be very careful before you do so.

You have to be particularly cautious before you do so and this is what's known as it's called a corroboration warning and corroboration would be evidence of some kind that would actually make it more likely that the accused was implicated in the crime and nothing that meets that test is being presented in this case. There is no corroboration in a legal sense. Therefore, you have to take on board the warning I am giving you that you have to be particularly cautious of the dangers of convicting in this case. As I say it's still your decision. You are the ones who decide whether you're satisfied beyond all reasonable doubt but in forming a view as to reasonable doubt you do have to take that warning on board. You do have to take account of it. Now, in forming the view on that, you can take into account all the evidence in the case but none of it is evidence of a nature which could displace the warning I have just given you and that's a specific warning that I have to give you in the case.

(Emphasis added)

35. In the Court's view, the warning given by the trial judge was more than adequate. Indeed, it is somewhat rare these days to see the warning being given in terms of it being "dangerous to convict" in the absence of corroboration, as distinct from a formula such as "you should be particularly careful" or "you should exercise particular caution" or some such formula, which would also be perfectly adequate to convey the warning.

36. Whatever quibbles one might have with the trial judge's definition of corroboration at one point when he said that *"corroboration would be evidence of some kind that would actually make it more likely that the accused was implicated in the crime"* (and indeed, if anything this favoured the appellant by casting the net potentially wider in terms of corroboration and then making it clear there was none), what is most important in this case is that the trial judge told the jury several times that there *was no corroboration* in this case and then followed it up several times with the warning. He told them (three times) that it was a case of one person's word (or account) against another, (twice) that there was "no supporting evidence", and (once) that there was no corroboration. He gave the actual warning four or five times: *"you have to be particularly cautious of the dangers of convicting in this case"*; *"you have to take particular care…."*, *"you have to be particularly careful…"*, *"experience has shown it to be dangerous to convict in those situations and that doesn't mean you can't convict but it means it's dangerous to do so", "…. particularly cautious of the dangers of convicting in this case".* And he underscored all of this with repeated references to the need for proof beyond a reasonable doubt.

37. We note also that counsel for the appellant did not raise any requisition at the trial about the charge in this regard and this, while not determinative, is a matter to be given some considerable weight.

38. We have no hesitation in rejecting this ground of appeal.

39. In view of the foregoing, the appeal is dismissed.