THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

No. 224/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Michael Murray

Appellant

JUDGMENT of the Court delivered on the 3rd day of March 2017 by

Mr. Justice Birmingham

1. On the 29th July, 2013, following a trial which lasted 24 days, the appellant was convicted of counts of rape, s. 4 rape, sexual assault and false imprisonment. Subsequently he was sentenced to a term of fifteen years imprisonment. He has now appealed against his convictions and the DPP has sought a review of the sentence on grounds of undue leniency. This judgment deals with the conviction aspect.

2. Written submissions on behalf of the appellant have grouped the issues that arise as follows:-

1. Grounds of appeal relating to the admissibility of interviews conducted with the appellant while in garda custody.

2. Issues relating to the manner in which the examination in chief and cross examination of the complainant proceeded.

3. An issue relating to an alleged failure on the part of the prosecution to make disclosure in good time.

4. An issue in relation to the failure of the judge to warn the jury about the risks of social media influence on the trial.

5. An issue in relation to the admissibility of certain exhibits taken possession of by the gardaí from the location of the alleged crime, but at a time after the location had ceased to be designated as a crime scene.

3. Before addressing the grounds of appeal, it is proper to refer briefly to events that occurred during the course of the appeal hearing. Detailed written submissions had been prepared on behalf of Mr. Murray and these had been signed by senior and junior counsel. Senior counsel opened the appeal by reference to these submissions. However, while he was in the course of presenting the appeal, it was indicated that Mr. Murray had lost confidence in his lawyers. Counsel withdrew from the case though Mr. Murray's solicitor, at his request remained in court on a watching brief basis.

4. Mr. Murray who was at that stage appearing in person, then addressed the remaining grounds of appeal that had not been dealt with up to that point and also readdressed issues that had already been dealt with by senior counsel on his behalf, including the issue about the admissibility of interviews. In doing so he repudiated the core arguments on that topic that had been advanced by counsel. Mr. Murray's actions in discharging his lawyers during the course of appeal, mirrors events that occurred at trial. At an early stage of the trial senior counsel for the appellant informed the trial judge that his client had lost confidence in him and had discharged his services. The trial proceeded with junior counsel conducting the defence though at a later stage of the trial he was joined by a new senior counsel. It must immediately be said that junior counsel presented a dogged, determined and thoroughly professional defence at all stages.

5. The trial was concerned with events that occurred on the 12th February/early hours of the morning of the 13th February, 2010. The prosecution case was the complainant, a young Chinese national, was walking home from work in the Smithfield area of Dublin accompanied by her four year old son at approximately 16.10 when she was lured into an apartment by the appellant on the false basis that there was a lady inside who was sick and needed help. The prosecution case was that thereafter the appellant locked them both into the apartment and subjected the complainant to an escalating and relentless ordeal of rape, attempted rape, sexual degradation and violence, drugging her, binding and gagging her and threatening to kill both her and her young son. This episode was said to have lasted until the appellant left the apartment shortly before 5.30 am, leaving her tied up in the bath. The appellant had left the apartment at an earlier stage when he took the complainant's son away by car and deposited him on the street sometime around 22.00/22.30 hours.

6. The trial was a fully contested one and Mr. Murray advanced a defence that the complainant far from being unknown to him prior to the incident as the prosecution contended was in fact a prostitute or escort who had been working for him in an agency that he ran. This proposition is utterly rejected by the complainant.

The admissibility of interviews

7. It should be explained that the appellant was arrested on the 14th February, 2010 and was detained and then interviewed on a number of occasions on the 14th and 15th February, 2010. In the course of an interview conducted on the 14th February, 2010, the interviewers became concerned that the appellant was showing signs of intoxication and a doctor was summoned. At approximately 11.00 pm on that evening, the appellant was examined by a doctor called to the station for that purpose who found him unfit to be interviewed and certified him unfit for a period of six hours. The doctor's directions were complied with and the appellant was given an opportunity to rest. At trial and again on appeal the point has been taken that the appellant was not certified as medically fit to be interviewed on the morning of the 15th February, 2010, before interviewing recommenced.

8. The written submissions and the oral presentation to this Court by counsel on behalf of Mr. Murray essentially made two points. First, that having been certified as unfit on the evening of the 14th February, that it was necessary that he should be examined again by a doctor and certified fit to be interviewed before he was brought to an interview room again. Secondly, it was argued that the

procedures followed when Mr. Murray was brought to the garda station following his arrest, were invalid in that he was given his notice of rights and informed of his rights at a time when he was, as it later emerged, intoxicated. This appears to have been the point of departure between Mr. Murray and his legal team on the appeal in that Mr. Murray has told the court in emphatic terms that he was perfectly all right when brought to the station, as he had only a glass or two of wine and fully understood what he was being told about his rights. However, he says that the situation changed while he was in the station and that in the station he came under the influence of certain substances. He says that he was under the influence of these substances when interviewed on the 15th February, and was not in a fit condition to be interviewed to such an extent that the contents of those interviews should have been excluded.

9. At trial, the prosecution did not seek to have the contents of the interview conducted on the evening of the 14th February, 2010 admitted. But the prosecution did seek to have four interviews conducted on the following day, during the course of which extensive admissions were made admitted.

10. A lengthy *voir dire* was conducted which saw the judge viewing the tapes of interviews that were in issue. The prosecution say that what the appellant is seeking amounts to a rewriting of the Criminal Justice Act 1984 and the Custody Regulations, in the he is contending that once a person is certified as unfit for interview that they can never be re-interviewed unless re-examined and recertified as fit for interview. It is said that no such provision is to be found in either the Act or the Regulations.

11. The court agrees with the prosecution that there was no mandatory requirement for recertifying the appellant as fit for interview. The court therefore rejects this as a stand alone argument. However, that it is not say that the point ceases to be of significance, because obviously the question of the fitness and well being of the interviewee is a highly relevant consideration when it comes to determining the voluntariness and therefore admissibility of interviews. The court's conclusions in that regard, and this is an issue that will be returned to when considering the question of voluntariness are reinforced by the fact that in the course of his evidence, Dr. Khan, the doctor who was summoned to the garda station made clear that he anticipated that the appellant would be fit for interview after a period of six hours had elapsed. So much appears from the following exchanges:-

> "Q. What did you feel was appropriate in Mr. Murray's case?
>
> A. Six hours.
>
> Q. And after that six hours, would you - did you anticipate that you then have been fit for interview?
>
> A. Yes. When I gave the rest period of six hours, so I deemed fit, fit for interview, after six hours."

12. Later in the evidence the following exchange took place:-

> "Q. You are happy that after six hours Mr. Murray would be fit?
>
> A. Yes, Judge, yes."

13. So far as the issue in relation to the appellant being given his notice of rights when he arrived at the garda station is concerned, which was the point on which senior counsel on his behalf majored and which was rejected in emphatic terms by Mr. Murray, the court does not see it necessary to deal with this issue in any detail having regard to the stance taken by Mr. Murray. However, there was in fact no evidence that Mr. Murray did not know or appreciate the significance of what he was being told when he was given his notice of rights. Moreover, the issue cannot be divorced from what occurred the following morning when interviews recommenced approximately nine hours after Dr. Khan had certified that he was unfit for interview for a six hour period.

14. The first interview began with a caution in the usual terms which was acknowledged by Mr. Murray who signed the memo to acknowledge his understanding of the caution. At that stage he was asked whether he required a solicitor and he indicated that he did not. This exercise was repeated during the course of a number of later interviews.

15. The real issue in the case and this was central to the voir dire that was conducted was the question of voluntariness. The defence perspective on this issue was summarised in these terms by counsel:-

> "Bearing in mind that the test for admissibility is voluntariness, it is respectfully submitted that while the behaviour of the appellant might appear to be that of a person who is remorseful and making genuine voluntary admissions if there was no evidence of intoxication, given that we know that the appellant was under the influence of an intoxicant it is unsafe to exclude the real risk that is behaviour is not explained by remorse, but by the voluntary effects of the intoxication."

16. That the question of voluntariness and by extension the issue of reliability is central to the present appeal was made clear by Mr. Murray after he had discharged his legal team. At the trial, the defence called and relied heavily on the expert evidence of a medical witness, Dr. Antonio Lehane. Rather remarkably, given that the voir dire was all about the admissibility of interviews on the 15th February, these interviews were not viewed by Dr. Lehane, apart that is from a brief excerpt that she saw while waiting in court to give evidence. Inevitably, in a situation where interviews in question had not been viewed the evidence of Dr. Lehane to a significant extent depended on deduction and indeed, it must be said, as was said by the trial judge "speculation".

17. The issue was therefore one of fact for the trial judge in the first instance. The judge had the evidence of the various garda interviewers and others who interacted with Mr. Murray during the period of his detention, and the evidence of Dr. Khan and most significantly had the opportunity to view, and took the opportunity of viewing the interviews of the 15th February. The judge was therefore in a position to compare and contrast the presentation of the appellant on the 14th and 15th February.

18. In dealing with the evidence of Dr. Lehane which was of course based on what she had seen of what had occurred on the 14th of February, the trial judge commented:-

> "That sense of being distracted or not concentrating on his interviewers was not present in the subsequent interviews, insofar as it existed at all. One should not exaggerate the extent to which it was present even in the first. She went on to say: 'he sometimes appeared not to understand questions which were put to him'. Now, I pause and say certainly that was not the position on the 15th and indeed to any great extent I have to say on the 14th, but that is by the by."

19. In the course of his ruling, the judge commented as follows:-

"She [Dr. Lehane] said that people under the influence of a withdrawal are more suggestible. There was, looking at those interviews, there was no basis for a suggestion or suggestibility. What was marked I thought about much of them was the nature of the questions which were almost like the type of questions which would be asked in examination in chief by a Barrister, that is to say not leading questions. Taking the matter as a whole, there was no basis for any actual fear or suggestibility in this case. There was also a reference to unguarded responses. One must go through the 15th. They did not seem to me to be in a category. They seemed to me to be in the circumstances a person of – a person who was in full command and a highly intelligent person and a highly fluent person and she – and it seems to me therefore that first of all insofar as there was drink or drugs on or before his custody on the 14th this had, on viewing these tapes, been completely dissipated. This was a normal person, admittedly a tired person, who was dealing with these matters and I thought that in all the circumstances accordingly I am quite satisfied indeed that he was fit to be interviewed and that what he said was not tainted in any way, nor is there any element of unfairness or otherwise which would require the exercise by me of my discretion."

20. This was quintessentially a matter of fact for the trial judge. It is beyond question there was evidence to support this finding and accordingly this ground of appeal must fail.

21. Both in the Central Criminal Court and before this Court, the appellant has sought to advance a "fruit of the poisoned tree" argument. What is contended is that as the appellant confessed his involvement on the evening of the 14th February, 2012, at a time when he may have been under an intoxicant that this influenced and indeed determined his attitude on the following day. The appellant links the point to the fact that he did not have access to his solicitor initially on the 15th, perhaps it is said because his judgment making was impaired and the argument goes that had he had a solicitor that he might have been advised that the admissions made the previous evening would be or might be found to be inadmissible and that accordingly he had the option of exercising a right to silence throughout the 15th February. The court does not see any merit in this argument. There are a number of difficulties with it. First of all, on arrival at the garda station the appellant was told of his entitlement to contact a solicitor and he understood what his rights were in that regard. Secondly, at the start of the interview process on the 15th February, he was again asked did he want to contact a solicitor and declined to do so. Most fundamentally, there is no suggestion of garda misconduct or ill treatment on the 14th February. There can be no question of someone who has, as the appellant suggests was the position voluntarily ingested substances and voluntarily intoxicated himself rendering himself immune from further questioning once he has regained sobriety.

The complainant as a witness

22. Issues have been raised about both the direct evidence of the complainant and the cross examination of the complainant. So far as the complainant's evidence is concerned, the complaint is that she was led through a number of the sub-incidents that had been dealt with by her, in her statement that appeared in the book of evidence. The court has read the transcript of her direct evidence and sees no substance whatever in the complaint. It is true that the complainant was in some respects a reluctant witness, she was obviously very uncomfortable talking about the details of the sexual depravities to which she was subjected. However, the conduct of the direct examination by prosecution counsel did not go beyond the norm and the judge was obviously conscious of the difficulties that leading questions could cause for the defence. Reading the transcript, one is somewhat surprised that counsel for the defence was moved to protest and surprised that this issue should surface on the appeal. The court is quite satisfied that the direct examination was conducted properly and that this portion of the trial was carefully monitored by the trial judge.

23. So far as the cross examination of the complainant is concerned it is said on behalf of the appellant that he was never given full or adequate opportunity to test her evidence and to demonstrate that his version of events was correct or might reasonably be believed to be correct and that hers was incorrect. This issue is rooted in the fact that while the complainant was saying that she was a stranger to the appellant who was lured into the apartment by him, where she was held prisoner and sexually assaulted and humiliated in various ways over a prolonged period, the case for the defence was put on the basis that far from being strangers the parties were very well known to each other indeed as the complainant had worked for the defendant in his escort business, a suggestion which was utterly rejected by the complainant. An application was made to cross examine the complainant as regards her prior sexual history namely that she worked as an escort specialising in domination services. No objection in principle was raised by the respondent or indeed by counsel for the complainant, but there was objection to the evidential foundation to that questioning. In particular in relation to material on a web site where the defence was suggesting that the complainant operated under the name Tama.

24. The issue was canvassed at some length and ultimately the judge held with the appellant. The cross examination that began took the remainder of that day and the entirety of the following day. The appellant's case was put firmly and forcefully by his counsel. The complainant was asked about her work as an escort, her specialities and expertise and the contents of phones and computers were put to her. It was suggested to her that she had lied in her account from start to finish, that she had in fact stolen a large sum of money from the appellant in the course of her work and that she then sought to repay this by dressing up in a nurse's uniform and offering him sexual services as a way of clearing the debt. It was suggested to her that she had taken drugs on the night and that she had at one point taken a knife and threatened to kill the appellant, her own child and herself.

25. Unsurprisingly the complainant found this line of cross examination distressing, but the cross examination was permitted to proceed at length and the only intervention by the judge was to ask the complainant to answer and respond to an assertion put to her.

26. The appellant complains that he was severely curtailed in the manner in which he was permitted to cross examine the complainant. This ground of complaint relates to an exchange involving the trial judge and defence counsel on day 8 of the transcript, the 4th July, 2013, at p. 22:

"Q. [Defence counsel] You see, I am going to suggest to you the reason you are really here is to cover your tracks, because you told a story on the night and now there is no going back?

A. [Complainant] I did not do anything prostitute. What do I want to cover?

Q. Well Ms. G, you are here as a student, isn't that right, initially?

A. Yes

Q. And does that mean you can work all the time or is it a limited amount of time you can work?

A. I only worked part time.

Q. Exactly, you need extra money.

Judge. I think that's enough, Mr. Lynam, on that topic, really it is. I don't think I am inhibiting your client's case by inhibiting me from canvassing –

Mr. Lynam May it please you judge. I do have one more question I have to put to her in that regard.

Judge Yes

Q. I am suggesting to you that your husband does know about this and that at some point in the last two years, you attempted to bring this to a halt, this prosecution to a halt, and that in fact, you were in contact with Mr. Murray about it . . ."

27. Mr. Murray has suggested that at the point the judge intervened that his counsel was about to embark on a line of questioning which would have exposed the complainant's finances and have revealed them to be consistent only with the case that Mr. Murray was advancing. The court finds that very difficult to accept. At the point the judge intervened the cross examination was well into its second day and the issue or suggestion that the complainant worked as a prostitute had been thoroughly explored. It is noteworthy that the trial judge was not asked to consider his ruling further by defence counsel and that there was no submission or suggestion that the defence was being unfairly or unreasonably curtailed. On the contrary the response of counsel was to indicate that he had one further question and the judge agreed to this being put. In fact the further question was a composite one relating to the extent of her husband's state of knowledge and a suggested attempt to stop the prosecution.

28. There is absolutely nothing in the nature of the response by the defence counsel to suggest that he believed that unreasonable constraints were being imposed upon him. It is perfectly clear from the transcript as a whole that had he believed that was the case he would have vigorously protested and properly so. The court does not accept improper or unreasonable constraints were imposed upon the conduct of the defence. On the contrary the defence was afforded considerable latitude and very properly so.

Disclosure

29. This ground of appeal has its origin in an application that was made at the outset of the trial after the appellant was put in charge of the jury, but before any evidence was heard. It was described by senior counsel opening the application as a "prohibition application". The basis of the application is that the defence had sought telephone records in respect of a number of different telephones. From the opening statement of counsel on the issue it appears that the defence interest in the phones was twofold, first it was hoped to establish contact between the defendant and the complainant prior to the events of the 13th February, 2010 and also it was hoped to establish that on a subsequent occasion, while the applicant was in custody that he had further contact with the complainant. A further area of interest is that it was suggested that the telephone records of the complainant would potentially show that she was engaged in activities as an escort.

30. The request for disclosure of telephone records which was made in the context of a request for wider disclosure was first made in October 2011, this in a situation where the offences had occurred in February, 2010. Telephone records are ordinarily kept for a period of two years. Mr. Murray gave evidence in the course of the "prohibition application" and he accepted that in February 2011, he knew that there were important contacts on a particular phone and notwithstanding that a letter was written on his behalf which made no mention to phone records.

31. The prosecution also relied on the fact that at no stage during the course of the detention of the appellant after the incident did he suggest that he knew the complainant or that there had ever been any prior contact with her.

32. In the course of submissions counsel for the appellant said:-

"Without wishing in any way to be presumptuous that the court may wish to hear further evidence as in within the trial before determining whether or not there is a real unfairness, and certainly the authorities do allow for that so I am just asking again for the court to consider this as being a way of sort of a . . . ."

33. The prosecution point out that the first indication that there was a contention that there was prior contact was in the course of correspondence which commenced in October 2011, but which stage many of the phone records which it is now said had the potential to be relevant would have ceased to exist. The prosecution also argued that it was incumbent on the defence to carry out its own inquiries and access those records over which they had control.

34. The judge ruled on the issue as follows:-

"What I am going to do, actually, is I am going to postpone this until the conclusion of all the evidence, Mr. Dwyer [then senior counsel for Mr. Murray] I think that's the sensible approach, because then everybody can see the full picture, so to speak, and at this junction we cannot, by definition, see it. We would have on, theoretically, I suppose on a voir dire to hear all the evidence. And of course it is manifest that if one were, for example secretly to prohibit a trial, for example while it would be done on the anticipated evidence, it would be done on the entirety of it, and this process here before us is quite a different process since this is a trial court. So I am not going to, on the basis of – I believe the trial should, at this juncture, proceed, and that it is only having regard to the entirety of the evidence that one can make an informed judgment about the extent to which there might be, for example a real and unavoidable risk of a fair trial, and that is one avoidable notwithstanding rulings and so on by the trial judge. And I think that is the point in the case. Ok?"

The judge then continued:-

"That's the central thing, because I would like to, I mean, as a matters presently stand, I mean, I have some preliminary views in relation to the matter, but they are merely preliminary, and I don't think – I cannot give you a settled decision until I hear all of the evidence. I should say this to you, if I - if there was no alternative, I would refuse the application now. But I don't believe that would be right and fair to the defence. I think we need to hear all the evidence. It would – orders have been made for production. That is something in issue at the beginning of a trial . . . and I should say this, I think is it incumbent on a judge to be vigilant throughout the trial in respect of matters of this type, which have been raised in preliminary applications. Ok?"

35. Despite the indication that this was an issue that could be returned to, the issue did not in fact arise subsequently.

36. In the court's view the absence of the phone records does not render the trial unsatisfactory. This was not a case where the nature of the defence and therefore the potential relevance of the telephone records could have been expected to be anticipated. There was significant delay on the part of the defence in seeking records to the extent that many of records that were said to be relevant had ceased to exist by the stage the issue was first canvassed. The ground of appeal must therefore fail.

Social Media
37. It was submitted in the course of written submissions that in modern trials a judge has to give a warning in relation to the possible influence of social media. Realistically Mr. Murray has chosen not to argue this point. The sequence of events at the opening of this trial meant that there was ample scope for the defence to seek any warnings that they wanted and to have any warnings tailor made for their purposes. The court embarked on the prohibition application immediately after the appellant was put in charge of the jury and the jury left the court without hearing anything about the case other than the arraignment. If the appellant or his adviser felt that any particular warnings were necessary that that was the time to ask for them.

The admissibility of exhibits located in the course of a search
38. This arises in circumstances where the *locus in quo* 3 Oxmanstown Green, was designated as a crime scene by gardaí when they became aware of what was alleged to have occurred there. A stage was reached where the apartment ceased to be designated as a crime scene. However, on the 15th February, 2010, members of An Garda Síochána returned to the premises at which stage the appellants' wife was there and she permitted them to enter. A number of items were found which were said to be of evidential significance. The argument is made that the unusual sequence of events meant that the evidence did not meet minimum standards of relevance and admissibility.

39. In the course of submissions on this issue, counsel had said:-

> "So, I say, my Lord, that these are issues that go to the fundamental reliability of the evidence that was proposed to be called and obviously there are issues of weight, but I am instructed to make the case and I do make the case that these are issues which go to the very reliability and admissibility of the items which it is sought to adduce."

40. The court is in no doubt that the issues raised go to weight rather than admissibility. Accordingly the court has no hesitation in rejecting this ground of appeal.

41. In summary then the court has considered all of the grounds of appeal and is quite satisfied none are made out. The trial has not been shown to be unsatisfactory or the verdict to be unsafe and the court will therefore dismiss the appeal and affirm the conviction.