



THE COURT OF APPEAL

Record No. 215/2016

**Mahon J.
Edwards J.
Hedigan J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

D. McG

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of March 2018 by Mr. Justice Mahon

1. The appellant was tried before a jury at the Central Criminal Court and unanimously convicted on the 3rd June 2016 of seventeen counts of sexual assault and rape. He was sentenced on the 4th July 2016 to concurrent imprisonment terms ranging from five years to twelve years. It was also directed that there be post release supervision for a period of five years from the date of his release from prison. This is the appellant's appeal against conviction.

2. The seventeen counts are summarised as follows:-

- Count nos. 1 to 10 inclusive: Sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s. 37 of the Sex Offenders Act 2001.
- Count nos. 11, 16 and 17: Rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990.
- Count nos. 12, 13, 14, and 15: Rape contrary to s. 48 of the Offences Against The Person Act 1861 and s. 2 of the Criminal Law (Rape) (Amendment) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990.

3. The complainant in respect of all counts was the appellant's step daughter, B. The appellant, B's mother and B's three siblings moved to Ireland from abroad in 2011. B was then eleven years old. They lived in four different addresses in County Cork during the period when the sexual abuse of B took place, and when she was between the ages of eleven and fifteen. B alleged that the appellant abused her on a fairly regular basis, and usually when her mother was out of the house working. The abuse included the appellant digitally penetrating B's vagina, touching her breasts, requiring her to touch his penis, oral rape, attempted sexual intercourse and one incident of abusing her in the shower. The abuse occurred at the different addresses at which the family lived, including the home of B's maternal grandmother. One incident took place in the appellant's car. An older sister of the complainant recalled that the complainant alleged to her and her grandmother in 2005 that particular incidents of abuse had taken place. She gave evidence that when confronted by her grandmother the appellant admitted that these incidents had indeed occurred. Similar evidence was given by the grandmother. The complainant's mother gave evidence to the effect that the appellant had admitted incidents of sexually abusing the complainant to her. When questioned by gardaí the appellant denied the allegations but did admit touching the complainant's breasts in the course of tickling her.

4. The grounds of appeal submitted on behalf of the appellant are:-

(i) The learned trial judge erred in law in admitting into evidence certain alleged admissions made by the appellant when same ought to have been excluded. (This ground was stated by counsel for the appellant, Mr. Munro SC, as being the primary focus of the appeal).

(ii) The learned trial judge erred in admitting into evidence and / or failing to appropriately edit the memorandum of interview with the accused with the result that the jury were unlawfully prejudiced against him.

The admissions

5. The focus of this ground of appeal is the evidence of what was said to and by the appellant on a date in August 2005 at the home of the complainant's grandmother, JT. Evidence in relation thereto was given by the complainant, JT, the complainant's mother, Mrs. McG and the complainant's sister, Ms. McG.

6. In the course of her evidence on the first day of the trial, the complainant gave a graphic account of the allegations of rape and sexual assault which formed the basis of the various counts with which the appellant was charged. She went on to recall a discussion or conversation which took place in the home of her grandmother in the course of the period of her living in her grandmother's home between the summer of 2005 and January 2006. In the course of her examination in chief by Mr. O'Leary, counsel for the prosecution, the following was stated:-

"Q. And was there something said by D. McG in your presence to I think your grandmother in (address)?

A. It was my grandmother and my mother, yes.

Q. Yes. But I only want you to say what you heard him saying, you understand, it's not what somebody else said to you, it's what you remember Mr McG himself saying to you or to them, but in your presence, you understand me?

A Yes. I remember him admitting to some of the stuff that he had done to me, he..

Q When was that roughly, were you living in your Nan's house?

A. I had not moved in just yet.

Q. Okay?

A. It was just before I moved in.

Q. All right?

A. Like literally a day before I moved in, I went to my grandmother's house one night after a row with D. McG.

Q. Okay?

A. And I'd had enough, so I -

Q. Yes?

A. Sorry.

Q. You said something to your grandmother?

A. Yes.

Q. As a result of that your grandmother presumably contacted D. McG - isn't that right?

A. Yes.

Q. She presumably said something to him?

A. Yes.

Q. And then as a result of that he came over to your grandmother's house; is that right?

A. Yes.

Q. And you were there, and your mother was there, is that right?

A. Yes, and my sister.

Q. And your sister?

A. Yes.

Q. And - and what do you remember him saying, that's all - all I'm interested in?

A. He said that he had done some stuff to me, he wouldn't specify exactly, but he just said like, "I only did some of the small things, none of the big things".

7. At the conclusion of the complainant's evidence the learned trial judge, in the absence of the jury, was addressed by counsel for both sides in relation to the issue of the admissibility of the evidence (referred to above) given by the complainant, and also in relation to the proposed calling by the prosecution of the complainant's grandmother, mother and sister to give evidence in relation to the purported admissions made by the appellant in the complainant's grandmother's house in 2005. In the course of his submissions to the learned trial judge, Mr. McGrath SC (for the appellant), said:-

"Now, Judge, the difficulty, I say, that this evidence has is that it is not admissible under any exception to the hearsay rule. My friend has made it clear that it is not - he is not seeking to admit what (the complainant) said, as evidence of recent complaint and that-- and so therefore what my friend must be seeking to admit this is as a form of admission. And in my respectful submission the evidence does not amount to an admission for a number of reasons. Firstly, if I could ask the Court to look to the evidence, proposed evidence of (Mrs. McG), this is not a case where, for example, the normal position where an accusation is made, for example, in the presence of an accused person of criminal wrongdoing and the accused person admits either expressly, or by implication, or by his conduct, or possibly indeed by his silence, to the accusation. And that would be, in my respectful submission, that would be the evidence which the Court would be entitled to admit as a classic exception to the hearsay rule, as an admission against interest. But none of the evidence which it is proposed to call amounts to such evidence when one drills down into it."

8. Mr. McGrath SC went on to make detailed submissions in relation to the purposed evidence to be given by the grandmother, mother and sister of the complainant. Mr. O'Leary SC submitted that the evidence was admissible, that it was probative and did not offend against the rule against hearsay.

9. At the conclusion of these submissions, the learned trial judge briefly ruled as follows:-

"All right, in relation to the three statements of (the grandmother, mother and sister of the complainant), I'm going to allow those in the limited circumstances in which you've outlined, Mr O'Leary..Clearly they shouldn't go beyond what, and I think there's probably even no need for me to say that, but just in case, it shouldn't go beyond what you've said it is, it does appear clear from (the mother's) statement that (she) repeated what (the complainant) had said."

10. On the second day of the trial Ms. McG, the complainant's sister, gave evidence. In the course of her evidence in chief, she was questioned by Mr. O'Leary SC in relation to the conversation in the grandmother's house in 2005, already referred to. The following exchange took place:-

"Q. Okay, all right. And he came over to the house. You say in your statement, "I remember in the house him coming in and Mum repeating what (the complainant) said"; is that right?"

A. That's correct.

Q. Okay. So, she had told him what (the complainant) had told you earlier on, or all of you, earlier on that evening, is that correct?"

A. Yes.

Q. Okay. I think he denied this initially and said (the complainant) was making it up; is that correct?"

A. Yes.

Q. Okay. I then think that you say that, some time later, "He changed his mind and admitted it in front of me, Mum, Gran, and (the complainant) that what (the complainant) had said was true"; is that correct?"

A. Yes.

Q. And then you also say, "I remember D.. (that's Mr. McG).. sitting and crying after he admitted that everything he said was true"?"

A. Yes.

Q. Is that correct?"

A. That's correct."

11. The complainant's sister was then cross examined by Mr. McGrath SC. The following exchange between them took place:-

"Q. Now, we've heard Mr McG in his evidence, has, or sorry, in his statement which the jury will hear in due course, indicates that what happened was that he agreed that he had touched you sister's breasts and that this was as a result of, or during the course of, tickling her; do you recall him saying that?"

A. He didn't actually say what he did.

Q. Okay?"

A. He just agreed to everything that my mum mentioned.

Q. Well, can I just probe you a little bit in relation to that?"

A. Yes.

Q. Because that's what he says, okay, and what your sister indicated, that's your sister (the complainant)-?"

A. Yes.

Q. that what she indicated happened in her statement to the guards, she indicted that, "D came over to the house, denied everything at first but then agreed he had just touched my breast, or something small like that, but I was screaming at him to tell the truth." Do you recall your sister, is your sister, that's what your sister's recollection of it was?"

A. That's my sister's recollection, yes.

Q. Yes. Okay, thank you very much?"

A. Okay.

Q. Sorry, I'm suggesting to you, first of all, I'm suggesting to you that what Mr McG, his recollection is correct and that I'm suggesting to you also, and you agree that your sister was there, and you've heard what your sister says and I think you'd accept that what she said is somewhat different to what you recall of that incident?"

A. I honestly can't remember that night. It was a very emotional night."

12. The complainant's grandmother then gave evidence. In the course of her examination in chief by Mr. O'Leary SC, the following exchange took place:-

"Q. ...And do you remember a particular night, or day, when (the complainant) came over to you and said certain things to you, isn't that right?"

A. Yes.

Q. In relation to D. McG, okay? I don't want you to say what they were, but you remember that particular night, do you?"

A. Yes.

Q. All right, okay. And I think, as a result of that, somebody phoned D. McG, isn't that right? And he came over to your house; do you remember that?"

A. Not exactly like that.

Q. All right?

A. Can I say? I phoned (complainant's mother) and D. answered her phone.

Q. Oh, I see, okay. No, no, I think you're misunderstanding me. I'm not worried who phoned D. Did D. arrive at your house that night?

A. Yes.

Q. And the last witness as well; isn't that right?

A. Yes.

Q. Okay. So, you were all there and I think it appears to be the case from the last witness that these, well, I should just read from your statement in that regard. The matters that (the complainant) had spoken about were relayed to D. McG.; isn't that right?

A. Yes.

Q. Okay. And then you said in your statement, "D. said, in these exact words, said to (complainant's mother).. " as in, said to your daughter and his wife, who had just put these matters to him - "...we were all there in the house and, in these exact words.. "... this is what you said to the guards ", he said, "I did it, I admit I did it." Do you remember that?

A. Yes.

Q. Did that happen?

A. Yes.

Q. And have you a clear recollection of that?

A. I do.

Q. Thank you very much indeed?"

13. The complainant's grandmother was then cross examined by Mr. McGrath SC., as follows:-

"Q. And (the complainant) has told the guards something different about what happened that particular night. (The complainant) has told the guards that, "D. came over to the house, denied everything at first, but then agreed he had just touched my breast, or something small like that, but I was screaming at him to tell the truth." Do you remember that?

A. No.

Q. Okay. And D. McG. says in his statement, which the jury will hear, he also mentions the touching of the breast in these circumstances; and that he had touched the breast in circumstances of tickling. Do you recall that conversation?

A. Yes, I do, sorry.

Q. And I'm suggesting to you that that's what was said that night. You recall that?

A. D. did say that he did it -

Q. Yes?

A. D. said "Don't press the children. I did it."

Q. But a moment ago, I think you recall this conversation or this mention of tickling and touching the breast. Do you recall that? You said, a moment ago, I think you'd said you did?

A. Yes.

Q. Yes?

A. But he - when he did say, he said - cried that, "Don't question the children. I did it."

Q. Okay. Thank you very much?"

14. The complainant's mother then gave evidence. She was examined by Mr. O'Leary SC as follows:-

"Q. Yes. And I think, at a certain stage, (the complainant), your daughter, said certain things to you in the presence of others; isn't that right? I don't want to know what she said, but they related to D. McG, isn't that right?

A. Yes.

Q. Yes. You remember all that?

A. Yes, sir.

Q. And I think did you ring D. McG. then, or somebody did, to get him to come over to the house; is that right?

A. He came over, yes, sir.

Q. He came over, all right. Yes, doesn't really matter. And I think that whatever (the complainant) had said was relayed to him then, and said to him, isn't that right? Do you remember that?

A. That is correct.

Q. The various matters, isn't that right?

A. Yes, sir.

Q. Okay. And I think you went downstairs, I think you had been downstairs. I think you screamed at him, perhaps, but, in any event, you then say, in your statement, "He confessed to us, everyone - well, me, my mother and (complainant's sister) - that he did as what (the complainant) said and that (the complainant) was telling the truth the whole time"; is that right?

A. That is correct, sir.

Q. You remember him saying that?

A. Yes, sir.

Q. And then, finally, he said he could not stand back and see (the complainant) suffer like that anymore and that she was telling the truth?

A. Yes, sir.

Q. Do you remember him saying that?

A. Absolutely, sir.

Q. Thank you.."

15. Mr. McGrath SC then cross examined this witness in relation to her evidence on this issue. The following exchange took place:-

"Q. ..You see, just in relation to your daughter, your daughter, who was clearly there at the time and has given evidence. Her recollection, and she's the person, I suppose, most intimately involved in this, her recollection was that what D. McG. said in relation to this, was - and I'll quote it verbatim, in other words word-for-word so that I'm as fair as I can be - "D. came over to the house, denied everything at first but then agreed he had just touched my breast, or something small like that, but I was screaming at him to tell the truth. He wouldn't admit any more." Is that correct?

A. No. He admitted to everything. There was just a lot of emotion in the house.

Q. Okay?

A. Everybody was crying, you know, D. was crying and - but he did. He was sitting on the bed, he was crying and he said that he doesn't want to see her suffer anymore and everything she's saying is true.

Q. Well, can I just - I mean, she was there, your daughter, isn't that right?

A. Yes, sir.

Q. When this happened, and that's her recollection?

A. But she was also very young at that time.

Q. Yes, yes. And as it turns out, and just as a matter which it'll be again for the jury to decide, Mr McG., in his interview, that's Mr D. McG. in his interview, admitted to touching her breasts in the course of tickling her and that's what he says he admitted to on that particular evening, but you clearly have a different recollection; is that correct?

A. Absolutely, sir."

16. No application was made by Mr. McGrath SC in relation to the evidence outlined above.

17. Mr. Munro SC made a number of submissions in relation to this evidence. He has argued that the evidence given by the complainant and the complainant's grandmother, mother and older sister ought not to have been admitted. He submitted that the jury had, in effect, been told that the appellant had admitted to everything alleged against him, but in circumstances where it was unclear what he was accused of at that time by the complainant. It was submitted that this evidence from the complainant, her grandmother, her mother and her older sister merely established that a certain unspecified allegation had been made against him by the complainant at that time and that, in response, and in the presence of the four witnesses, the appellant had maintained that all he had done was to innocently touch the complainant's breasts while tickling her but at the same time acknowledged that the complainant was telling the truth in relation to the allegations she was making against him, and that he did not want her to suffer anymore because of them. The submission therefore was that the jury were presented with evidence which suggested that the appellant was guilty of everything alleged against him by the complainant and that such allegations were those which formed the basis of the charges against him.

18. The evidence of what was said in the complainant's grandmother's house was specifically referred to in the course of the learned trial judge's charge to the jury. He said:-

"...She was asked was there something said by D. McG in her presence in her granny's house and she said her grandmother was there, her mother was there and her sister was there. She said she had not moved into her granny's house at that stage and before she moved in D. McG came over to her granny's house and she said, "He said that he had done some stuff to me. He wouldn't specify exactly but he just said like I only did some of the small things, none of the big things.""

19. He also re-visited the issue later in his charge when he stated:-

"She was asked about the events in (XY) in August of 2005 and it was put to her that in her statement to the guards she had said, "(D) then came over to the house, denied everything at first, but then agreed he had just touched my breast or something small like that but I was screaming at him to tell the truth. He wouldn't admit anything more." She agreed that that is what she had said in her statement. It was put to her that in her direct evidence here in court she had said, "He said he had done some stuff, some of the small things, none of the big things" and she agreed and it was put to her then that these two accounts were materially different and she said, "The words were different but basically - they basically mean the same." It was put to her that the precise admission was he denied everything at first, then agreed that he had touched her breast or something small like that and she agreed and she said, "He agreed to minor abuse."

20. She was asked had the appellant not said that this happened in the course of tickling and she responded *"I don't remember him saying that"*. It was put to her that he said he may have touched her breast in the course of tickling her and she said, *"I know the difference between tickling and not been tickled"*. She said, *"I particularly heard him say that day that he confessed to certain things and I know it wasn't tickling"*. It was put to her that he did not admit to that and she said *"I disagree with that highly"*.

21. No requisition was raised in relation to this issue at the conclusion of the charge.

22. The appellant, in the course of submissions made to this court, relies on the following extract from Archbold, *Criminal Pleading, Evidence and Practice*, 2017, and the respondent takes no issue in relation to it.

"A statement made in the presence of a defendant accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save insofar as he accepts the statement so as to make it in effect his own.

If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is for the jury to determine whether he accepted it in whole or in part. A mere denial does not necessarily render the statement inadmissible. There is no rule of law that evidence cannot be given of an accusation of a crime and of the behaviour of the defendant on hearing such an accusation where that behaviour amounts to a denial of guilty. Although there is no such rule of law, the evidential value of the behaviour of the accused person where he denies the charge is very small either for or against him, and the effect in the hands of the jury of his been publicly or repeated charged to his face with the crime may seriously prejudice the fairness of his trial. The judge may, therefore, in most cases rightly exercise his influence in order to prevent such evidence being given where it would have little or no evidential value: R v. Christie [1914] AC545 HL. As to admissibility, the questions for the judge to consider are whether a jury properly directed could conclude that the defendant had in fact adopted the statement in question; if so, whether the matter is of sufficient relevance to justify its introduction in evidence; and whether its admission in evidence would have such an adverse effect on the fairness of the procedures that it ought to be excluded."

23. The respondent referred the court to an extract from McGrath, *Evidence 2nd Edition 2014*, paras 5/105 to 5/106, as follows:-

"The statement by a party either orally or in writing, that is adverse to his or her case is admissible as an admission. The straightforward example can be seen in DPP v. Buckley with a statement by the accused that a brown substance found in his pocket was cannabis was admissible as an admission on a charge of possession of a controlled substance.

It is not necessary that the evidence of the admission be given by the person to whom it was made. It was held in R. v. Simmons that evidence should be given of what a party was overheard saying to another or even to himself if it was an admission."

24. The witnesses who gave evidence in relation to this issue were the subject of robust examination by counsel for the appellant. The real issue was whether the appellant had, as contended in his statement, admitted only to an innocent touching of the complainant while tickling her, or whether he had admitted to something altogether different and more serious. For example, in the course of examining the complainant's sister, Mr. McGrath SC asked the following question:-

"Now, we've heard (Mr. McG) in his evidence, has - or sorry, in his statement which the jury will hear in due course, indicates that what happened was that he agreed that he had touched your sister's breasts and that this was as a result of, or during the course of, tickling her; do you recall him saying that?"

25. The test to be applied on an issue as to the admissibility of evidence which is both prejudicial and probative arises for consideration quite frequently in criminal trials. It is primarily the duty and responsibility of the trial judge to consider submissions made as to whether particular evidence should or should not be excluded and then rule on the matter. An appellate court will be slow to interfere with the significant level of discretion enjoyed by a trial judge in this respect, although it will do so where justice so requires. In the judgment of the court delivered by Macken J. in *DPP v. Carney* [2011] IECCA 53, the following was stated:-

"On the merits, it is undoubtedly the case that such answers are prejudicial. It is equally clear from the case law that the courts have recognised and acknowledged that in a prosecution, much of the evidence will be prejudicial. Indeed, it might even be said, without serious contradiction, that a great deal of material, given the nature of crimes and trials, will be prejudicial to an accused. That is why, in essence, principles have been established for the specific purpose of protecting an accused from an unfair trial when the evidence sought to be adduced, even if prejudicial, must in an appropriate case, be measured or balanced against its probative value so as to ensure that prejudicial material, unfairly outweighing its probative value, cannot be admitted."

26. The judgment went on to say:-

"The exercise by the learned trial judge, therefore, in concluding that the answers were both relevant and probative,

when assessed and measured against the principles outlined to him and the arguments made, are clearly indicative of the judicial and careful exercise by the trial judge of the discretion vested in him."

27. In this case, the Court is satisfied that the learned trial judge properly exercised her discretion to admit the evidence of the witnesses referred to in relation to the subject matter referred to. Such evidence as was given in relation to the particular issue was reasonably summarised by the learned trial judge in the course of his charge to the jury.

28. The Court is satisfied that the admission of this evidence did not render the trial unfair, and this ground of appeal is therefore dismissed.

The memorandum of interview

29. This ground of appeal relates to the contents of a garda interview of the appellant while in custody. In the course of the trial, the appellant sought to exclude as evidence certain answers and questions put and listed in the course of that interview. Specifically, what was sought to be excluded was the following:-

"Q. Everything I have put to you so far, all the allegations you say are not true or did not happen, and yet, when I say why B would say these things, you can't give me an explanation?"

A. When I pulled away from B, because I was very close to her, maybe it had an effect on her. I'm very surprised that these allegations came up.

Q. So it's because you pulled away from her?

A. Yes. By that I mean not giving her affection.

Q. Do you think it affects her, this?

A. I think no. I think she was doing the best of all them. She is the most able.

Q. Do you know B made these allegations about you three days ago, and you say she is the most able, as you say; why would she say this?

A. Because maybe she is being influenced.

Q. But you said she is the most able, why?

A. I don't know.

Q. Any contact with the family?

A. No, not with the kids or M. I spoke to B six months ago last December and not since. I thought we had a close relationship as I gave her lifts in my car, shopping, et cetera."

30. The basis for the objection was that the questions and answers referred to above suggested that there was an onus on the appellant to give an explanation as to why an allegation was made against him.

31. The learned trial judge ruled as follows:-

"...There is no obligation on any accused and that's part of the standard charge, to advise the jury in relation to that aspect of it and I usually advise the jury in relation to the fact that an accused person doesn't give evidence in court that they can't speculate about that in any way. I also usually advise them that, when a person is in a garda station, they're under no obligation to answer any questions whatsoever and that would be part of the standard direction. Here, I have to say, it appears frequently in interviews that the guards ask questions as to why do you think somebody would say these things? Answers are given, and I don't see that there's any reason - it's part of the interview and I don't see that there's any reason why that shouldn't be admitted. I will be telling the jury, as I say, and I'll put emphasis on it in due course and if I fail to do so, you might remind me, but that there's no requirement and no obligation on anybody in custody to answer any question whatsoever. I've no doubt that I'll be told at some stage that I should tell the jury that, in answering their questions, that Mr McG was cooperative and I've no difficulty doing that either. So, I'll allow that portion."

32. The learned trial judge did as he suggested he would do in the course of his charge to the jury, and no requisitions were raised in relation to this particular issue.

33. The questions put to the appellant in the course of his garda interview could not be said to be particularly prejudicial. They are of a type which one commonly comes across in the course of the interviewing of accused persons by gardaí. In the court's view no unfairness arises by the admission into evidence of a portion of the garda interview, particularly having regard to the extensive and comprehensive nature of the learned trial judge's charge to the jury. This ground of appeal is therefore dismissed.

Conclusion

34. As neither ground of appeal argued on behalf of the appellant has succeeded the Court will dismiss the appeal.