THE COURT OF APPEAL

Sheehan J
Mahon J
Edwards J.

Record No : CA 201/15

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

FOLAJIMMY AWODE

Appellant

Judgment of the Court delivered 20th February, 2017 by Mr. Justice Edwards

Introduction
1. This judgment is concerned with an appeal by the appellant against his conviction by a jury, who delivered a 10/2 majority verdict, at the Dublin Circuit Criminal Court on 15th of June, 2015, on a single count of sexual assault contrary to s. 2 of the Criminal Law (Rape Amendment) Act, 1990. Following the appellant's conviction he was sentenced to two years imprisonment with the final six months suspended for a period of three years.

The Relevant Evidence
2. At all material times the complainant, S.L., was an in-patient at the Mater Private Hospital in Dublin. On the 24th of November, 2013, she had been admitted to the hospital and was scheduled to undergo surgery on her back, and specifically a lumbar discectomy, on the following day to address persisting symptoms from an injury that she had sustained in an earlier accident. She was accommodated on a particular ward, and specifically in a four bed room on that ward which she was required to share with a number of other women. Each bed was capable of being screened off from the others by means of cubicle curtains.

3. On the evening in question the appellant was working at the Mater Private Hospital as what is known as a "bank carer". A bank carer, as the Court understands it, is a health care assistant provided by an outside agency to a hospital or nursing home on an ad hoc basis as the need arises, and frequently such a person may be on a zero hours contract. The jury heard that on the evening in question the appellant's primary responsibility was to care for a confused patient in another room on the complainant's ward, and also to answer any calls for assistance from other patients on the ward in question. He was the only such carer on the ward that night, alongside the nurses.

4. The jury heard that the complainant had been given medication, namely, a muscle relaxant and a painkiller, before bed. These had been prescribed by her neurosurgeon and the complainant told the jury that they had no effect on her alertness. The complainant went to sleep around 11 p.m. and was fasting from midnight. The curtain had not been pulled fully around the complainant's bed.

5. The complainant and the appellant had had some interaction when another patient in the complainant's room had vomited in the en-suite toilet, and the appellant had been asked to come and clean up, which he did.

6. The complainant told the jury that she was asleep and lying on her right side when she awoke in response to a feeling or sensation that her right breast was moving. She did not initially understand what it was and, before opening her eyes, attributed the sensation in her own mind to the fact that because she was in hospital she was wearing a bra, which she would not normally wear in bed, and thought *"Oh, maybe it's just the bra"*. She then opened her eyes briefly and closed them again, and once more felt the sensation in her breast. She said *"it was like somebody was just moving my breast"* and characterised it as being the *"sensation of somebody rubbing against it"*. Under cross-examination, she told the jury that had she been at home, she would have understood the sensation immediately as being someone touching her breast, but because of her unfamiliar clothing and surroundings, it took her longer to comprehend the sensation. She opened her eyes again and rolled onto her back. On doing so, she saw the appellant move his right hand away from her body quickly before fleeing. She said he was on the right hand side of her bed and he looked *"totally stunned"*. She recognised the appellant from their earlier interaction, when he had come to clean the toilet. She testified that he was wearing a yellow polo shirt.

7. Under cross-examination by the defence, she was asked about a statement she had given to Una McKeown of the hospital's Human Resources Department, where she said *"I don't know if I fell back asleep"* referring to the period in between waking up initially and subsequently rolling over. She said she now didn't think she did and that answer may have been given in response to a question of whether she fell back to sleep, and that she may have meant sleep in that context to mean "dozing".

8. The defence also cross-examined her in relation to conversations she had had with Tresama Joseph, a staff nurse on the ward that night who walked into the room just after the incident. The prosecution did not initially intend to lead this evidence, recognising that these conversations involved complaints by the complainant which would not normally be admissible at the behest of the prosecution, on the basis that they would offend the rule against self corroboration, the only exception being where the prosecution intended to rely on such evidence for the limited purpose of showing that the complainant's conduct in so complaining was consistent with her testimony. However, the defence indicated to the prosecution that they in fact wanted such evidence to be led, and the prosecution, with some reluctance, agreed to do so. Evidence in chief concerning the complaint was then led, following which the complainant was then asked in cross-examination whether she had told Ms Joseph she was dreaming:

> *Q. I think again getting back to and I'm only mentioning her because I think Ms Joseph Tresama - I think that she has suggested I think that you had thought you had said to her that you thought that you were dreaming, that you might have been dreaming?*
>
> *A. No. In fact, I probably said I wasn't.*

Q. Okay?

A. Because when she came back in and said he said he wasn't in the room, I said, "He was in the room. I wasn't dreaming" or do you know what I mean? That was the context of that conversation.

9. Ms Joseph was then called in chief and was later cross-examined. She told the jury she had administered the complainant her medicine. The appellant had been on the ward that night as a "bank carer". Ms Joseph told the jury that after midnight, she had done her rounds. She had found the complainant standing at the end of her bed and seeming stressed. The prosecution asked Ms Joseph about the conversation she had had with the complainant at that point:

A. I just I pulled the curtains completely and I just made sure S.L. was lying down comfortably in the bed. Then, I started to I asked her, " what happened? Tell me now." Then, she said she felt as if

Q. Well, I think she indicated at that point that the male carer had been there and that at point

A. Yes. She told me

Q. -- you dealt with you went out to talk to him; is that correct?

A. No, she told me, like, she felt as if, you know

Q. Well, just perhaps the details of what she says happened well, certainly if you want to say whatever it was that happened I think that my friend is fine with that?

A. Yes. She told me, like, she felt as if her breasts were moving. So, that's what she told me. Then, I asked her, "was he here?" and then she told me, like, she felt as if he was there and then I got stressed myself. So, I went out and I called Eileen Daly, my colleague, senior nurse, to come and talk to her further and give her reassurance. Eileen came back Eileen came and spoke to S.L..

10. Subsequently, the defence cross-examined Ms Joseph in relation to a statement she gave to Gardaí suggesting that the complainant thought she was dreaming:

Q. But I think you also said that she had said to you she felt that she was I'll put it to you exactly what you said. "She thought she was dreaming. She said she thought she was dreaming"?

A. Initially, she told initially, she thought that she was dreaming and initially, she thought that she was dreaming.

Q. Could you please, Ms Joseph

A. Then, she said she felt that again and then she woke up.

11. On re-examination by the prosecution, she was asked if the complainant had seemed like someone who was dreaming. Ms Joseph replied that *"it did not feel like a dream."*

12. Next, the jury heard from Dr Pádraig O'Neill, who was the complainant's neurosurgeon and the admitting consultant. He told the jury he had prescribed two drugs, a muscle relaxant (Valium) and an anti-inflamatory painkiller (Naprosyn). He told the jury this was quite a small dose, and would have no impact on sedation or perception.

13. Subsequently, the jury heard from M.C., a fellow in-patient in the room on the night in question. M.C.'s bed was across from the complainant's, and she said the curtain was pulled all the way down the complainant's left side of the bed and across the bottom, but she could still see the right side of the complainant's bed. She told the jury that after the main light in the room was turned off, she continued reading with her bedside lamp on. The appellant walked into the room twice, and on one of the occasions she waved to him, but got no response. M.C. had turned off her bedside lamp and removed her reading glasses when the appellant walked into the room for a third time. She was not asleep, and saw the appellant walk to the far end of the room before turning back and standing beside the complainant's bed. She could only see the appellant's legs. She told the jury that he remained at the head of the complainant's bed for a few minutes, before he *"scurried"* out of the room.

14. The prosecution then led evidence in relation to her subsequent dealings with the complainant. Once again this was evidence of complaint that could not normally have been led at the behest of the prosecution, save for the limited purpose alluded to earlier. However, as in the previous case, the defence had indicated to the prosecution that they wanted this evidence to be led. Accordingly, the following evidence was adduced in chief from M.C.:

Q. And what did you do?

A. Well, S.L. then jumped out of the bed and I jumped as well because she was she more or less shouted, you know, "Somebody's been at, you know, my chest."

Q. And did you get up before or after she had gotten out of bed that you're aware?

A. I really again, I couldn't swear to that. Like, it just happened and I'd say we could have done it it could have happened simultaneously. I couldn't swear.

Q. And was there anybody else in the room at that point?

A. Well, there was the old woman but she was totally she was very sick that day and she wasn't aware of anything. She was sleeping all day. That woman Kay that was in the bed beside me.

Q. And did any other nurse come into the room?

A. Oh, they did after that but not at the not at that particular time.

Q. And what happened? I think did you speak with S.L. or what took place?

A. Yes, I did. Yes. She said to ring the bell and I don't know whether she rang it or I rang it. I can't honestly say which of us.

15. In cross-examination the defence asked M.C. if there had been coughing in the room at the time the appellant came in. M.C. replied that there had been coughing all evening, but it was not coming from her room.

16. The next witness was Eileen Daly, an experienced staff nurse at the hospital who was on duty on the night in question. She told the jury that the appellant's duties had been to look after a confused patient in another room, and to answer any calls for assistance from other patients. She said the appellant entered the office on the ward at midnight, to take his bag and timesheet for the night sister to sign. Ms Daly said the night sister would not normally be there for another two hours and asked the appellant whether the night sister had arrived. Shortly afterwards, Ms Joseph arrived and asked Ms Daly to come and check on a patient with her. At that point she spoke to the complainant and was made aware of the incident. Asked by prosecuting counsel how the complainant seemed, she stated as follows:

A. Well, she seemed a bit shocked, you know. She was standing at the end of the bed and she had her hands across her chest or whatever and she just said that she had been on the she had taken her medication and had been on the point of sleeping but she said when you're at that stage between half awake and half asleep that she kind of felt her breast move. So, she turned over on the other side to go to sleep and she felt it again and then woke up and saw the carer standing over her.

Q. And I think that you became aware obviously as a result of that that there had been an issue and I think that the carer was then taken off duty on that ward for the evening; isn't that correct?

A. Yes. I just said to her, you know, "I'll make sure he won't come back in again." I went out and I spoke to the carer and I just told him to sit outside in the armchair outside the other patient's room and not to go near that room again. I said, "One of the patients got a fright" and he just said, "Which patient?" and I said, "The lady in 12-4."

17. Catherine McKeown, a clinical nurse manager at the hospital, was the next witness called by the prosecution. On the night in question she had answered a call from Ms Daly to come to the ward. She spoke to Ms Joseph and the complainant and having done so realised there was a problem. She told the jury she then talked to the appellant. She put the allegation to him. The appellant denied it and she told him she would have to investigate it further. He told her that he had entered the room after someone inside it had coughed. He said he had not approached the complainant's bed, but had approached M.C.'s bed as he said M.C. was coughing. Ms McKeown said she swapped him with a carer from another ward. Ms McKeown contacted the nursing executive, who instructed her to take a statement from the appellant. She did so and sent him home.

18. Under cross-examination, counsel for the defence put it to Ms McKeown that Ms Joseph and the complainant had told her that the complainant had dreamt that someone was touching her breast:

Q. Just to clarify, because I think what Tresama said in her statement or what Tresama said to you is that S.L. had told her that she dreamt her boob was being touched, she turned to the other side and felt the other boob being touched and at that she woke up and saw Jimy beside the bed?

A. Yes.

Q. So, I suppose what I'm asking you is you said that S.L. repeated what Tresama had said?

A. Yes, exactly.

Q. So, that's what Tresama had said to you just for the benefit of the jury?

A. Yes.

Q. Is that also said what S.L. said?

A. That's also what S.L. said.

19. Ms McKeown also told the jury that the curtain would not ordinarily be fully around the bed and a gap is always left to allow staff to check on the patient. She also told the jury that before sending him home, she (Ms McKeown) had brought the appellant to her office and had given him a sheet of A4 paper on which to make a statement. She read and signed the piece of paper but made no comment on it. In the statement, the appellant had said he heard M.C. coughing, had entered the room and had checked all beds, including the complainant's (bed 4). The defence put it to Ms McKeown that this contradicted what she claimed he had told her earlier in the night, that he had not gone near the complainant's bed. The defence suggested that Ms McKeown suggested she was mistaken in recalling that the appellant had said he not been near the complainant's bed.

20. In further cross-examination of Ms McKeown, counsel for the prosecution pointed out that in the statement, the appellant had said that the patient in bed 1 had coughed. Ms McKeown agreed that this was M.C.

21. M.C. was then recalled to the witness box. She stated that she was not coughing, nor was anyone else in the room.

22. The final witness for the prosecution was Garda Elaine O'Malley of the District Detective Unit at Mountjoy Garda Station. Garda O'Malley and her colleagues commenced investigations on 27th of November 2013 and arrested the appellant at his home on 13th of January 2014 in connection with the incident. The appellant was interviewed twice by Gardaí, and in both interviews gave an exculpatory account.

23. In his first interview, which was a question and answer session, the appellant stated the following (inter alia) in response to a question as to whether he had gone into anyone's room:

"I sat back down and heard a cough in the four bed room. I stand up and walk in there. The lady in bed 1 is awake and her head is up a little bit. This bed is on the left when you walk in. I asked her was she okay. She said she was fine. I

definitely talked to her because she was the only one awake in the room. I moved to the other bed, bed 2, the lady that was throwing up earlier but she was fast asleep. I opened the curtain a small bit and look in. I stood beside her feet and asked was she okay but she was asleep and did not answer. I asked her in a lower voice because you do not want to wake them if they are sleeping. The third bed is empty. The fourth bed is where the lady is. I opened her curtain a little bit and asked her was she okay but she did not answer. She was sleeping on her side facing the wall. I moved the curtain back to the end of the bed and asked was she okay. I was behind her. She did not answer so I left and moved the curtain back. I was only there for 10 seconds."

24. In his second interview, which again took the form of a question and answer session, the following exchanges (*inter alia*) are recorded:

Q: "M.C. claims you came into the room that night three times?"

A: "I was only there two times."

Q: "She says the first time you came in, walked to the end of the room, turned and left. The second time you did the same and after that she switched off her light and was lying down in the bed and that on the second time when you came in she waved her hand to you but you completely ignored her. On the third time when you came in you walked into the room, down to the end of the room, turned around and went to the right hand side of S.L.'s bed. She says you were at the side of S.L.'s bed for a good few minutes and then you scurried away from her bed and left in a rush. She says she sat up in the bed because it looked like something had happened and then she spoke with S.L. who had leapt out of the bed. S.L. said to her that somebody had just touched her breasts and S.L. told her that she had seen the care attendant leave her bedside so she knew it was him. Is she lying also?"

A: "At first all the four bed lights were off when I heard the cough. She said, 'Yes, thanks' when I asked her was she okay. Her light was off, the room light was off. I did not see her waving at me. If the light was on I would not have to ask is she okay …" sorry "If the light was on I would not have to ask is she okay."

Q: "Is she lying?"

A: "I don't know. The light was off. All the lights were off. No lights in the room. I can prove it."

Q: "Are both ladies lying?"

A: "I don't know. She talked to me."

Q: "We have two people saying you were beside S.L.'s bed?"

A: "S.L. didn't wake up. When I pulled the curtain to check on her she was sleeping. I did not see her moving or waking up. She didn't wake up until I left. I didn't see her wake up. I didn't see her wake up or moving." Q: "The lady opposite her sees her wake up too?"

A: "I did not see that. We walk slowly in the hospital. I did not rush out. I did not see the lady moving."

25. Later in the interview there were the following further exchanges:

Q: "Catherine McKeown, she was in charge of the hospital that night. She gave us a statement and she knows you for two or three years. She says, 'On the night in question Jimmy was assigned to look after Mr M. in room 406 opposite room 412. He was supposed to be sitting in the corridor outside room 406 and that Jimmy could, if asked, give the staff a hand with other patients'?"

A: "That's what they told me. I was supposed to be specialing but I could give a hand on the floor."

Q: "S.L. Catherine also met with S.L.. S.L. was very shocked and had a look of disbelief and distress on her face. In the office when she said this to you, you said that you had been in room 412 because you thought the lady in bed 1 had been coughing and you said that you did not go near bed 4?"

A: "I wrote that down on the night in front of her what I had done. I checked everybody that night. I wrote it all down. I read it, she read it, then I signed it in front of her. I said bed 4 was sleeping. It's in the statement. I write in front of her."

Q: "Catherine said that you Catherine said how you said you did not go near bed 4. Is she lying?"

A: "I don't know if maybe she's lying. Maybe she omits it from her statement."

Q: "S.L. said how the nurse came back into the room saying how you denied being in the room?"

A: "No. Go back to the nurses' station, I am telling the 100% truth."

26. That concluded the case for the prosecution. The defence elected not to go into evidence.

Grounds of Appeal

27. The appellant appeals his conviction essentially on three grounds. The Notice of Appeal as originally filed contained certain other grounds but the grounds set out below were the only grounds actually proceeded with.

28. First, he complains that the trial judge erred in failing in the course of her charge to explain the limited basis on which evidence of complaint is admissible and the limited use to which it may be put. It is said that she failed to administer the mandatory direction specified by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v M.A.* [2002] 2 I.R. 601.

29. Secondly, he complains that the trial judge failed to properly charge the jury regarding the expert opinion evidence, and in particular that she failed to direct the jury as to the weight to be attached to such expert testimony, and further failed to direct the

jury as to its entitlement to accept or reject the expert opinion evidence tendered.

30. Thirdly, the appellant appeals on the basis that the trial judge did not adequately summarise the case being made on behalf of the defence in the course of her charge.

31. Finally, the appellant asserts that these alleged errors, individually and cumulatively, rendered the trial unsatisfactory and the verdict unsafe.

Submissions on behalf of the Appellant

32. In relation to the first ground, the appellant argues that the trial judge failed to explain the nature and purpose of the complaint evidence adduced by the prosecution and failed to administer the mandatory direction regarding the limited purpose for which any evidence of complaint that has been admitted may be used.

33. The appellant refers to a number of cases in support of this argument. In particular, he relies on the judgment of Murray J in *The People (Director of Public Prosecutions) v M.A.* (cited earlier) as well as that of Hawkins J. in *R v. Lillyman* [1896] 2 Q.B. 16 and that of O'Flaherty J. in *The People (Director of Public Prosecutions) v. Brophy* [1992] I.L.R.M. 709. This jurisprudence establishes that while evidence of statements made by the complainant to a third party or parties in the absence of the accused is, in general, inadmissible both as hearsay and as offending the rule against self corroboration (sometimes called the rule against narrative), an exception is made in cases involving sexual offences, allowing the evidence to be admitted by the prosecution for the limited purpose of showing consistency on the part of the complainant, thereby providing possible support for the complainant's credibility before the jury.

34. Speaking for the Court of Criminal Appeal in the M.A. case, Murray J stated (at p 611):

> *"Where evidence of a complaint made by a complainant to third parties in the absence of the accused is admitted in a trial of a sexual offence to establish the consistency of the complaint with the evidence of the complainant the purpose of the evidence should be explained to the jury and it should be made clear to it that such evidence is not evidence of the facts on which the complaint is based but may be considered by them as showing that the victim's conduct in so complaining was consistent with her testimony. It should also be explained to the jury that such evidence does not constitute corroboration, in the legal sense of that term, of the evidence of the complainant.*
>
> *The court does not consider persuasive the submission of counsel for the prosecution that the giving of such a direction to the jury be considered a desirable practice rather than a mandatory one or, at most, one which must be given only where, in the particular circumstances of the case, it is necessary to avoid injustice. Where evidence of complaint to third parties is tendered by the prosecution, as part of its case against an accused, it is admissible only by virtue of the fact that it may demonstrate consistency of conduct by the complainant with her evidence. If such evidence is incapable of demonstrating such consistency or is not tendered for the purpose of demonstrating consistency, there would appear to be no legitimate basis for the prosecution to call such evidence in a criminal trial. It is the very nature and purpose of the evidence itself which give rise to a need that the jury are properly instructed and not other facts or circumstances. Accordingly, the direction should be given in all cases where such evidence is tendered by the prosecution. A failure to give such a direction would upset the balance which has long been considered necessary to ensure the fairness of the trial."*

35. The appellant claims the trial was unsatisfactory because the trial judge did not, in the course of her charge, give the direction mandated by the M.A. judgment.

36. It was conceded that no requisition was raised in respect of this matter.

37. In so far as the appellant's second complaint is concerned, it has been argued that the evidence given by Dr Pádraig O'Neill in relation the sedative affect of the medication taken by the complainant amounted to expert evidence. The jury, the appellant argues, should have received an explanation as to the nature and purpose of such evidence, the process of determining what weight should be attached to it and stressing the jury's entitlement to accept or reject it.

38. In support of this ground of appeal the appellant relies on *The People (Director of Public Prosecutions) v. Abdi* [2004] IECCA 147; *Davie v. Edinburgh Magistrates* (1953) S.C. 34; *F(Orse C) v C* [1991] I.R. 330 and *R. v. Luttrell* [2004] 2 Cr App R 250. It was submitted that this jurisprudence establishes that the jury, as sole arbiter of fact, is not to be usurped by experts giving evidence. The jury is not bound to follow expert evidence, and a judge must give the jury appropriate warnings in this regard. (It was somewhat surprising to note no reference was made, by either side, to the comments of this Court, concerning the obligations of a trial judge in charging a jury concerning expert evidence, in its relatively recent judgment, delivered by Ryan P., in *The People (Director of Public Prosecutions) v. Doyle* [2015] IECA 131.)

39. Once again, it was conceded that no requisition was raised in respect of this matter.

40. In so far as the appellant's third complaint is concerned, it was submitted that trial judge failed to identify and highlight a number of key pillars to the appellant's defence, namely:

> (i) The fact that the complainant accepted in cross-examination that she had characterised the initial feeling as a vibration in her chest (as opposed to anybody touching her breast);
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> (ii) The fact that the appellant was contending that the complainant's re-creation of events over a number of days following the incident was as a result of her having doubts about the correctness of her complaint concerning the appellant (notwithstanding her denials to defence counsel);
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> (iii) The appellant's contention that the complainant was mistaken in her description of events;
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> (iv) The fact that Nurse Tresama Joseph confirmed in cross-examination that the complainant had asked her whether the appellant had actually been in the room
>
> (v) The appellant's contention that his presence on the ward should not be viewed suspiciously or out of the ordinary as he was both permitted and required to be present on the ward assisting and checking on patients as confirmed in cross examination by Eileen Daly and Tresama Joseph;

(vi) The appellant's contention that confirmation of whether the patient in bed 4 was sleeping or not necessitated entering the ward room;

(vii) The appellant's contention that he had nothing to hide as evidenced by the full accounts furnished to his employer and Gardaí.

41. It is accepted by counsel for the appellant that there was no requisition suggesting to the trial judge that she had failed to put the defence case, or raising any of the seven specific matters listed above.

42. Anticipating (correctly) that the respondent would seek, in responding to the various complaints now being made, to invoke and rely upon the principles set forth in *The People (Director of Public Prosecutions) v. Cronin (No 2)* [2006] 4 I.R. 329, counsel on behalf of the appellant (who was represented by a different counsel at the trial) has submitted that the reason requisitions were not raised on any of these matters was likely due to "oversight", and that if the appellant was to be shut out from relying on these grounds it could give rise to a fundamental injustice. Counsel for the appellant has submitted that the prosecution are also under a duty to keep the judge right and that, since neither side raised relevant requisitions, the issues now being raised were in fact overlooked by all parties; and the judge's failures amounted to a fundamental defect in the appellant's trial. The further point was made that appellate courts have sometimes shown willingness to intervene notwithstanding that appeal points were not raised during the trial.

Submissions on behalf of the Respondent

43. In relation to all grounds the respondent relies first and foremost on the fact that none of the complaints on which the appellant's appeal is now based was raised at the trial. We have been referred to *The People (Director of Public Prosecutions) v. Cronin (No 2)* [2006] 4 I.R. 329, a judgment of the former Court of Criminal Appeal that (*inter alia*) deals at the level of principle with points not taken at trial, Giving judgment for the court, Hardiman J stated (at 390/391):

> "Throughout the history of this court considerable emphasis has been placed on whether a point relates to something which was thought at the time, by those involved in the case, to be of real importance, as opposed to a point devised much later, perhaps by persons who had no connection with the trial and only after a "trawl" of the transcript. The decision of the early case of *The Attorney General v. Gilligan* (Unreported, Court of Criminal Appeal, 2nd May, 1929), is unreported but is noted at p. 180 of the second edition of *Sandes Criminal Practice Procedure and Evidence in Éire* (2nd ed., 1939) as follows:-
>
> > 'The specific grounds of appeal must be stated in the notice of appeal … The [Court of Criminal Appeal] will not permit a defendant or his counsel, after he has read through the transcript of evidence and has made a meticulous scrutiny of it, then to formulate grounds of appeal.'
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> This attitude has been restated on numerous occasions since. Specific mention may be made of *The People (Attorney General) v. Michael Coughlan* (1968) 1 Frewen 325. In the more recent case of *The People (Director of Public Prosecutions) v. Moloney* (Unreported, Court of Criminal Appeal, 2nd March, 1992), the judgment of the court was delivered by O'Flaherty J. who said at p. 3 of the judgment:-
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> > 'We would wish to reiterate the jurisprudence of the court which has been in place for many years that there is an obligation on counsel on both sides, the prosecution and the defence, to bring to the attention of the trial judge any inadequacies they perceive in his directions to the jury. If an appeal is brought before this court on a point that has not been canvassed at the trial this court will regard any person making such a new point as having an obligation to explain why it is sought to be made on appeal when not made at the trial. That is not to say but that if the essential justice of the case calls for intervention we have an obligation so to intervene.'
>
> We would respectfully concur with what is said in this passage. The reason for this rule or statement of principle is not at all a technical one, or one merely designed to assist in the orderly conduct of trials and appeals. It is to ensure a proper relationship, based in reality, between the conduct of an appeal and the task on which the court is engaged, which is to say whether or not the trial was a safe and satisfactory one. The rule was recently restated, in the slightly different context of an application by the Director of Public Prosecutions for review on the grounds of undue leniency. In *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390 it was said at p. 401:-
>
> > '… the prosecutor, like a defendant/appellant, has normally to formulate his grounds of appeal without having seen a transcript of the proceedings. This fact has clear drawbacks for an appellant. However it has the often discussed advantage that the grounds of appeal will normally reflect what struck the parties as important at the time of the hearing, and distinguishes between these points and other points which may be the result of a subsequent "trawling" of the transcript.'
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> In *The People (Director of Public Prosecutions) v. Noonan* [1998] 2 I.R. 439, this court considered what should be done in a situation where an apparently obvious error, as to the legal requirements for provocation, had been made in a judge's charge, but had not been the subject of any requisition. Geoghegan J., giving the judgment of the court, referred to the error and to the absence of a requisition on it and said at p. 445:-
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> > 'That being so, this Court must consider whether the application for leave to appeal should be refused. There is absolutely no doubt that this Court can refuse to entertain an objection to a judge's charge where that objection did not form the subject matter of a requisition. But it does depend on the particular circumstances of the case whether this Court takes that course or not. An obvious example where it might take that course would be where there might appear to have been a deliberate omission to raise the requisition for tactical reasons in the circumstances where perhaps other parts of the charge had been highly favourable to the accused.'
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> In that case, the court permitted the point to be argued having observed at p. 445 that
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> > '[i]t is impossible in this case to conceive of any tactical reason why such obvious defects in the learned trial judge's directions to the jury on provocation would not have given rise to a requisition if they had been averted to.'
>
> "

44. It was submitted that in the present case the appellant was attempting to take advantage of a change in legal team, where the

original legal team had presented the case in a competent and strategic manner. It was suggested that the reason requisitions were not raised was likely to be due to tactical decisions having regard to the run of the case.

45. Before elaborating further on this, it should also be recorded that reliance was also placed on *The People (Director of Public Prosecutions) v. Cronin (No 2)* [2006] 4 I.R. 329, and in particular on the following passage from the judgment of Kearns J (at p.346):

> "46 It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial and the rulings made therein, and not with other suggested errors or oversights which may pre-date the trial or have been amenable to remedy in some other manner.
>
> 47 Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J. when this case was in the Court of Criminal Appeal, this court should abhor the practice and strongly discourage it."

46. The respondent contends that, although the absence of a satisfactory explanation as to why a point or points were not raised at the trial will not always be fatal to an application to ventilate those points on appeal, especially if the point or points not raised could have led to a fundamental injustice, the *Cronin No 2* case makes clear that the usual or default expectation on the part of an appellate court is that some explanation should nevertheless be offered for its consideration. The respondent contends that it is significant that in this case no explanation has been put forward for the failure to raise the points at trial, and that counsel for the appellant has merely volunteered a surmise on his part that it was due to oversight. However, it is pointed out, no evidence was adduced from any member of the actual defence legal team at the trial to confirm that the reason was in fact, and in each instance, "oversight" or indeed offering any explanation for it.

47. The court was also referred to *The People (Director of Public Prosecutions) v. T. O'R.* [2008] IECCA 38; and *The People (Director of Public Prosecutions) v. T.E.* [2015] IECA 218, as examples of cases where in more recent times appellate courts have refused to allow grounds not relied on at trial to be argued on appeal, applying the principles stated in the *Cronin*, and *Cronin (No 2),* cases.

48. Without prejudice to his client's primary ground of opposition, counsel for the respondent then sought to engage with the substantive grounds of complaint. In relation to the first ground the point is made that it was never the intention of the prosecution to tender evidence of any conversation between the injured party and the other witnesses. The only reason this was done was at the express request of the defence. Even then, the prosecution had sought to minimise any hearsay elicited. However, counsel for the defence had indicated during the course of the complainant's evidence that he wished the witness to give evidence of the details of her conversations. In effect, it was submitted that the evidence was adduced at the behest of the defence, and they cannot complain that it was led now.

49. Similarly, the defence expressly requested that Tresema Joseph should state what was said to her by the complainant, and they also sought the introduction of a written statement made after the fact by the complainant at the request of the hospital. Counsel for the respondent makes the point that such complaints, whether made in the course of the said conversation or in the said statement, formed no part of the closing speech for the prosecution. Counsel for the defence, on the other hand, drew the attention of the jury to what he described as "discrepancies" arising from what was said to Nurse Tresama Joseph. While the Judge did rehearse the evidence which the witnesses had given, the summary as to what had been said to others was mostly taken from answers given in response to questions asked under cross-examination.

50. Counsel for the respondent has taken no issue with the appellant's reliance on the passage from *The People (Director of Public Prosecutions) v. M.A.* quoted earlier in this judgment (at paragraph 34 ante), save for contending that it is misplaced in as much as the principles therein stated are primarily directed to providing necessary safeguards for an accused in a situation where the prosecution seeks to introduce complaint evidence to bolster the prosecution case. The respondent contends that this was, in effect, a case where the contemplated safeguards were not necessary because the accused himself wanted the complaint evidence to be admitted in support of the defence case. Moreover, having regard to the manner in which the evidence had in fact been deployed, namely in a collateral attack on the consistency and reliability of the complainant, the jury could have been under no misapprehension as to the context in which it was potentially relevant and the use to which they were being invited to put it.

51. The Court was also referred to the following further passages from *M.A.*, on which the respondent places some reliance (at pp 611/612):

> "The court finds itself in the same position as the court did in *The People (Director of Public Prosecutions) v. Sweetman* (Unreported, Court of Criminal Appeal, 23rd October, 2000), where Keane C.J., having observed that it was not necessary for the court to consider whether there was an entirely satisfactory explanation for the failure of counsel to raise a requisition on an aspect of the trial judge's charge, went onto say:-
>
> > 'It is sufficient to say that, as this court has said on numerous occasions in the past, of course it is the duty of counsel for the prosecution and the defence to draw the attention of the trial judge to any aspects of his charge which require reconsideration on his part so as to give him an opportunity of putting any matter right before the jury reached their verdict. There are also cases in which in the context of the whole trial and what is at issue being of relative insignificance, this court can overlook a defect in the charge and can take into account a failure to raise any requisition. This court is satisfied that this is not such a case because this was central to the trial, it was a matter of crucial importance, it was the critical evidence against the appellant and consequently the court is satisfied that that ground of appeal has been made out.
> >
> > In this particular case the court is satisfied that the evidence of complaint was a central and critical part of the prosecution case. Accordingly, it is satisfied that the failure of the defence to raise the issue at the conclusion of the learned trial judge's charge is not a bar to this application.
> >
> > In the circumstances of the case and having regard to the conclusions outlined above, the court is satisfied that it would be unsafe to allow the jury's verdict to stand and, accordingly, will allow the appeal, set aside the verdict

and order a retrial.'

52. Counsel for the respondent contends that in the light of this extract the circumstances of the present case can be clearly distinguished from those in the *M.A.* case, in that the prosecution in this case was not seeking to put the evidence of recent complaint before the court, and that it could not be seen as "central and critical to the prosecution case".

53. In relation to the second ground of complaint, namely that relating to the judge's charge concerning expert evidence, the respondent makes the following points.

54. In this case the injured party described taking two types of medication earlier on the evening of the alleged sexual assault, ie., Valium and Naprosyn, respectively, and had stated the fact that this medicine had no impact on her levels of drowsiness. Although in this instance the medication had been prescribed by her neurosurgeon, the complainant's evidence was that she had been on similar medication, i.e.,Valium and Ponstan, respectively, prescribed by her GP, ever since her accident She expressed a belief based on her experience of taking such medication regularly, and over quite some time, that her medication would not have had, and did not have, any sedative effect upon her. Following on from this there was no cross-examination of the complainant at any time, or in any way, to challenge her evidence in that regard. The defence did question the complainant as to whether she had fallen back asleep, as to whether she could have been dreaming, and as to whether she was drowsy on waking-up. However, they never extended the cross-examination into seeking to suggest that the medication she had taken had any impact on her drowsiness.

55. Mr. Padraig O'Neill, who was the neurosurgeon under whose care the injured party was admitted, was the treating doctor and indicated as part of his evidence what medication had been prescribed to the complainant on her admission under his care that evening. Having indicated what medication was prescribed to her, he was also asked by counsel for the prosecution what the effect of those medications, and in particular the Valium, would have been. He stated that the Naprosyn would have anti- inflammatory effect and the Valium, in low dosage which was what he had prescribed, was intended to reduce the patient's muscle spasm but that it would have no cognitive or sedative effects. It was submitted that Mr O'Neill, in this regard, was a witness dealing with facts, rather than as expert witness offering an independent and external opinion on some technical or scientific matter in controversy. On the contrary, he was the treating physician, under whose care the complainant was admitted and his evidence as to the medication which she was taking and the effect it would have had was not adduced as, nor did it purport to be, the opinion evidence of an independent expert with no connection to the case. The witness's testimony represented a statement of the factual position as it pertained on the evening in question. His evidence was to be regarded differently to that of an expert brought in to provide independent opinion evidence on a technical or scientific matter in controversy. There was, in any event, no technical or scientific matter in controversy. Although cross-examined, the high water mark of what was put to him was that: "I take it that everything you're saying is without prejudice …. to the normal vagaries of one waking up, being tired, what one had eaten or not eaten, being awoken unexpectedly, for example". This gave rise to the following exchanges in response:

> *A. I'm saying very clearly that that dose of Valium would have no effect on sedation or perception.*
>
> *Q. Indeed. I understand your*
>
> *A. Under any circumstances.*
>
> *Q. I understand your evidence. Thank you, Mr O'Neill.*

That concluded the cross-examination. It was never put to Mr O'Neill that any aspect of his emphatic evidence was wrong or incorrect, or that another witness would say something different. Moreover, no contradictor was in fact called by the defence.

56. The respondent contends that the appellant is now asking this Court to make a determination based upon something which was not part of the Defence case at the trial, and this further offends against the principles laid down *The People (Director of Public Prosecutions) v. Cronin (No 2)*. Moreover, to reiterate a point already made, no explanation has been offered as to why, if it is the view of the appellant that the learned trial Judge had misdirected the jury in law, his counsel did not bring same to the attention of the court for the purposes of remedying same.

57. In so far as the third ground of appeal is concerned the respondent rests his objections based on the *Cronin* and *Cronin (No 2)* jurisprudence and the fact that no requisition was raised after the trial judge's charge complaining that the trial judge had failed to properly summarize the defence case.

Analysis and Decision

58. While it is true to say that it is not an absolute requirement that a satisfactory explanation should be provided as to why a point or points were not raised at the trial, before an appellate court will allow those points to be relied upon in any appeal, the general rule, which is to be departed from only in egregious cases where the court is satisfied that the failure to raise the point or points in question creates a real risk that a fundamental injustice was done to the appellant, the default expectation on the part of an appellate court is that some cogent explanation should be put before it for its consideration. No explanation has been offered in this case for any of the three failures at issue, namely the failure to raise a requisition in relation to the charge in relation to complaint evidence, the failure to raise a requisition in relation to the charge in relation to the expert evidence, and the failure to raise a requisition in relation to the charge in relation to alleged inadequacies in how the judge "put the defence case" in the course of her charge.

59. A speculative possible reason has been put forward by counsel for the appellant, namely "oversight", but it utterly unsupported by any evidence. Moreover, while an oversight can of course happen it is inherently unlikely that multiple and serial "oversights", central to the case and potentially resulting in a fundamental injustice, could have occurred where an accused was represented by both solicitor and counsel and the transcript reveals that the case was defended on an ostensibly competent and strategic basis.

60. The appellant's submissions do not make a case of incompetent representation. Nor do they expressly make any case of a likely real risk of a fundamental injustice having been done. Nevertheless, it is incumbent on this Court to examine, in respect of each purported ground of appeal, whether in fact there exists a real risk of a fundamental injustice having been done such as would justify the court in entertaining that ground at this late stage, notwithstanding that the point was not raised previously.

The first ground of appeal

61. In so far as the first ground is concerned, it is not disputed by the appellant that the defence wanted the evidence of complaint to be adduced; moreover that they pressed the prosecution to adduce it as part of the relevant witnesses' evidence in chief, rather than wait to seek to elicit it themselves in cross-examination. That the defence would have wished the complaint evidence to be

adduced in chief was entirely understandable, in case a witness should go "off script" so to speak. While any deviation from the Book of Evidence could be pursued either way, the defence could make more of it if the deviation were to occur during evidence in chief.

62. It is also common case, or at least not disputed by the defence, that the prosecution did not otherwise intend to adduce the evidence of complaint; that they would not in fact have done so but for being pressurized to do so by the defence; and that in reluctantly agreeing to it they did so to facilitate a collateral attack on the reliability of the complainant that appeared to be one legitimately open to the defence to pursue having regard to the contents of the Book of Evidence and possibly other materials disclosed in the normal way. In reluctantly agreeing to facilitate the defence in that regard, counsel for the prosecution is to be commended for acting as a "Minister for Justice", and for seeking to conduct the prosecution with scrupulous fairness.

63. The transcript reveals that the way in which the complaint evidence was utilised by the defence was to attempt to undermine the reliability of the complainant, by suggesting that she had made prior statements inconsistent with the evidence she had given at the trial. At no time did the prosecution seek to take unfair advantage of the fact that evidence of complaint had been admitted, or to suggest to the jury that it could be relied on in support of the prosecution case. As pointed out in the respondent's submissions the fact that complaints had been made formed no part of the closing speech for the prosecution. Counsel for the defence, on the other hand, sought, quite legitimately, to exploit what he characterised in his closing address to the jury as "discrepancies" between what the complainant had said in the witness box and what she had stated to others, and Nurse Tresama Joseph in particular.

64. The point of the rule of evidence which precludes evidence of complaint from being admitted at the behest of the prosecution save, in a sexual case, for the limited purpose of demonstrating consistency on the part of the complainant, is to protect an accused from the possibility that a jury might inappropriately rely on such evidence as being corroborative of the complaint. It is to ensure that complainants cannot "self corroborate".

65. In deciding that they wanted the evidence of complaint to be adduced notwithstanding the theoretical risk that a jury might treat it as evidence corroborating the complainant, the defence legal team may be inferred to have made a strategic decision that the potential benefits of doing so outweighed the risks. Moreover, it was open to them, if they were in any way concerned about that, to ask the judge to instruct the jury that the evidence could only be used in connection with evaluating the reliability of the complainant, and that it was not evidence capable of amounting to corroboration of the complainant's testimony. However, they did not do so and clearly the need to do so did not strike anybody involved in the case as being important at the time.

66. In circumstances where the evidence had only taken one day, in circumstances where the defence had made a strongly focussed closing address that would have been still fresh in minds of the jury, relying heavily on the alleged "discrepancies" between the complainant's testimony, and what she had previously said to others; in circumstances where the prosecution had not sought to suggest that the evidence of complaint supported their case in any way; and in circumstances where the trial judge's charge was ostensibly regarded by the original defence team as having been fair in general (certainly it provoked no requisition complaining of any unfairness), it is reasonable to infer that that the defence were happy with the overall run of the case such that they were disinclined to raise a requisition to address what was a theoretical and, we would suggest, remote risk in the circumstances of the particular case, which might have had the unwanted effect of distracting or unfocusing the jury from the points on which defence counsel had laid such emphasis.

67. However, we do not agree with counsel for the prosecution's contention that a jury instruction of the type specified in The People (Director of Public Prosecutions) v M.A. was not required in the circumstances of this case. It is true that, strictly speaking, the requirement to give the mandatory direction specified in *M.A.* is only engaged where the prosecution seeks to adduce evidence of complaint *in support of their case and for the purpose of demonstrating the consistency of the complainant.* In this case that was not the position. Be that as it may, although the evidence of complaint was not led by the prosecution to support their case, and it was done at the behest of the defence with a view to facilitating them in contending inconsistency on the part of the complainant, it was nonetheless evidence of complaint introduced by the prosecution in a sexual case that carried with it at least a theoretical risk that the jury might rely on it inappropriately absent instructions as to what reliance might properly be placed upon it. We therefore feel that an *"M.A."* type direction, tailored to the circumstances of the case, should ideally have been given, namely that evidence of complaint had been introduced because it was potentially relevant to the jury's assessment of the reliability, *or otherwise*, of the complainant; and that in that regard the jury could only use it in examining whether the complainant had been consistent *or inconsistent* in her account as presented to them in her testimony, and that such evidence of complaint could not be relied upon as corroborating the complainant's account in any way. The failure to give such an instruction represents an error of principle, though not necessarily one that would have necessarily rendered the trial unsatisfactory and the conviction safe in the circumstances of this case.

68. It would certainly have been better if such an instruction had in fact been given in this case. Notwithstanding that that is our view, we are satisfied that in this particular case the fact that the trial judge was not asked to do so, and did not herself decide to do so, does not raise the spectre of a real risk of a fundamental injustice having been done to the appellant. We believe that any risk of injustice is remote and more theoretical than real having regard to the run of this case, and in particular the scrupulous fairness with which the prosecution was conducted, and the ostensibly competent manner in which it was defended.

69. Therefore insofar as the issue raised in first ground of appeal is concerned, in circumstances where we are not satisfied as to the existence of a real risk of a fundamental injustice having been done to the appellant, and absent any explanation for the failure to raise the issue now sought to be relied upon at the trial, we are not disposed to allow the appellant to do so at this stage, having regard to the jurisprudence to be found in the *Cronin* and *Cronin (No 2)* cases. We therefore reject this purported ground of appeal.

The second ground of appeal

70. Again this was a matter not raised at the trial, and in respect of which there has been no explanation for the failure to raise it at the trial. We therefore adopt the same approach as in the case of the first ground, and will examine whether to refuse to allow the appellant to ventilate now the issues that he now seeks to rely upon would create a real risk of a fundamental injustice being done to the appellant. Having carefully considered the issue we are satisfied, for the reasons elaborated on below, there is no risk of a fundamental injustice being done to the appellant if the appellant were to be precluded from pursuing his second ground of appeal.

71. Therefore, again applying the *Cronin* and *Cronin (No 2)* jurisprudence, we are not disposed to allow the appellant to rely on this ground of appeal, as these matters were not raised at the trial.

72. In considering the possibility of a real risk of injustice it has been necessary for us to engage to some extent with the substance of the complaint that the appellant now wishes to make. In that regard, we find ourselves in complete agreement with counsel for the prosecution that no warning would have been required concerning the evidence of Mr O'Neill. It is correct to say that there was no technical or scientific controversy in the case and that Mr O'Neill was predominantly giving evidence as to matters of fact pertaining

to his treatment of the complainant, the medicines that he prescribed for her, and the purpose of those prescriptions. To the extent that he indicated an opinion, in response to questioning, as to whether the drugs in question (and in particular the Valium), at the dosages prescribed to the complainant, would have had sedative or cognitive effects, his evidence that it would not have had such effects was not disputed in any way or made the subject of any controversy. It was not put to him that he was incorrect or in error in his opinion. Neither was any contradictory evidence called from another expert.

73. While it is certainly true that experts should not be allowed to usurp the function of the jury, there was simply no risk of that happening in the circumstances of this case.

74. Accordingly we are completely satisfied that in the circumstances of the present case a special warning or instructions was neither required nor, indeed, would one have been justified.

75. In the circumstances we dismiss this ground of appeal also.

Ground of Appeal No 3
76. We have received no written submissions from the appellant's side concerning the third ground of complaint which he now wishes to ventilate. To the extent that they were addressed in oral argument it is also fair to say that they received only "a light rub".

77. The essence of the complaint is that the trial judge failed to properly put the defence case, or to highlight the cross examination of the complainant and other witnesses giving evidence of complaint.

78. Again this was a matter not raised at the trial, and in respect of which there has been no explanation for the failure to raise it at the trial. We therefore adopt the same approach as in the case of earlier grounds, and will examine whether to refuse to allow the appellant to ventilate the issue that he now wishes to rely upon would create a real risk of a fundamental injustice being done to the appellant.

79. The absence of an explanation is very significant in terms of this complaint. Whatever about the possibility of technical requirements being overlooked by the lawyers in the case who listened to the judge's charge, the generic requirement that a charge should be fair and balanced is so fundamental that, barring manifest ineptitude and incompetence, it is fanciful to suggest it could have been overlooked. In any event it is our view based on the transcript that the appellant was in fact represented with competence. In those circumstances it is very significant that none of the lawyers who listened to the charge found it to be unfair, or was moved to make any complaint as to the balance struck, or as to the adequacy of the review of the evidence. Counsel for the defence did raise one requisition, but it was in respect of an unrelated issue. It does not appear to have struck either him, or his instructing solicitor, that there had been a failure to adequately put the defence case, such as would necessitate the raising of a requisition.

80. In any event, it is not part of a trial judge's job to repeat the speech for the defence or to identify every detail in the evidence pointed to or relied upon by the defence. We have considered the judge's charge in this short case in the light of the evidence adduced, and we are satisfied that it was balanced and fair. It is true to say that she makes no specific mention of the defence's reliance on so called "discrepancies" in the accounts given by the complainant, but she nevertheless reviewed the actual evidence given in adequate detail. Further, she did not expressly attempt to summarise in terms either the prosecution or the defence case, by stating "*the prosecution case is …"*, and that *"the defence case is …"*. It might have been better had she done so, but the case was so short the jury could not have failed to appreciate the case being advanced on both sides. Moreover, the defence speech would still have been fresh in the minds of the jury as they listened to her charge.

81. In the circumstances we are not persuaded that to refuse to allow the appellant to ventilate the complaint he now seeks to make would create a real risk of a fundamental injustice being done to the appellant. Accordingly, applying the *Cronin* and *Cronin (No 2)* jurisprudence, we are not disposed to allow the appellant to rely on this ground of appeal, as these matters were not raised at the trial.

82. We therefore also dismiss this ground of appeal.