[251/2017]

Birmingham J.
Mahon J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Thomas Folliard

Appellant

JUDGMENT of the Court delivered on the 10th day of May, 2018 by Mr. Justice Birmingham

1. On 6th July 2017, the appellant was convicted in the Circuit Court sitting in Castlebar by a unanimous jury of the offence of Sexual Exploitation of a Child contrary to s. 3 of the Child Trafficking and Pornography Act 1988 as amended of s. 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 and as substituted by s. 3(2) of the Criminal Law (Human Trafficking) Act 2008. Subsequently, on 27th October 2017, he was sentenced to a term of five years imprisonment to date from that day. He has appealed against conviction and sentence. This judgment deals solely with the conviction aspect of the appeal.

2. The background to the trial and now to this appeal is to be found in events that are alleged to have occurred in Claremorris, Co. Mayo, on 13th January 2016. On that day, the complainant, P.K., had finished school and before making his way home, he went into the Tesco shopping centre. Before going into the Tesco store proper, he went into the toilets and noticed the male who was a stranger to him. The injured party then went into the store and the male stranger followed him in. The complainant left the store and walked along Kilcolman Road towards Mount Street. He was conscious that the individual he had observed in the Tesco shopping centre was following him. When this individual caught up with P.K. at Mount Street, he asked him whether he would like to earn some money to which P.K. said no. The individual then asked P.K. whether he would have sex with him in return for €50, to which P.K. said no also. The individual then left the scene, returning in the direction of the shopping centre. The injured party made his way home, which was empty on his arrival, as both his parents were out at work.

3. The incident had occurred at approximately 4.45 pm but when his mother returned home shortly after 6 pm, she was surprised to find her son there, as she would have expected him to be at GAA training. She asked him why he was not training. At first he did not answer, and then she noticed he was crying. He then told her that he had been propositioned and offered money for sex. In the course of her examination-in-chief and cross-examination she reported that her son had said that the man had a moustache. Further, in cross-examination, she reported that her son had said the man had a dopey expression. There had also been a reference to a red cardigan. The complainant's mother brought her son to Claremorris Garda Station where they met Garda Jason Lardner who took charge of the investigation. He set about seeking CCTV footage from the shopping centre and locations close by for the relevant time period. The footage from the centre was available for the entrance/exit area, the mall or centre area, and for the store itself. There was also footage from the county council building on the nearby Kilcolman Road. This county council footage showed P.K. walking from the store towards Mount Street. Very shortly afterwards, a person who it is accepted is the appellant is shown going in the same direction as P.K. had. He was moving quickly, in effect jogging, such that if he maintained that pace he would very quickly catch up with P.K. or overtake him. This same individual was visible earlier in the shopping centre, in the mall, going out of view, coming back into view, entering the store, leaving the store area, it seems without making any purchase, and leaving the shopping centre very soon after P.K. had left.

4. On receiving the report, Garda Lardner's priority was to access CCTV footage. In a situation where P.K. had described the person who propositioned him as white, 5'7", as having dark hair, a slightly grey, receding hairline, a moustache and wearing a red top, blue jeans, and boots with laces, he went to Tesco where he viewed footage from the mall and downloaded some footage with the assistance of the security guard. It is clear from the footage downloaded that even at this early stage the appellant was a person of interest, indeed was the person of interest. The following day Garda Lardner was informed that the person of interest was back in the store. Through the registration plate of the car in which that person had travelled to the store, Garda Lardner was able to put a name on this individual.

5. On 28th April 2016, Mr. Folliard was arrested and brought to Claremorris Garda Station. At the time of arrest he appeared to be wearing the same clothes as he had on 13th January 2016. In the course of interview CCTV footage was shown. The detainee indicated that he did not recognise the person seen running, asked whether there was any reason why he was running after the boy, he said "I can't remember", asked "Did you speak to the boy that day?" his answer was "I don't remember". Asked "Have you offered anyone any money for sex or sexual acts?" he replied "No, not in my life." Asked "Are you denying you offered P.K. €50 so that you could have sex with him?" he replied "I can't remember." On 10th April 2016, Garda Lardner showed the complainant the CCTV footage. According to Garda Lardner, before playing the various clips he said to the witness "This is for ID purposes only and I will not be speaking. I am going to show you the clips, you identify yourself and the person you believed who propositioned you and I am going to take that down in witness statement form."

6. On 21st February 2016, Garda Lardner arranged for P.K. to be interviewed by specialist interviewers. His account to them and his description of the individual involved in the incident which was played in the course of the trial in accordance with the statutory provisions is broadly consistent with what he had said on the day of the incident. The focus of the appellant's argument is on the fact that the description given by P.K. had referred to a red cardigan and a moustache, whereas the person shown in the footage is wearing a blue jacket. It is the case though that at one point in the footage a flash of red is visible under the jacket.

7. At trial, and before any evidence was heard, there was an objection to the CCTV evidence. It was said that the objection was made on the basis of relevance and that the prejudicial effect of the evidence exceeded its probative value. At the time, defence counsel was operating on the basis that there were three pieces of footage in issue, the footage from the shopping centre, from the county council building from 13th January 2016, and also footage from 14th January when Mr. Folliard was once more in the Tesco store. However, it soon became apparent that the prosecution had no interest in showing the footage from the 14th January, their only interest in this footage was that it was a step towards establishing how the arrest and detention occurred.

8. So as far as the county council footage is concerned, counsel described it as "indecipherable, indiscernible and unidentifiable". In relation to the footage from the centre, counsel commented that while it purported to show the complainant and purported to show the accused, it did not show either of them doing anything wrong. Having heard from counsel on both sides in relation to the Tesco footage, the judge ruled by saying that both accused and injured party are alleged to be visible, and while no offence was being committed, it created a context for the whereabouts of the parties. As such, subject to the weight to be attached by the jury, it was clearly relevant and not inadmissible.

9. The judge then proceeded to view the county council footage. Counsel for the prosecution submitted that the people shown were clearly identifiable from the clothes that they were wearing in the CCTV footage from Tesco. Counsel for the defence said he thought there may well be a doubt that the first person shown was P.K. and, that more to the point, they were not readily identifiable. Consequently, there would be a necessary element of speculation if the jury watched it. The judge ruled that it was a matter of weight rather than anything else. If it was the case that the people in Tesco were dressed the same way as in the county council footage, then whether or not the people were identifiable from the footage would be a matter for the jury and he did not think that they were being asked to speculate. He then added a rider, saying many cases are dealt with on circumstantial evidence, commenting "this may be slightly better than circumstantial evidence." In the view of the Court, given the manner in which the issue was presented to the judge, any other conclusion being arrived by the trial judge would have been inconceivable. It should also be noted that there was no issue about the admissibility of the evidence of P.K. The DVD of his interview with the specialist interviewers was played as his evidence in-chief, in accordance with the statutory provision. At that stage the CCTV footage from Tesco and from the county council building was played for the jury, the trial judge having earlier ruled on its admissibility. Counsel for the DPP, without objection, asked P.K. to view the CCTV footage and point out anyone, including himself, that he recognised. The witness did that, pointing himself and "the man" out on numerous occasions.

10. At the close of the prosecution case there was an application for a direction. The judge ruled on the application as follows:

> "It seems to me the fact that there are inconsistencies in the description that was given by the complainant of 'the man' – I'm going to use that expression because I think that's the expression that he used – doesn't mean that he is not correct when he identifies this man as the same person who had propositioned him. I can't – to deal with one net issue, I can't accept the contention that the relatively brief duration of the CCTV that was shown to the complainant by Garda Lardner imputed any pressure or suggestion or contamination of the ability of the complainant to give an independent reaction to viewing it. The clips shown related to the relevant times when the complainant was in the mall area and it just wouldn't make sense to show other CCTV from the area when the complainant wasn't around. Now, insofar as the substantive application is concerned, it's accepted it appears that the accused was the person seen in the CCTV coverage with the blue jacket on him. I'm not prepared to view the testimony of the complainant as being of such overall inconsistency - overall inconsistency as I emphasise as to create a risk of injustice to the accused. He was steadfast throughout that the man he identified in the CCTV was one and the same person. Skilful cross-examination, quite proper cross-examination, elicited a particular answer, effectively a single answer at the end of the cross-examination that has been referred to by counsel for the defence quite properly. The conflicts and inconsistencies in the description given by the complainant are matters for the jury to resolve. There is evidence upon which a jury properly directed could convict."

11. The defence did not go into evidence, and having heard closing speeches from both sides and the trial judge's charge, the jury began their deliberations and returned a unanimous guilty verdict after one hour and nine minutes.

12. Following a change of legal team, a bail application was prepared. However, when that appeared in a management list it was felt more appropriate to offer a very early hearing of the substantive appeal, thus obviating the necessity for two separate hearings.

13. Opening the appeal, counsel explained that there were three issues in the case:

> (i) the failure to hold an identification parade;
>
> (ii) issues arising from the cross-examination of the complainant; and
>
> (iii) issues arising from re-examination of the complainant.

Identification Parade

14. So far as the identification parade issue is concerned, counsel says that this is a case where a formal parade could and should have been arranged to be viewed by the complainant. He points out that by 14th January at least, the Gardaí had a suspect identified. Arrangements could have been made for a parade any time after that. A second, less preferable option was the possibility of an informal identification. He stresses that it is entirely accepted and not at all in dispute that the complainant is a completely truthful witness. Counsel does, however, point out that completely truthful witnesses can and have made mistakes when it comes to identification and it is that fact that makes the holding of a formal identification parade so important. He refers in that regard to the case of The People v. Beroket Mekonnen [2012] 1 IR 210.

15. This Court is in no doubt whatsoever about the importance of identification parades when identification is in issue. Likewise, the Court is in no doubt that if in a particular case where identification is in issue and a formal parade is for good and adequate reasons impossible and it is decided to resort to some alternative form of identification, then it is essential that a commitment to a duty of fairness should permeate all aspects of what takes place.

16. The Court, however, is quite satisfied that this was very far from a classic identification case. The contrast between the identification in this case and the identification which occurred in The People v. Beroket Mekonnen [2012] 1 IR 210 is striking. In that case, the identification was at a time remove of three weeks by someone who on her own admissions was very drunk at the time that the offence occurred, and the identification was a cross racial one. It is always an identification regarded as particularly problematic. The present case involved an identification by a young boy, whose honesty was expressly stated not to be in doubt, giving evidence of being in the toilet area of the shopping centre, of noticing a stranger who followed him into the Tesco store, who then followed him from the store and, he says, propositioned him at nearby Mount Street. The available footage provides what is effectively a continuum. Most significantly the county council footage clearly shows someone wearing the same clothes that Mr. Folliard was wearing minutes before in Tesco running after the injured party and then returning in the direction from which he had come a few minutes later.

17. It seems to the Court that the extent of the footage available and its significance meant that the focus was always going to be on this footage. The members of the Court have viewed the footage from the shopping centre and from the County Council offices and are in absolutely no doubt about its significance. In the circumstances of this case, it is not clear that an identification parade, successful or unsuccessful would have added or subtracted very much to the case. A parade that involved a positive identification would have added little to the objective evidence of the CCTV footage, which put the complainant and accused in close proximity both in terms of time and place, and which, of course, does not show anyone else following the complainant from the toilets, to the mall, to the store and from the shopping centre along Kilcolman Road. If the complainant failed to pick out the accused when he was standing in a parade, either because the complainant did not pick out anyone or because he picked out a foil in error, there would still be the real evidence recorded by the cameras of what occurred in the shopping centre, in the Tesco store and on Kilcolman Road. The Court is not persuaded that the procedure followed was unfair or, as had been suggested, gave rise to a miscarriage of justice. Accordingly, this ground of appeal is rejected.

Cross-Examination

18. So far as the point in relation to the cross-examination is concerned, counsel draws attention to the remarks of the trial judge in ruling on the direction application that the complainant was steadfast throughout the process that the man he identified on the CCTV was the same person as the person who had approached him. Skilful and quite proper cross-examination elicited a particular answer, that the person the complainant had described as having a moustache and wearing a red jumper could not be the person he had identified on the CCTV footage. Counsel for the appellant says that the judge was quite wrong to say that the complainant was steadfast, and also wrong to refer to a single answer. Counsel says that if one reads the transcript it is clear that the defence counsel at trial made considerable headway and that there were a number of very significant concessions made by the complainant. He points out that what he says was the judge's error in referring to the complainant as being "steadfast" and in mentioning a singular answer would later permeate the judge's charge to the jury. Counsel says that insofar as the prosecution sought to repair the damage done to their case by way of re-examination, that exercise was worthless as it involved the complainant acquiescing to what were outrageously leading questions. This is a reference to the fact that prosecution counsel had asked:

> "Q. Okay. Are you happy to tell the Court that the person that you were aware of in Tesco and the person we've seen on the CCTV was the person that propositioned you on the street?
>
> A. Yes.
>
> Q. You're happy to say that?
>
> A. Yes.
>
> Q. And you stand by that?
>
> A. Yes."

And then a little later:

> "Q. Okay. But it's most important that you're happy that the person you've described and you've pointed out on the CCTV is the person that made the proposition to you. Are you happy about that?"

This Court does accept that counsel for the defence achieved some considerable success with his cross-examination which was, as the judge acknowledged, a skilful one. It may be thought, though, that the ground given by the complainant in cross-examination is explained by the fact that the 13-year-old boy who was being cross-examined was very uncomfortable with the process. In his Victim Impact Report produced at the sentencing stage he commented:

> "I met with a psychologist who I found helpful and I found that it was good to talk to somebody about what had happened. It felt good to be believed. The court case made me nervous but once it started I was glad that I had carried through on it. During the court case I felt annoyed, I was made feel like a liar and I felt that nobody believed me. I felt frustrated when I went home that evening and a bit shocked about how I was dealt with. It was a big relief when it was all over."

19. Likewise, the Court agrees that the impact of the re-examination was diminished by the fact that a number of what would otherwise have been significant reassertions were secured as a result of questions that were clearly leading. On the other hand it must be pointed out that there was no objection taken at the time. Had there been, it is likely the questions could and would have been reformulated. It is not really a satisfactory situation if no objection is taken to a question at trial, but then on appeal the Court is asked not to have regard to the answers obtained. Be that as it may, the Court is in absolutely no doubt that the judge was entitled to take the view that the state of the evidence following the closing of the prosecution case was such that there was a case to go to the jury.

20. In summary, the Court has not been persuaded that the trial was unfair or unsatisfactory or that the verdict was unsafe and so dismisses the appeal.