THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

No. 260/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

S. O'C.

Appellant

JUDGMENT of the Court delivered on the 7th day of February 2017 by

Mr. Justice Birmingham

1. On the 29th November, 2014, the appellant was convicted in the Central Criminal Court of one count of rape and 115 counts of indecent assault/sexual assault. Subsequently he was sentenced to ten years imprisonment on the rape charge and to concurrent five year terms in respect of each of the counts of sexual assault/indecent assault. He has appealed against his conviction and sentence and this judgment deals with the conviction aspect only.

2. The background to the trial and now to this appeal is that the complainant was one of six children, she was the youngest. The appellant, a primary school teacher, was first the boyfriend and later the husband of one of the complainant's older sisters. He regularly visited the complainant's family home in north Dublin and she regularly visited his home in south Dublin. The prosecution case was that the appellant began abusing the complainant when she was aged six years of age. This began with him fondling her vaginal area over her clothing, progressing to touching her genital area, to digital penetration and fondling her breasts. The activity started in the complainant's home, and also occurred in the appellant's home when the complainant visited him and her sister there. The single count of rape is alleged to have occurred in the appellant's home. Counts on the indictment covered the period 1981, when the complainant was six, to 1993 when she was eighteen. A direction was granted by the judge in respect of 29 counts and the jury returned verdicts of not guilty on 27 counts.

3. The grounds of appeal might be summarised as follows:-

> 1. That the judge erred in permitting evidence to be given by two witnesses of what the complainant had said to them about being abused. The complaints were ruled admissible to rebut allegations of recent fabrication.
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> 2. That the judge erred in ruling that the evidence of some six witnesses, referred to as "the civilian witnesses", was admissible.
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> 3. That the judge erred in allowing the prosecution to recall the complainant after the accused had given evidence.
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> 4. That the judge erred in allowing the prosecution to recall two witnesses, as well as calling the mother of one of them who had not until then been a witness, in order to rebut evidence given by the appellant during the trial.
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> 5. That the judge's direction in relation to the issue of delay was inadequate.
>
> 6. That the verdict was perverse and inconsistent.

Ground 1

4. It was submitted that the judge erred in permitting evidence to be adduced that the complainant had told two people about the abuse, one a school/college friend and the other a treating psychiatrist who dealt with the complainant after a suicide attempt.

5. The issue surfaced on day 4 of the trial after the cross examination of the complainant concluded. At that stage the prosecution applied to call the two witnesses. The prosecution had accepted that it would not have been possible to call the evidence by reference to the doctrine of recent complaint. However, the prosecution contended that the nature of the cross examination which put to the complainant that the allegations that she was making were untrue and fabricated meant that the accounts could be adduced because of the rule that permits prior consistent statements to be introduced in evidence in order to rebut an allegation of recent fabrication.

6. Making the application, counsel for the prosecution pointed out that the complainant had been advised before giving evidence that she ought not mention the complaints that she had made in 1994, because these were not capable of being brought within the parameters of the recent complaint doctrine. This gave rise to the following exchange between counsel and the bench:

> MS BIGGS: …. . Fundamentally, Judge, the Court has heard the cross examination of the complainant and there were repeated and numerous references to her failure to complain.
>
> JUDGE: "Why didn't you tell anyone" or whatever, yes, yes.

MS BIGGS: Yes. And it was repeated, Judge, and I've ten or twelve, I won't rehearse them.

JUDGE: Yes, yes.

7. It must be said that a major theme of the cross examination was that there were many opportunities to complain and these were not taken. Indeed, the absence of complaint was a defence preoccupation as is shown by the manner one of the first witnesses in the case was cross examined about the fact that there was a garda station very close to the complainant's home which would have been passed by the complainant on a regular basis and that there were two garda stations quite close to the appellant's home.

8. Counsel for the appellant says that it was never put to the complainant that she had never complained. Rather, questions were put on the basis that there were opportunities to complain which were not availed of and that there was no complaint during the currency of the alleged abuse.

9. Further, in the course of the debate with counsel the judge commented:-

> "But I don't know about the jury, but certainly an impression, not due to you, but there was an impression from the cross examination and from the replies given that this is all going on for years and years and years and you do absolutely nothing, you don't tell anybody, you don't confide in anyone, and here we are in the 21st century and you are making these allegations. There was the impression given, and I think its blinkering a jury in some way."

10. Later the judge commented that the complainant "was restrained in her answers to [defence counsel's] questions by not elaborating and saying, 'Well, I told so and so and so and so'" Then, when he came to rule, the judge commented:-

> "I appreciate the prosecution may be taking some risks in this. But I have little doubt in this case, it is not a question of showing consistency, but there is an impression left with the jury, it is not criticism whatsoever of the cross examination, but there is an impression left with the jury or could be left with the jury that this little girl from the age of five or whatever was groomed and abused and raped and never said a word until 2011. And as going to her credibility and I think to – I think the prosecution must be entitled to have the case tried in such a manner, in such a way that the jury is not so mislead."

11. The Court attaches considerable significance to the impression formed by the judge who actually heard the cross examination. It is of course true that counsel never put it to the witness that she had never complained. It was implicitly accepted in argument that if such a false proposition had been put that the prosecution would be entitled to rebut. However, counsel for the appellant says that he was careful not to put any such suggestion. Be that as it may, it is the case that the question of lack of complaint was a major theme, indeed it might be said to have been the dominant theme, of the cross examination of the complainant. She was asked whether she had passed the garda station on her way to and from school. She was asked about the closeness of her relationship with each of her sisters, and it was suggested to her that if she had been in trouble she could have gone to any one of her sisters. The complainant was also asked whether there was any impediment to bringing matters to their attention. She was further asked about her relationship with her teachers and why she didn't complain to them.

12. Such was the emphasis on the absence of the complaint that one might have expected that the complainant would retort at some stage, "but I did tell my school/college friend with whom I discussed the matter in detail and I did tell the psychiatrist on the occasion that I took the overdose". However, in a situation where she had been expressly told that it would not be permissible for her to mention the fact of complaints she did not respond in that fashion.

13. The Court has commented that it is struck by the impression that the cross examination left with the trial judge. This is particularly relevant because the role of the trial judge in this area is key. McGrath in Evidence (2nd Ed.) at para. 3-194 comments:-

> "The application of this exception is, thus, primarily a matter for the discretion of the trial judge, and his or her opinion will be accorded great weight by an appellate court."

14. It is clear that the judge felt that there would be a real unfairness if the jury was left with the false impression that there was no complaint until recent times. The nature of the cross examination brought the question of complaint centre stage and in those circumstances this Court cannot conclude that the judge exceeded his discretion when he permitted the jury to hear what the complainant had told her friend and the psychiatrist who was treating her. This ground of appeal therefore fails.

Ground 2

15. This ground complains that the judge erred in ruling that the evidence of six witnesses, the so called "civilian witnesses", was admissible. The appellant challenged the admissibility of evidence to be given by one witness concerning an occasion on which the witness visited the home of the appellant and claimed to have seen the complainant and two other young girls naked in bed with the appellant. The two girls, primary school friends of the complainant, gave evidence to the same effect, and also gave evidence of "naked gymnastics" occurring. There was also evidence of watching a pornographic film in the presence of the complainant and the appellant. Another witness, a male, gave evidence that the appellant had answered the door naked and that the complainant was present there naked at the time.

16. In the course of ruling the judge commented:

> "I am quite satisfied that the fact – or the allegation that he was in bed with two young girls that were naked is part – and one of them being the complainant, the relationship has been explained by her, if her evidence is to be accepted and this is, I think a crucial part of it. It's not – there is no allegation of wrongdoing at all, but the unusual relationship by any standards, the unusual relationship, if – if it occurred are him being in bed with young girls makes it entirely admissible."

17. On behalf of the appellant it is submitted that the evidence that was sought to be admitted and was actually admitted was potentially very prejudicial. It is said, using the language of *DPP v McNeill* [2011] 2 I.R. 669, that while it might be helpful to the prosecution it was neither relevant nor necessary.

18. The Court cannot agree with the defence submissions. That an adult male should be in bed naked with naked eleven year old girls and that he should observe them performing naked gymnastics is manifestly inappropriate. While it is not suggested that any criminal activity took place on the occasion when the friends were present, their evidence does provide support for the complainant's evidence and does provide support for the proposition that the relationship that the appellant had with the complainant was not a normal or healthy one. It was evidence that was relevant to a fact in issue and was probative. The Court rejects this ground of

appeal.

Grounds 3 and 4
19. These grounds of appeal relate to the calling of rebuttal evidence by the prosecution after the appellant had given evidence. This issue arose in the following circumstances. The appellant gave evidence in his own defence and was cross examined by prosecution counsel. At one stage counsel was asking the accused about whether it was appropriate for him to comment upon and encourage a relationship that his sister in law would seem to have had while a fourteen year old girl. Counsel asked "would her mother have known that you were discussing relationships with boys at fourteen years of age". The appellant answered:-

> "Her mother had told my wife that she would allow and appreciate if I could give C all necessary and required information about what were known as the facts of life, sex education and so on. And I did that and I had that role in C's life with her mother's knowledge and consent and that would have taken place sometime in the 80's".

20. At a later stage in his evidence he indicated that he had explained the "facts of life" (as they are known) to the complainant and to her two school friends with their mother's permission. The appellant contends that recalling the witnesses and calling the mother of one of the then schoolgirls in rebuttal was in breach of the rule relating to the finality of answers given to collateral questions.

21. On behalf of the prosecution it is said that these were not collateral issues. The prosecution case was that there was talk in relation to sexual matters by the appellant in the appellant's house. It was never suggested to prosecution witnesses, when cross examined on behalf of the appellant, that any such conversation was in the context of sex education. The Court regards it as relevant that the issue was not raised directly by the prosecution, but was introduced by the appellant in the context of a question about whether it was appropriate for him to be encouraging the complainant as a fourteen year old to have a relationship. That, taken in conjunction with the fact that the question of sex education had not been put to prosecution witnesses in the course of cross examination justify the application.

22. The judge was obviously anxious that witnesses recalled, and in one case the witness was called for the first time, should simply be asked about the giving of sex education by the appellant. As a result of this questions from the prosecution were very brief, with the witnesses simply being asked whether they had ever received any formal educational instruction on the facts of life from the appellant. The defence then cross examined by suggesting that there was a liberal attitude in the house when it came to discussing any matter and that if people had questions they could ask them and the appellant would answer.

23. In the case of the mother who was called for the first time, she was asked whether she had given permission for her daughter to be told about the facts of life and responded by saying that she never gave permission to anybody to teach her daughter the facts of life.

24. The Court is not convinced that the issue was of such central significance in the context of the trial, that there was any necessity to seek to lead rebuttal evidence, but once the application was made it had to be ruled on. Having regard to how the issue had arisen and what had happened at earlier stages of the trial, the judge's ruling was an appropriate one. This ground of appeal, therefore fails.

Ground 5
25. This ground of appeal related to the trial judge's charge to the jury on the issue of delay. When the matter came on for trial, the offences were alleged to have taken place between 21 years and 34 years previously. The judge indicated to counsel that he would be giving a delay warning and a corroboration warning. In charging the jury the judge commented:-

> "The other warning is of delay. Again, absolutely being nobody's fault, particularly having regard to – well I won't – to when it's alleged these matters began to arise. But the fact is there has been huge delay, the last act about a quarter of a century ago or almost that and the first over 30 years ago. There has been a huge delay, and when there is such a delay, people's memories differ or people can become entrenched in a view. Another factor in delay that mitigates an accused person is things can't be investigated properly, as illustrated properly by Mr. McGuinness (counsel for the appellant). If somebody is raped, even back then, there would be forensic evidence if the complaint was made promptly. Again I am not suggesting its anyone's fault at all, but the complaint wasn't made and houses weren't searched, issues like the gap over the wardrobe, various things that could have been checked had all this – had all this arisen much earlier."

26. The judge's reference to the gap in the wardrobe was a reference to an issue in the trial about the complainant accessing photographs taken of her in erotic poses which she said she had located in a gap above built in wardrobes, but it was put to her that there was in fact no such gap.

27. In the Court's view the judge's treatment of the delay issue while brief was adequate. It referred to the length of the delay, memory difficulties, people becoming entrenched in memories, difficulties in investigating, made reference to the absence of forensic evidence, made reference to houses not being searched and then gave the example of the gap over the wardrobe where the photos were said to have been placed. The remarks while brief were tailored to the circumstances of the case and the Court has no hesitation in dismissing this ground of appeal.

Ground 6
28. This ground complains that the verdict of the jury was perverse in all the circumstances. This ground is advanced in circumstances where the jury convicted the appellant of one count of rape and of 115 counts of indecent assault, but acquitted him on 27 counts. It is submitted that the acquittals are inconsistent with the guilty verdicts on the remaining counts and that accordingly the jury verdict has to be regarded as perverse. It is submitted that if the jury did not accept the evidence of the complainant in respect of early and later counts as well as certain other counts that it must be that they had significant doubts about the reliability and veracity of the complainant's evidence.

29. The prosecution retorted that there was nothing perverse about the jury acquitting on some counts and convicting on the bulk. Rather, they submitted, that the jury had acted in the discriminating way in which they did showed that the jury approached their task with particular care and the outcome is consistent with a jury concluding that there was a pattern of prolonged abuse, but that there was some element of doubt about when the abuse started and ended.

30. In the Court's view, the fact that the jury decided to acquit on certain counts does not lead to a conclusion that they regarded the complainant as unreliable. On the contrary, the fact that the jury convicted on some counts and acquitted on others is indicative of a jury approaching its task with particular care and deliberation. The fact that acquittals were recorded in respect of the earliest

and latest counts is, as suggested by the prosecution, suggestive of an element of doubt about when the abuse started and ended. So far as the latter offences are concerned, a jury may also have had to consider whether they could be satisfied beyond a reasonable doubt that the touching at that stage was without the consent of the complainant.

31. The acquittals on counts 89/90 covering the period 1st May, 1987 to the 30th June, 1987 and 95/96 covering October 1987 to the 30th November 1987 may be explained by the fact that the complainant indicated that the abuse was interrupted for a period after the single act of rape which occurred on a warm summer day in 1987. Fundamentally the Court does not believe that the fact that the jury convicted on the majority of the counts while acquitting on a minority provides any basis for an intervention.

32. The Court has considered the various grounds of appeal that have been argued and is not of the view that the trial was unfair or unsatisfactory or that the verdicts are unsafe. In the circumstances the Court must dismiss the appeal.