THE COURT OF APPEAL

[182/14]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

EH

APPELLANT

JUDGMENT of the Court delivered on the 5th day of February 2019 by Birmingham P.

1. On 7th February 2014, following a trial in the Circuit Court, the appellant was convicted by majority verdicts of two counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) Amendment Act 1990 (as amended) and two counts of defilement of a child contrary to s. 3 of the Criminal Law (Sexual Offences) Act 2006. Subsequently, he was sentenced to a term of six years imprisonment on 27th June 2014, the sentences to date from that day. He now appeals against that conviction. While the original notice of appeal identified a number of issues which it was proposed to canvass and a motion was brought seeking to add a number of other grounds, in fact, the appellant, through his counsel, made clear that one ground, and only one ground of appeal was being pursued. That ground of appeal was formulated as follows:

> "[t]hat the trial Judge erred in law and in fact in refusing to admit certain evidence of mobile phone communications sent and received by the complainant and thereafter refusing leave to the appellant to cross-examine the complainant about these texts in circumstances where the said messages had the potential to undermine the credibility of the complainant and her allegations against the appellant."

2. Before turning to consider the issues raised by the single ground that is being pursued, it may be helpful to say something about the procedural history of the case.

3. The complainant was born in February 1996, while the appellant was born in October 1964. The appellant lived in a quiet, rural area of the locality. When the complainant was eleven years of age, her family moved to the townland where the appellant lived with his wife and family. Thereafter, the appellant and the complainant lived across the road from each other. The Court below heard that in the late summer of 2009 when the complainant was thirteen years of age, she had been in the habit of walking the dog owned by the family of the appellant. In August or late summer 2009, it was alleged that the appellant had hugged the complainant and then in October, progressed to putting his hands up her top and feeling her chest. In October 2009, the complainant went to the home of the appellant in relation to seeking sponsorship for a charity project that she was undertaking. The jury heard that the appellant had brought her into his room and had then got on top of her on the bed in his room. The injured party's mother called to the house looking for the appellant and matters were therefore interrupted. The evidence of the complainant at trial was that the appellant had tried to kiss her during that year. She proceeded to outline that in March 2010 that the appellant had called her into an apartment or 'granny flat' in his house, and at that stage, produced a purple vibrator which he inserted into her vagina. Her evidence to the jury was that she bled after this event. Later that year, he put his hands down her pants and also touched her chest while she was cleaning out a shed that was on his property.

4. In summer 2010, in or around July, the appellant spent time in hospital. When he came out of hospital, he asked the injured party over to his house and brought her upstairs, into the granny flat again, and there he had sexual intercourse with her. At trial, there was evidence from the injured party, and this was not really in dispute, that she and the appellant were texting each other on a daily basis. Hundreds of texts passed between the two phones.

5. On 19th August 2010, Gardaí called to the area where both parties lived in relation to an entirely unrelated matter. While Gardaí were in the area, the appellant and complainant arrived back from the nearby town. The appellant had been giving the complainant a lift home.

6. When phones were seized and examined by Gardaí, there was what was described as a litany of highly sexualised text messages passing between the two. The complainant was medically examined and it was noted that there was a tear to her hymen, which was abnormal and strongly suggestive of vaginal penetration. The home of the appellant was searched and a purple vibrator was seized. It was identified by the complainant as the object that was used to penetrate her.

7. On 13th September 2010, the appellant was detained and interviewed. In the course of interviews, the appellant denied sexual intercourse with the complainant and denied any form of sexual assault. He did, however, admit to the phone contact, saying that

this had been instigated by the injured party. It was suggested that the complainant was making all of this up and the defence contention was that the complainant had found the purple vibrator in the house while going through cupboards or presses while babysitting.

8. The appellant was charged with five offences. His first trial commenced in June 2013 and was presided over by Judge Donagh McDonagh. That trial ended with the jury being discharged in a situation where, at a time after the complainant had given evidence, a juror realised that he recognised somebody involved in the case.

9. In October 2013, the second trial began before Judge Tom Teehan, and after a six-day trial, the jury disagreed and were discharged. In the course of this trial, one count on the indictment was the subject of a directed verdict of not guilty.

10. On 4th February 2014, the appellant's third trial began before Judge Teehan who, it bears highlighting, was the same trial Judge that had presided over the trial that ended with a disagreement.

11. The relevance of the fact that the trial which resulted in a conviction was the third trial is to be found in the fact that because there had been two earlier trials, the presiding Judge and counsel started the case with some considerable degree of familiarity about the issues. The effect of this was that debates were somewhat truncated and arguments were sometimes formulated by reference to what had occurred on previous occasions. As a result, the transcript of the February 2014 trial at times does not make easy reading for a reader unfamiliar with the background to the trial. It was for this reason that the Court did not conclude the hearing of the appeal when it was first listed, but instead put the matter back so that the text communications referred to in the sole ground of appeal could be accessed, isolated and made available to the Court.

12. While the ground of appeal is couched in terms of the Judge's refusal to admit evidence in relation to mobile phone communications and not permitting cross-examination in relation to texts, the issue at trial was about the extent to which the defence would be free to explore the complainant's prior sexual history.

13. The defence's interest in this issue was connected to the fact that there was evidence before the Court from the Medical Director of the Community Child Centre, the regional Child Sexual Abuse Assessment Unit, that she carried out a medical examination on 20th August 2010. She reported observing a transection or tear or laceration through the entire width of the hymenal membrane. The tear was healed and the doctor indicated that this meant that the tear had occurred at least a week before the examination. Apart from saying that it was more than a week old, it was not possible to date the tear. The evidence suggests that the injury was not caused by tampon use or by digital penetration but rather blunt force penetrating trauma.

14. The defence's concern about the medical evidence and an anxiety, if possible, to provide an explanation other than the activity in which it was alleged the appellant engaged, was heightened by the fact that the complainant, between the second and third trials, had provided a statement of additional evidence as follows:

> "[n]obody inserted a vibrator into my vagina or had sexual intercourse with me by inserting a penis into my vagina before [EH] did."

15. Before the case was opened to the jury by prosecution counsel, the defence sought leave of the Judge to put questions to the complainant about her sexual experience. The complainant was represented by counsel instructed by the Legal Aid Board for this aspect of the trial.

16. The debate that ensued was a somewhat truncated one as all involved were conscious of the fact that the issue had been canvassed and ruled on by the same trial Judge in the course of an earlier trial. The Judge was reminded that his previous ruling had been to provide for what was described as "limited leave". As part of the disclosure process, a huge number of text messages which had been retrieved were disclosed. The prosecution was keenly interested in the phone records because of the obviously inappropriate sexualised text messages from the middle-aged appellant to the young teenager. It happens that the defence were also interested in text messages between the complainant and friends of hers and, in particular, exchanges with a young male friend, DR.

17. In urging the Judge to grant leave and to do so on a broader basis than he had done previously, counsel drew attention to the anticipated medical evidence in relation to the hymen tear and also to the recently served additional evidence of the complainant, saying that she had not been penetrated by anybody else, which, as the Judge pointed out, was consistent with her position at the previous trial.

18. The Judge was reminded by defence counsel that in the course of the previous trial he had ruled as follows:

> "[h]aving regard to all of the arguments that have been put before me I would allow Mr. Cody [Senior Counsel for the defence] to question Ms. C. as to whether or not there has been vaginal penetrative sex of any sort with anybody involving anybody else, anybody other than [EH] and I have heard outlined to me some text messages which have emanated from a third party. It seems to me that many of these are of a very general nature indeed and to have these canvassed in court would result in real danger, a situation which the legislation is specifically designed to prevent, because as I understand the section the ultimate issue is, if the complainant were not to be cross examined on some specific instance involving her own history would this be the determinate, the ultimate determinate, between guilt and innocence, and there is a possibility of that here, I have to say, having regard to this issue and I would allow, as I say, such a question to be put by Mr. Cody and I would allow, I would have to say, that what has been opened to me in relation to the question of balance is of so general a nature that the matter should not be visited, but I would allow in the particular circumstances here Mr. Cody raise (1), the issue of one text message which he says most strongly suggests the possibility at least of there being penetrative sex as between the complainant and a third party in the month of August, 2010 prosecution counsel indicated that so far as a specific text message from a young man of her acquaintance about having sex is concerned she would not oppose the defence application."

19. In response, prosecution counsel referred to the damaged hymen and said that because of a specific text message to her from a young man of her acquaintance in relation to having sex, that she would not contest the defence application in relation to the that particular text. There was no difficulty in relation to one or two questions in that regard. However, as far as the rest of the application was concerned, counsel said it was based on a series of text messages passing between teenagers, not talking at all about penetrative sexual intercourse, but rather, engaging in sexual chat. Apart from the text about having sex, the balance of the texts did not assist in terms of relevance or probity, they positively flew in the face of what the Act was intended to achieve. The approach struck by the prosecution was supported by counsel on behalf of the complainant.

20. After the debate concluded, the Judge ruled as follows:

> "[t]his matter was gone into at some length the last time. It has been gone into at some greater length on this occasion, and I am reinforced in my view that the ruling I made on the last occasion was correct. The defence will be allowed to cross examine in relation to the issue which I permitted on the last occasion. The more I heard in relation to this serious of text the more I am satisfied that I made the correct ruling on the last occasion. To allow this would be to bring about the very mischief which the legislature had in mind when this Act was put in place and bearing in mind the very strong words of Mr. Justice Kearns (as he then was) in 2006 in the GK case, as set out at para 25 of his judgment, the ruling I repeat is the one which I made on the last occasion."

21. At the request of this Court, counsel on behalf of the appellant clarified that the defence's interest related to texts exchanged on 16th, 17th, and 18th August 2010. In assessing the significance of the texts exchanged on those days, those dates are important because it means that these texts would have been exchanged at a time after the penetrative activity or trauma which gave rise to the hymen tear occurred.

22. At 10.13pm on 17th August, DR texted UR on the topic of 'bands being broken' and we now comment on that. The defence interest in this text is that they say that a group of teenagers, which included the complainant, were in the habit of wearing bands or bracelets with different coloured bands linked to different activities of a sexual nature, one colour for a kiss, another colour for oral sex and so on. If the message with its reference to bands being broken, is to be interpreted in the way that the appellant suggests then it must be read as a suggestion or an invitation to engage in some form of sexual activity, perhaps as innocent as a kiss on the following day. It is implicit in that suggestion or invitation that the activity contemplated had not occurred in the past.

23. The defence are also interested in a series of text exchange starting at 0024.49:

> "DR: Cn I kis ya tomrw 0024.49
>
> COMPLAINANT: Mayb 0025.05
>
> DR: Ride 0025.37
>
> COMPLAINANT: Mayb 0025.53
>
> DR: Hahaha is Claire cumen down 0026.52
>
> COMPLAINANT: Tink so 0027.19
>
> DR: Am weld n cnt touch ya 0027.59
>
> COMPLAINANT: I kno 0028.20
>
> DR: Im farey horney nw boi 0029.54"

24. The appellant is also interested in an exchange that took place on the 18th August commencing at 0021.46.27:

> "DR: No u me hav ta hav sex u no 0021.46.27
>
> COMPLAINANT: Hey, dya hav a hickey no? 0021.47.13
>
> DR: Bite marks ya so wem we haven sex 0021.49.51
>
> COMPLAINANT: Hahaa never 0021.51.38
>
> DR: U hav tu u broke my bands 0021.52.56
>
> COMPLAINANT: Indidn 0021.55.15
>
> DR: Hey, u betr giv me a hand job so 0021.56.19
>
> COMPLAINANT: No 0021.59.02
>
> DR: You broke d bands 0021.59.51
>
> COMPLAINANT: So 0022.05.02
>
> DR: U just hav ta il male it a quickie 0022.07.42
>
> COMPLAINTANT: Na 0022.14.17"

25. The complainant was cross-examined in relation to this section. She was asked about the text "bite marks ya so wem we having sex". Soon after she remembered getting that, she said "no", but that he texted it. Her attention was drawn to her response "ha ha never" and there the following exchange occurred:

> "Q. So taking that phone message, that text message that he sent and you sent back to him, were you in a sexual relationship with [DR]?
>
> A. No
>
> Q. At all
>
> A. Never

Q. Never?

A. Never.

Q. At that time prior to that message?

A. No

Q. You are quite sure about that?

A. Yes, I am positive. We are still good friends to this day."

26. At another point, she was asked whether she had been going out with DR or was there any kind of a relationship with him. The response was somewhat equivocal, saying that they were going out but that they never saw each other, "[i]t was like we were in a relationship but not really in a relationship at the same time. We were kinda just more friends".

27. Restrictions on evidence and cross-examination at trials for rape offences were introduced by the Criminal Law Rape Act 1981 and the scope was widened by s. 13 of the Criminal Law (Rape) Amendment Act 1990 to cover other sexual offences. Section 3 provides:

> "3(1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charges relate, of a complainant with any person:
>
> (2) (a) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him in the absence of the jury, by or on behalf of an accused person.
>
> (b) The judge shall give leave if and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied."

28. The statutory threshold is, therefore a high one, though we hasten to add not an impossible or unattainable one.

29. In the case *of DPP v. GK* [2007] 2 IR 92 from p.103-104, the Court of Criminal Appeal commented as follows:

> "[h]aving regard to the severely restrictive terminology of the statutory provision, the Court is of the view that, in general, a decision to refuse to allow cross-examination as to past sexual history may more readily be justified in most cases than the converse. Indeed, the Act is quite explicit in so providing. Furthermore, the younger the age of a complainant, the less desirable it is to ever allow cross-examination which may well be extremely traumatic for a complainant of tender years. Where a form of questioning is allowed, it should be confined only to what is strictly necessary and should never be utilised as a form of character assassination of a complainant."

30. In the present case, given that the complainant had said that she had been penetrated by EH and that the medical evidence clearly was supportive of the fact that penetration had occurred, that the defence would wish, if possible, to provide an alternative narrative in relation to penetration was very understandable. Their difficulty was that they were not in a position to point to any other evidence or any penetration other than EH. The sexual chat passing between two teenagers, the boy was aged thirteen at the time he was texting, does not go anywhere near providing a basis for a conclusion that the complainant was sexually active with a peer to the extent of penetrative intercourse.

31. Having raised the issue at the start of the trial, the Judge permitted it be explored and canvassed, but in a restricted way. So, the complainant was asked about the nature of her relationship and asked whether the relationship was a sexual one, something which she firmly denied.

32. This Court has read the extracts from the text exchanges of 16th, 17th, and 18th August 2010, focussing in particular on the exchanges on which the defence had laid emphasis.

33. In the Court's view, the trial Judge was correct in concluding that the statutory threshold had not been met. It seems to us that nobody reading the exchanges in full would conclude that their impact was such that a jury not hearing about them might reasonably be satisfied beyond reasonable doubt of the guilt of EH, but a jury that heard about them might not have been so satisfied. The Court is clearly of the view that the statutory threshold had not been met, and indeed, that this application does not come anywhere close to meeting the statutory threshold. No doubt has been raised in our minds about the fairness of the trial or the safety of the verdict.

34. Accordingly, the Court will dismiss the appeal.