THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

Record No: 2014/53

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

ANTHONY MCCABE

Appellant

JUDGMENT of the Court delivered 28th of July 2017 by Mr. Justice Edwards.

Introduction
1. The appellant was tried before a jury at Tullamore Circuit Criminal Court on two counts of indecent assault on a male person contrary to common law and as provided for in s. 62 of the Offences Against the Person Act 1861, and on the 14th of February 2014, which was the fourth day of that trial, he was found guilty on Count No 1 on the indictment by an 11:1 majority verdict of the jury.

2. He had earlier, on the previous day, been found not guilty on Count No 2 on the indictment.

3. The appellant was subsequently sentenced on the 20th of February 2014 to a sentence of twelve months imprisonment suspended upon conditions for a period of twelve months.

4. The appellant now appeals against his conviction only.

The Grounds of Appeal
5. The appellant makes the following complaints in his Notice of Appeal:

> 1. The trial judge erred in law in refusing to accede to the applicant's application for a direction and to withdraw Count No. 1 from the jury at the close of the prosecution case;
>
> 2. The trial judge erred in law or misdirected herself in determining that there was on the evidence as adduced and at the close of the prosecution case evidence to support Count No. 1 in the indictment being a specific charge that the applicant did on a date unknown and at a particular place, namely [a specified residential care centre] indecently assault one [named person – hereinafter to be referred to as "C"];
>
> 3. The trial judge when considering the application for a direction and/or the application to withdraw the said Count No. 1 from the jury erroneously had regard to and/or took account of evidence of the said complainant which said evidence was irrelevant and/or inadmissible in that the said evidence did not support the charge as laid and in respect of which the appellant was tried

The Evidence before the Jury
6. The jury heard that the complainant "C" was born on the 12th of September 1968 and was 24 at the time of the incident. He is a vulnerable person who has a mild intellectual disability and also suffers from a number of physical ailments including epilepsy, hepatitis and haemophilia. He entered a named residential care centre in 1985 and was resident there for 24 years. The appellant was a carer at the centre.

7. "C" acknowledged knowing the appellant from the named residential care centre. In a question to the complainant that was clearly intended to elicit the nature of the appellant's role or employment in the residential care centre, the complainant was asked: *"Okay and what did he do in [the named residential care centre]?"* This elicited the following reply and follow up exchanges:

> *"A. He felt me up.*
>
> *Q. Well, if you leave that just for the moment. Does he work in [the named residential care centre]or did he work in [the named residential care centre]?*
>
> *A. Yes, he did. He was an assistant nurse.*
>
> *Q. Assistant nurse?*
>
> *A. He would have -- yes he was. He wasn't actually a nurse as such.*
>
> *Q. Yes?*
>
> *A. A nurse is someone who is qualified as a nurse. But, he was a carer."*

8. Later in the complainant's evidence the jury was told by him that he normally took a bath at around six or seven o'clock in the

evening but was capable of running it himself as he was relatively independent. On the occasion of the alleged offence he took his bath at around eight o'clock in the evening which was unusual.

9. The complainant told the jury that on the occasion in question:

> *"A. And he was feeling me up in the bath.*
>
> *Q. So, can you tell us what happened?*
>
> *A. I was turning from the left to the right, the left to the right just to get away from that.*
>
> *Q. Well, tell us what happened. If we can just take it in stages? You recall an incident when you were having a bath: is that right?*
>
> *A. Yes.*
>
> *Q. Okay, We.., can you tell us what that incident was?*
>
> *A. Tony came and put his hand into the bath.*
>
> *Q. Yes?*
>
> *A. And he wanted to feel me up.*
>
> *Q. And what did you do?*
>
> *A. I was turning over to my left and over to my right each time.*
>
> *Q. Yes?*
>
> *A. So, he wouldn't feel me up.*
>
> *Q. And how long did that last for?*
>
> *A. Well, I had the bath as quick as possible."*

10. He went on to say that he was afraid to tell anyone because Mr. McCabe was a staff member. However in December he made a complaint to a named nurse at the centre who is now deceased. An internal investigation was instigated and the appellant was suspended with pay. He was subsequently allowed to resume his work at the centre. However, the matter was also brought to the attention of An Garda Siochana who commenced a criminal investigation that ultimately culminated in this prosecution.

11. In cross-examination it was put to the complainant by counsel for the appellant:

> *"Q. And insofar as the alleged incident in [the named residential care centre] is concerned he did not touch you in any inappropriate way. Do you accept that?*
>
> *A. No, I don't."*

12. Under questioning by Gardaí the appellant denied all allegations. He denied ever bathing the complainant or supervising him on his own during bath time although he did admit to supervising him when another carer was present.

The Appellant's Submissions

13. The appellant submits that the prosecution had opened the case to the jury on the basis that the sexual or indecent component of the offence in question involved physical and direct contact perpetrated by the accused. Though the appellant accepts that evidence of the creation of an apprehension of imminent uninvited and unwelcome physical contact of a sexual nature is sufficient in law to establish an indecent assault (see this Court's decision in that regard in *Director of Military Prosecutions v Donaghy* [2016] IECA 191), the case as presented by the prosecution was that there had been actual physical and direct contact of a sexual nature. The appellant submits that the evidence given at trial, taken at its highest, does not prove physical and direct contact of a sexual nature. In submitting that the trial judge erred in failing to direct a not guilty verdict, he relies on the first limb of Lord Lane's statement of the principles applicable to how a judge should approach a submission of "no case" as expounded in *R v. Galbraith* (1981) 73 Cr App R 124; [1981] 1 W.L.R. 1039. It was suggested that, viewed at its height, the prosecution's evidence amounted to no more than that there was an unsuccessful attempt by the appellant to feel the complainant up. However, the case had been opened and presented to the jury on the basis that the substantive offence of indecent assault would be made out on the evidence, and the appellant was not charged with the inchoate version of the offence.

The Respondent's Submissions

14. Counsel for the respondent accepts that the prosecution opened the case as the appellant submits. However, he maintains that the transcript reveals that there was in fact evidence given of uninvited and unwelcome physical contact of a sexual nature, and he points to a number of statements by the appellant:

> *"Q. Okay and what did he do in [the named residential care]?*
>
> *A. He felt me up."*

And:

> *"Q. Right OK.*
>
> *A. And he was feeling me up in the bath."*

And (under cross-examination):

"Q. And insofar as the alleged incident in [the named residential institution]is concerned he did not touch you in any inappropriate way. Do you accept that?

A. No, I don't."

15. It is accepted that the complainant had indicated in his evidence that he had turned to the left and turned to the right while in the bath *"just to get away from that"*, but the evidence was far from bearing the interpretation that the appellant had been unsuccessful in effecting any molestation. There were clear statements from the complainant that *"he felt me up"*, and that *"he was feeling me up in the bath"* and an express rejection of a suggestion put to the complainant in cross-examination that he had not been touched up in any inappropriate way.

16. The respondent accepts that there was no evidence capable of corroborating the complainant's testimony but maintains that there was more than enough for the trial judge to have allowed the matter to go to the jury.

Discussion and Analysis

17. The offence of indecent assault of a male person requires proof of an assault in circumstances of indecency. The assault component of the offence can embrace both the apprehension of uninvited and unwelcome physical contact and actual uninvited and unwelcome physical contact. We are satisfied that in this case the matter could properly have been left to the jury by the trial judge on either basis notwithstanding the manner in which the case was opened by the prosecution.

18. Be that as it may, the prosecution have not sought to resile at any stage from the suggestion made in their opening that the jury would hear, and that they did in fact hear, evidence of actual uninvited and unwelcome physical contact of an indecent or sexual nature. We agree with the submission advanced by counsel for the respondent. In assessing the sufficiency of the evidence for the purposes of Lord Lane's test, the trial judge was obliged to consider the evidence adduced by the prosecution taken at its height. We agree that, while the complainant did certainly indicate in his evidence that he had turned to the left and turned to the right while in the bath *"just to get away from that"*, the totality of his evidence is not contra-indicative of actual molestation by the appellant. Rather, there were, as counsel for the respondent points out, a number of assertions of actual molestation, and there was an express rejection of a suggestion to the contrary put in cross-examination. There was clearly a sufficient case to go to the jury.

19. Moreover, we see no evidence to support the suggestion that the trial judge in arriving at his decision had regard to and/or took account of evidence of the complainant that was irrelevant and/inadmissible. No such evidence has been identified.

20. In the circumstances we dismiss the appeal on all grounds