THE COURT OF APPEAL

[72/17]

Birmingham P.

Mahon J.

Edwards J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V.

J.S.

APPELLANT

JUDGMENT of the Court delivered on the 26th day of June 2018 by Birmingham P.

1. On 12th October 2016, following a trial in the Central Criminal Court, the appellant was convicted on three counts of rape. The counts were laid as having occurred between 1st September 2009 and 31st March 2009, 1st October 2010 and 31st December 2010 and 1st January 2011 and 31st March 2011 at a location in west Cork. Subsequently, he was sentenced to a term of 7 years imprisonment but with the final six months suspended. He has appealed against both conviction and severity of sentence and this judgment deals with the conviction appeal. There is really only one issue in the appeal, which is a contention that the judge ought to have granted a direction at the conclusion of the prosecution case.

2. By way of background, it should be explained that the complainant was just short of his 14th birthday at the time of the trial. Over the period with which the trial was concerned, he lived with his parents and his three brothers. He was the second eldest of the four boys. The appellant is the complainant's uncle, the complaint's mother being the appellant's sister. At trial, it was clear that the appellant experienced special needs learning difficulties. The trial was concerned with a number of allegations of anal penetration.

3. When the complainant was 11 years of age, he was interviewed by specialist Garda interviewers and the video recording of this interview was presented in Court as his direct examination. He was then cross-examined by defence counsel.

4. It is clear that in the interview with specialist Gardaí, the complainant gave an intelligible and clear account. However, on behalf of the appellant it is said that when he was cross-examined, major inconsistencies entered the narrative. He was unable to provide any details and frequently resorted to saying that he did not remember when questions were put to him.

5. While the direct evidence i.e. the interview with Gardaí is in general clear, there are aspects to which the appellant draws attention. Counsel points out that there is an inconsistency as to whether or not the complainant was "dragged up the stairs" by the appellant prior to the commission of one of the offences, probably the first in time. In the course of the interview, he was asked:

> "Q. Okay, so you were on the computer, and what happened next?
>
> A. He dragged me upstairs, I went upstairs to go to the toilet because the downstairs one was blocked and then he, ah, took me somewhere but then, but I don't know where but it was upstairs in the house and then he started."

6. At trial, the complainant was cross-examined relatively briefly, but with considerable skill and sensitivity by defence counsel, Ms. Elizabeth O'Connell SC.

7. In the course of the cross-examination, the topic was dealt with as follows:

> "Q. But then you said to her [the specialist interviewer] that S [brother of the complainant] before he went out put all toilet paper down the toilet?
>
> A. Yes.
>
> Q. And because of that you said you went to the toilet upstairs because you couldn't obviously use the one downstairs?
>
> A. Yes.
>
> Q. So I suppose what I'm asking – what I'm asking is, did you go upstairs to use the toilet because the bottom one was filled with toilet paper?
>
> A. Yes.
>
> Q. That's what you think happened?
>
> A. Yes.

Q. Okay, so when did the dragging happen then?

A. When I was upstairs I accidentally said I grabbed the stairs because it was yes

Q. Okay, so what happened with the dragging?

A. Well I'm not really sure because I accidentally said I got dragged up the stairs because I was caught in the moment and stuff like that.

Q. Okay, so do you remember any dragging now?

A. I don't, no."

8. Other aspects of the narrative to which the advisers of the appellant draw attention are what was said about whether the appellant was standing or not and what was said about the use of a sheet. The issue of standing or otherwise was dealt with as follows during the course of the interview:

"Q. And when this happened, R, were you sitting, standing or some other way?

A. He, I was standing.

Q. You were standing and was, what way was he?

A. He was standing too.

Q. He was standing too, and tell me more about that?

A. I was standing and then he was standing but then he, he was starting kneeling down a little bit.

Q. Okay, describe that to me.

A. R pauses

Q. Okay, explain what you mean by starting to kneel.

A. He was bending down a bit and his knees were starting to bend outwards.

Q. Okay, and tell me how you know that.

A. Because I was looking, trying and stop him and I could see him doing it.

Q. And what could you see?

A. Him kneeling down and undoing his pants."

The topic surfaced in the course of cross-examination as follows:

"Q. So, do you remember any dragging now?

A. I don't know.

Q. Okay, fair enough. So, what you seem to be very clear about to Garda Keating [the specialist Garda interviewer] and I'm just wondering if you still remember it, was you standing when the bad stuff happened: do you remember that now?

A. Yes.

Q. Think about that now, do you actually remember that standing?

A. No, I don't know.

Q. Okay. What I'm talking about now when the very worst stuff happened, you know, you say and can you tell us about where you say the person who did that stuff, where were they standing?

A. They were behind me.

Q. Okay.

A. Yes."

At that stage, the cross-examination moved on to deal with the sheet issue with counsel asking:

"Q. And you said that person went to get a sheet: do you remember that?

A. Yes.

Q. And what were you doing when they were going to get the sheet?

A. I don't know.

Q. Do you remember now the sheet being put over your eyes?

A. I don't know.

Q. Do you remember your eyes being blocked out with someone's – you do?

A. Yes.

Q. And do you remember the way that that happened?

A. No.

Q. You know, if you opened your eyes and there was a sheet over them, you'd see the colour, the sheet wouldn't

A. I, yes I think so.

Q. So, if someone tied a pink sheet onto your face, you'd see pink wouldn't you?

A. No, you'd see black, I think, wouldn't you?

Q. Okay, okay, you'd just see dark.

A. Yes.

Q. So, do you remember it all being dark?

A. Yes."

In the earlier interview with the specialist Gardaí, the topic was dealt with in these terms:

"Q. Okay, R, earlier you said block arms and cover eyes, tell me about that.

A. He kept blocking my arms and then, and then he got a sheet to cover my eyes so that I couldn't what he was doing, so that I can't block where he is.

Q. Okay, and tell me about the sheet?

A. It was . . . I'm not sure what kind of sheet it was.

Q. Okay, where did he get the sheet?

A. From one of the rooms.

Q. From one of the rooms? Okay, and do you know the colour of the sheet?

A. I think it was blue.

Q. Okay, tell me how did he cover your eyes?

A. He put it around my eyes and then tied it from the back of my head?

Q. And how do you know he tied it?

A. Because I can feel the force, just tying it, and then he put his hands back on my shoulder.

Q. Okay, tell me how did this make you feel?

A. Even more scared and sad."

9. In contending at trial and on appeal that this was a case where there should have been a direction, counsel on behalf of the appellant points to two other aspects of the evidence. First, she points out that the complainant had said that the abuse tended to happen on a Friday when members of the family, including his parents and grandfather, would go shopping in Clonakilty. However, the mother of the complainant, when giving evidence, narrowed the window of time during which the appellant would be in charge of the children while babysitting. In the course of cross-examination, she had said:

"[n]o, he was there, just to look after the kids if we weren't back in time, which would be back five minutes late, but he was never there on his own all the time because John's cousin, she'd come up, she lived in Rosscarbery."

She went on then to name the cousin in question.

10. It should be noted that the resistance by the complainant's mother to any suggestion that JS was left in general charge of the children came about in the context where it was suggested to her that the reason why JS had been invited to move into the house was because he was needed to help out there.

11. The appellant says that, likewise, an issue arose in relation to the evidence of the father of the complainant and brother-in-law of the accused. This related to a suggestion that when he had brought his son to St. Finbar's Hospital in Cork following disclosure, that he had indicated that his son had a prolapse at one stage. The medical records do not indicate anything in relation to a prolapse, but notes taken at St. Finbar's of conversation with the father record that he had referred to a prolapse and a procedure to correct that. On behalf of the appellant, it is said that the conflict between what the complainant's father recalls about his conversation, and indeed the question of whether there was ever a bowel prolapse and what was recorded as having been said, gives rise to significant disquiet. The issue became relevant at trial in these circumstances. Medical evidence which might have been explained by sexual activity, but might also have been linked to the fact that the complainant, as a baby, experienced constipation.

12. In seeking a direction on behalf of the appellant, it was said that his performance in cross-examination at trial was such that he had not substantiated in any way what he had said during the course of the s. 16 interview. However, in argument with defence counsel, the trial judge had commented "it seems to me that on a fair appraisal of the evidence of the complainant, at the very least he remained unshakeable in respect of that core assertion". Having heard the argument, the trial judge ruled as follows:

> "What is before me is an application for a direction. It is advanced on the basis, not that there is no evidence, but rather that the evidence is tenuous and that of the consequences that I, in my discretion, should withdraw the case from the jury. The relevant legal principles to be applied are set out in the case law that has been handed in to me and I adopt the principles in those cases and in particular the statement of the law of Mr. Justice Edwards as set out in the M case . . . I have listened carefully and considered the various matters of fact that have been put before the Court by Ms. O'Connell [Senior Counsel for the defence]. She details various matters which would suggest that there are infirmities in the prosecution case and that I accept. However, I do not accept that those infirmities go to a point that the case is so tenuous that it must be withdrawn on a discretionary basis and for this reason I refuse the application."

13. In the course of submissions, counsel on behalf of the appellant had said:

> "I cannot put it further than to say this is a borderline case, in my submissions. I cannot put it within (1) [a case where there is no evidence]. I say it is within (2) namely, that it is tenuous for the reasons of inconsistency, vagueness and inherent weakness, but I would have to concede, I think, that it would be borderline on that analysis and I say it is within your discretion for that reason."

14. On one view, the fact that it was accepted that the case was borderline meant that it was a case that could safely be left to the discretion of the trial judge and that would be sufficient to dispose of the appeal. However, notwithstanding that the complainant has never resiled from his central allegations and, on the contrary, has remained steadfast in relation to them, the Court felt it appropriate to view the cross-examination of the complainant and significant portions of the Garda interview. The view that we have formed is that, when interviewed, the complainant was an impressive narrator. It is true that, on occasions, he responded to questions by saying that he did not know, but that did not, in our view, undermine his general credibility. We think it likely that any tribunal of fact would have been impressed by the account that he had to give and the manner in which he gave it. We acknowledge that the complainant was less impressive when cross-examined. There may be a number of reasons for that. He was three years older and was being cross-examined at a greater remove in time. It may be that the specialist Garda interviewers had established a greater rapport with him than prosecution counsel was able to achieve. However, while his account in cross-examination was lacking in detail in many respects, it is, nonetheless the case, that he never resiled from the central allegation, and indeed on re-examination, he essentially restated the core allegation.

15. In the Court's view, significant progress was made by defence counsel in the course of cross-examination. The progress that had been made provided a basis for addressing the jury and urging the return of a verdict of not guilty. However, the Court does not believe that the stage was reached where this was a case that should have been withdrawn from the jury.

16. In our view, the trial judge was very definitely entitled to rule on the application as he did and so we must dismiss this appeal.