



THE COURT OF APPEAL

Record Number: 268/2015

**Peart J.
Birmingham J.
Mahon J.**

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M. D.

APPELLANT

JUDGMENT OF THE COURT DELIVERED ON THE 7TH DAY OF DECEMBER 2017 BY MR. JUSTICE PEART

1. On the 15th May 2015 at Dundalk Circuit Criminal Court, the appellant was found guilty by a jury of a single offence of sexual assault upon a young girl then aged 13 years, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended. He was sentenced to 3 years imprisonment, all of which was suspended on his entering into a bond to be of good behaviour for a period of three years from the date of sentence, namely the 22nd October 2015.

2. The appellant appeals against his conviction only, on the ground that his trial was rendered unfair by reason of a ruling given by the trial judge just prior to the commencement of the trial.

3. That ruling related to the sequence in which certain evidence would be given, principally in relation to showing the jury certain CCTV footage from the shop in which the alleged offence was said to have been committed. It is submitted that the appellant was denied the opportunity to cross-examine the complainant in relation to what could be seen on the footage, while at the same time being able to show her the CCTV footage by reference to which she was being questioned. It is submitted that it was important to be able to do so in a case such as this, where there were no witnesses to what was alleged to have occurred, and where the credibility of the complainant's account of what took place was an important matter for the jury to consider. Counsel submitted that he was hampered unfairly in his efforts to attempt to cast doubt upon the correctness of the complainant's account in her direct evidence of what happened by not being permitted to show her the footage while he was questioning her about what could be seen on it.

4. While the CCTV footage was, of course, played to the jury as part of the evidence led by the DPP, it was, in accordance with the trial judge's ruling, played to the jury only after the complainant's direct evidence and cross-examination had been completed.

Background

5. The offence is alleged to have taken place in the evening of the 9th May 2012 in a shop owned by the appellant and which is quite close to where the young complainant lived with her family. She had been asked by her mother to walk down to the shop to get a fuse for the house. She made that purchase, but rather than leave the shop she remained for a short while in the shop while she chose some sweets to buy with her change. There were other girls in the shop apparently, and she allowed them to go to the shop counter to be served ahead of her. When those girls had left she paid for her sweets and made to leave. It is then that an area of controversy in the case arises. The complainant says that as she was making her way to the shop door she was called back by the appellant into a kitchen area at the back of the shop, and that the alleged offence was then committed by the appellant. The appellant on the other hand says that he did not call her back into that area, and that she voluntarily went back to the kitchen area uninvited as she had forgotten to take a bag of sweets she had bought. She denies this, and is adamant that he called her back into that back area and committed the offence there.

6. The kitchen area at the back of the shop is not seen on any CCTV footage, but it does show her turning back as she was making her way to the shop exit. There is no sound on the footage.

7. Counsel wished to be in a position to cross-examine her on her direct evidence by reference to what is to be seen on the CCTV footage both in relation to her turning back and making her way towards the back area of the shop, and also in relation to some interaction between her and the other girls who were in the shop, and whom she allowed go ahead of her to the counter. There was some question as to whether or not she knew those girls, and which counsel wished to explore by reference to the CCTV footage. The trial judge's ruling just prior to the commencement of the trial precluded him from cross-examining her while at the same time showing her the footage to which he wished to refer.

8. The complainant was aged thirteen years on the date of the alleged offence and accordingly her statement was video-recorded pursuant to s. 16 of the Criminal Evidence Act 1992. That statement formed her direct evidence and was shown to the jury at the outset of the trial. It is upon that statement of direct evidence that counsel for the appellant wished to cross-examine her. That cross-examination would normally take place via video link so that the young complainant would not be in the courtroom, and would not be able to see the CCTV footage as it is being shown to the jury. It was for this reason that before the commencement of the trial counsel for the appellant sought some directions as to how the evidence would proceed in order to facilitate his desire to be able to cross-examine the complainant by reference to the CCTV footage.

9. The matter was raised with the trial judge before the commencement of the evidence. The trial judge allowed a short period of time to see what arrangements could be made. In that regard he stated "because it would be impossible to conduct a cross-examination in those circumstances if you were trying to put issues about what's on CCTV, but she can't see and can't comment".

10. After a short adjournment, the parties again addressed the issue in the absence of the jury. Counsel for the appellant informed the trial judge that it had been agreed between the parties that the young complainant would be present in court for the playing of her videotaped direct evidence, and that she would in fact then come to the witness box to be cross-examined. Counsel then stated that this "would permit us in the course of cross-examination, if I wished, I would be in a position to play the CCTV".

11. Counsel for the DPP suggested that first of all the s. 16 interview should be played, to be followed immediately thereafter by the playing of the CCTV footage, to be followed by the complainant coming to the witness box for cross-examination.

12. However, counsel for the appellant was concerned that the complainant should not view the CCTV footage prior to the commencement of his cross-examination, and that he should be facilitated by being able, should he wish to, to show her such pieces of the CCTV footage as he wished depending on how his cross-examination proceeded. The CCTV footage would in any event be shown to the jury when one of the Garda witnesses was giving evidence after the evidence of the complainant had been completed. But counsel for the appellant was conscious that during his cross-examination there was no obligation on him to show her the CCTV at all or refer to what was on it, and therefore that it should not be shown to her at all prior to his cross-examination.

13. In response, counsel for the DPP expressed his concern that if matters proceeded as suggested by the appellant the CCTV might end up being shown to the jury in "bits and pieces" and that this would not be satisfactory. He stated that without wishing to impede the cross-examination unreasonably, he was nevertheless anxious that the jury would view the CCTV in its entirety when it was being put into evidence.

14. Counsel for the appellant maintained his position that he was entitled to cross-examine the complainant by reference to the CCTV footage should he choose to do so, and that insofar as the DPP was in any event going to be showing the CCTV to the jury as part of the evidence led by the DPP that should not occur between the direct evidence of the complainant and his cross-examination of her. He stated also that he would be content if the CCTV footage was played to the jury before any prosecution witness gave evidence, but provided that the complainant was not in the courtroom while that was done. He maintained his entitlement to be able to put questions in cross-examination by reference to the footage, and if necessary by replaying to the complainant relevant parts of the footage.

15. The trial judge was understandably concerned that he was losing valuable time while this issue was being debated, and decided to rule on the matter. He stated that he did not wish to lose a full morning, and ruled as follows:

"I am very concerned about why these issues were not dealt with at half past 9 in the morning. I'm going to rule. The video [i.e. complainant's direct evidence] will be shown, the complainant will be cross-examined, and then the CCTV of the shop can be shown, in that order. They are separate pieces of evidence ... That is my ruling."

16. Counsel for the DPP attempted to seek further clarification, but the trial judge stated:

"I'll not sustain it. The video will be shown of her interview, she can be cross-examined ... that is the first phase. The CCTV in the shop is a separate and distinct portion of evidence ... and can be shown, if need be, by the State on matters arising out of cross-examination, or can be shown as part of the State evidence. But the two videos will not follow each other. They will be separate and distinct in the line order of the evidence".

17. The trial then proceeded. Thus the appellant was unable to play to the complainant during cross-examination specific extracts from the CCTV thereby denying an opportunity to seek to demonstrate to the jury inconsistencies considered to arise between the complainant's direct evidence and what appears on the CCTV. In fact the CCTV footage was not shown to the jury as part of the DPP's evidence until the following morning, by which time the complainant, her father, her mother and her sister had all completed their evidence and cross-examination.

18. On this appeal counsel for the appellant has submitted that the ruling made by the trial judge unfairly restricted his ability to cross-examine the complainant by reference to what was visible on the CCTV footage, that there was no necessity for the trial judge to have ruled in the way he did, since it was perfectly feasible for his concern to be met, by permitting the CCTV footage to be shown to her during cross-examination should the need arise, so that she could be cross-examined by reference to it, and that in all the circumstances the appellant did not receive a fair trial.

19. It was submitted also that in a case such as this where it is essentially one person's word against another's, and where the only evidence against the appellant is the uncorroborated evidence of the young complainant against which the appellant can only deny what she says occurred, it is of particular importance that he should not be denied a fair opportunity to attack her reliability as a witness by pointing to differences between her account of the events leading up to the alleged offence, and what can be seen on the CCTV in an effort to put a reasonable doubt in the mind of the jury.

20. In response to these submissions, counsel for the DPP emphasised that there is no suggestion whatsoever that the available CCTV footage showed the offence being committed since there was no camera in the back area of the shop where the alleged assault occurred. The available footage covered only the shop area itself.

21. The DPP refers also the fact that the complainant was in fact cross-examined to some extent by reference to what was to be seen in the CCTV footage, and that in fact nothing put to the complainant to the effect that her account of what had occurred in the shop was different to what appeared on the CCTV footage. The DPP submits that counsel could have put it to the complainant that her account was not borne out by what is visible on the CCTV footage, and which the jury would be shown in due course.

22. The DPP also made the point that there was nothing to prevent the complainant being re-called for further cross-examination following the showing of the CCTV footage, should counsel for the appellant considered that such was necessary in the light of her answers under cross-examination.

23. Counsel for the DPP also submitted that at no stage did the appellant apply for a direction based on any particular aspect of the manner in which the case was presented and conducted by the DPP.

24. It was submitted that while there was a submission made prior to the commencement of the trial itself that there would be an unfairness in relation to cross-examination if the complainant could not be cross-examined by reference to the CCTV footage, no further submission or application was made as the trial progressed.

25. Counsel for the DPP also drew attention to the fact that in his closing speech to the jury, following the completion of the evidence, counsel for the appellant did not refer to his having been handicapped, or had any particular difficulty arising during the trial by having been unable to cross examine the complainant by reference to CCTV footage.

26. The DPP also referred to the listing history of this case before the Circuit Court and to the fact that for some considerable time prior to the matter proceeding to trial the appellant should have been in a position to raise any issue in relation to the CCTV footage.

It is submitted that this matter of cross-examination by reference to CCTV footage was as important as is now being asserted, the appellant ought to have sought to have matters put in place in advance of accepting the allocated trial date, and their failure to do so suggests that the issue was not considered by them to be truly of significance.

Conclusions

27. The right to cross-examine one's accuser is so firmly embedded as part of the constitutional right to a trial in due course of law guaranteed under Art. 38.1 of the Constitution that by now it requires no authority for its support, and can be simply stated as a truism. Subject to the trial judge's entitlement, even duty, to control the trial and give appropriate rulings, the defendant's right to cross-examine should be left unhindered, and should be facilitated as far as practicable. As Hardiman J. stated in *Maguire v. Ardagh* [2002] 1 I.R. 385 at p. 705:

"... the right to cross-examine one's accusers is a constitutional right and not a concession. It applies, as *In re Haughey* [1971] I.R. 217 demonstrates, in an Oireachtas committee or sub-committee as well as in any other forum in which a citizen may be accused. It is an essential, constitutionally guaranteed fair procedures.

It follows from the foregoing that the right of cross-examination may not be unreasonably confined or hampered in terms of the time allowed or otherwise ...".

28. One purpose of cross-examination is to test the accuracy and reliability of the evidence given. This can be done in various ways such as putting to the witness a previous statement made by him/her which is inconsistent with their evidence given in court. In such a case the prior inconsistent statement will if possessed by the prosecution be handed over pre-trial as part of the disclosure requirements. Nobody could sensibly argue that the accused person could not be afforded an opportunity to put that prior statement to the witness in cross-examination. It will be deployed as part of the effort to test the reliability of the witness's evidence in an effort to persuade the jury that they ought not to believe the evidence given in direct evidence, or at least to persuade the jury that the recollection, and reliability of the evidence is in question, such that the jury must be left with a reasonable doubt as to whether the guilt of the accused has been proven by the prosecution.

29. In the present case the appellant was not of course relying on a prior inconsistent statement as such in order to cast doubt upon the reliability of the complainant's direct evidence. He wished to do so by putting to her what was observable in the CCTV footage, and to suggest that what was visible thereon was inconsistent with what she had stated in her direct evidence. To that extent there is a great similarity as to the benefit sought to be gained by being able to put that evidence to her under cross-examination.

30. By reason of the trial judge's ruling the appellant was deprived of this opportunity in much the same way as would the accused who wished to put a prior inconsistent statement to the witness but was unable to do so because that statement was not being put into evidence until after the cross-examination was concluded, and had not been disclosed prior to the trial. The disadvantage which that accused would face is equal to that under which the appellant laboured in the case at hand. The appellant was deprived of an opportunity to confront the complainant with to be CCTV footage which he considered might discredit her evidence and her general credibility, and therefore potentially raise a reasonable doubt in the mind of the jury.

31. It is not for this Court to speculate as to the likelihood or even the possibility of such a reasonable doubt being raised had the CCTV footage been put to the complainant. The Court cannot and may not do so. The essential issue is whether the trial judge's ruling on the appellant's application to be facilitated in the manner sought for the purpose of his cross-examination, by being permitted to show the CCTV footage, or relevant parts of it, to the complainant during cross-examination, prejudiced his ability to have a fair trial to such an extent as to warrant his conviction being set aside by this Court.

32. Given the nature of the case against the appellant where the complainant was the only witness to what he is alleged to have done, and where the only evidence he can give in answer is to deny that it happened, he must, as a matter of constitutional fair procedures, be permitted to deploy the CCTV footage during cross-examination should he wish to do so. One can have every sympathy for the situation with which the trial judge was faced with such an issue being raised only on the morning of the trial itself commencing and having sworn a jury which was then waiting in the jury room for the trial to commence. It would undoubtedly have been desirable that the question of facilitating the showing of the CCTV during cross-examination should have been raised with the DPP's legal team well in advance of the trial date so as to hopefully have agreed how matters would proceed (subject to the trial judge's agreement of course). However, that is not what happened. Nevertheless, and though somewhat inconvenient, there is no question but that it would have been possible to facilitate what was requested. This is not a case where what was requested was impossible to achieve or was unreasonable.

33. For the reasons stated, the Court will set aside the conviction, and hear the parties in relation to ordering a retrial.