THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Record No: 155/14

Between

The People at the Suit of the Director of Public Prosecutions

Respondent

V

M. R.

Appellant

Judgment of the Court delivered (ex tempore) on the 12th day of May, 2015 by Mr. Justice Edwards

Introduction

Grounds of Appeal
1. Two grounds of appeal are advanced by the appellant. The first ground of appeal is that the trial judge, having granted a direction on counts 9 to 20 inclusive on the indictment, erred in law in failing to also grant a direction on the remaining 9 counts, being counts 1 to 8 inclusive and count 21, respectively. The second ground of appeal is that new facts have emerged since the verdict in the trial was returned on the 22nd May 2014 which were not known to the appellant, namely certain facts contained within a Victim Impact Statement was furnished to the applicant's legal advisers at the sentence hearing in the complainant set forth certain matters which were said to contradictory of evidence given by her at the trial, and/or contradictory of matters contained in the statements made by her to the Gardai which formed part of the Book of Evidence.

2. The appellant's case in respect of the first ground of appeal is, in essence, that there were insufficient grounds to distinguish between the counts in respect of which a direction was granted, and those in respect of which a direction was refused, to justify allowing counts 1 to 8 inclusive and count 21 to go to the jury.

3. In applying for a direction on all counts, counsel for the appellant relied upon *R v Galbraith* (1981) 73 Cr App R 124; [1981] 1 W.L.R. 1039 as approved in this jurisdiction in *The People (Director of Public Prosecutions) v Barnwell* (Unreported, High Court, Flood J, 24th of January 1997); *The People (Director of Public Prosecutions) v M.* (Unreported, Court of Criminal Appeal, 15th February, 2001) and many other cases.

4. It was argued on behalf of the appellant that there was a lack of correlation between the indictment on one hand and the evidence that had been adduced on the other. Counsel placed emphasis on the complainant's lack of specificity with respect to dates. Counsel also complained that there was nothing to assist the jury in correlating the counts on the indictment and the evidence of the complainant, in effect that there were insufficient "islands of fact" (to quote Hardiman J) to anchor individual instances of alleged abuse. This was true in respect of all counts but was particularly true after a certain point in time when the evidence supporting the complaints made was said to be of a very general nature. It was further complained that there were certain contradictions between the complainant's evidence at trial, and what she had said to the Gardai.

5. In substance therefore the complaints in respect of each count were really two fold. The first was that there was simply insufficient evidence to allow the matter to go to the jury, and secondly that such evidence that existed was so infirm as a result of a combination of lack of specificity with respect individual instances of offending, and inconsistencies in the accounts given by the complainant, as to render it unsafe to allow those counts to go to the jury.

6. Counsel for the respondent conceded that in respect of counts 9 to 20 inclusive there was a problem, and that the evidence was arguably too general. These were the counts that related to events post September 2009 (with the exception of an incident in October 2012 which was the subject of Count 21).

7. The trial judge agreed in light of this concession to grant a direction in respect of counts 9 to 20, effectively on the basis that the evidence, viewed at its height, was insufficient to support those charges. However with respect to counts 1 to 8 inclusive, and count 21, he appears to have taken the view that there was evidence capable of supporting those charges. We are satisfied that there were legitimate grounds for differentiating between the counts in respect of which a direction was granted, and those in respect of which it was not granted, and that the evidence, although it contained some infirmities, was indeed more specific and stronger in relation to counts 1 to 8 inclusive, and count 21, such that, viewed at its height, it was capable of supporting guilty verdicts on those counts.

8. It was then a matter for the trial judge to consider, in accordance with the second limb of Lord Lane's statements of principle in R v Galbraith whether the state of the evidence called by the prosecution, taken as a whole, was so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict upon it. The trial judge indicated that in his view the remaining matters should proceed to the jury, and the question for this Court is whether that was a legitimate exercise of his discretion, and one that was made within jurisdiction.

9. This Court has recently had cause to consider the Galbraith test in its judgment in *The People (Director of Public Prosecutions) v J.R.M.* [2015] IECA 65 (Unreported, Court of Appeal, 27th March, 2015). In that case we sought to address a commonly held misapprehension that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. We emphasised that it is not authority for that proposition. This Court went on to say:

"On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness.

Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.

This Court considers that the matter is well put in the following quotation from *Archbold, Criminal Pleading Evidence & Practice* 2014 at page 484, where the authors state:

> "In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function."

Further, in *The People (Director of Public Prosecutions) v M.* (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J, as she then was, provided the following exegesis, with which we fully concur, concerning how the *Galbraith* principles ought properly to be applied:

> "If there is no evidence that an element of the crime alleged has been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the case here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge was therefore correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and the law the learned trial judge did not err in refusing to withdraw the count in respect of the sexual assault from the jury at the conclusion of the prosecution case."

10. The Court has considered the evidence that was before the Court in the present case and is satisfied that the trial judge's view that it was appropriate for the jury to consider the evidence in relation to counts 1 to 8, inclusive, and count 21, was a view that was legitimately open to him and one which it was within his jurisdiction to make. There were certainly infirmities and inconsistencies in the evidence but it could not be said that they were of such an order as to render it manifestly unsafe to allow the jury to adjudicate on these matters. On the contrary, having regard to the evidence that had been adduced, we consider that it was appropriate to allow the jury to deliberate on the outstanding counts.

11. In so far as the Court considers that the trial judge was correct in refusing a direction in relation to counts 1 to 8, and count 21, respectively, we are further satisfied that there was no basis on foot of which it would have been appropriate for the trial judge to discharge the jury in respect of those counts, either by virtue of the fact that he had granted a direction on the other twelve counts or on any other basis. The Court does not consider that there was a reasonable basis for apprehending that the jury might speculate as to why some counts had been withdrawn from them and others had not. We are satisfied that the trial judge dealt adequately with that aspect of matters in his charge to the jury.

12. The Court therefore rejects the first ground of appeal.

13. The appellant's case in relation to the second ground of appeal was that the allegedly new matters contained in the victim impact statement could have provided a fruitful basis for cross-examining the complainant if they had been known about. It was emphasised that this was a case in which it was all about the credibility and reliability of the complainant.

14. There are three main areas in which allegedly new material is contained within the Victim Impact Statement. First the complainant states at lines 1-3 that:

> *"As a child I felt that M.R who is my stepfather did not like me. I felt as if I did not matter to him and never treated me nicely. I still remember the day where M started to treat me differently. I was about 13 years old …"*

15. This was said to have been inconsistent with the following evidence given by the complainant at trial:

> *"Q. You I think, and the jury in due course will see what Mr R said to An Garda Síochána when these allegations were put to him, but is it fair to say, Ms G, that you and Mr R would have got on quite well over the years?*
>
> *A. Yes.*
>
> *Q. Up until approximately a year before you made these allegations?*
>
> *A. No. We always … he was, like, my best friend."*

16. Secondly, it is complained that she states later in her Victim Impact Statement that:

> *"He broke the shower purposely so I was unable to wash. I would have to boil the kettle and fill the bath that way."*

17. This is alleged to be new information, although it is conceded that the complainant had stated in her evidence that:

> *"Over that year he started turning off the shower so I couldn't wash"*

18. The third complaint is that there was contradictory information concerning when the last incident occurred, and it is again

suggested that this could, if known about, have been exploited in cross-examination.

19. The complainant relies upon a number of authorities, and specifically *DPP v. G.K* [2006] IECCA 99and *DPP v. T.C* [2009] IECCA 63, and the Court has considered these. Having done so, we are of the view that the new alleged facts in the present case are matters of minor detail which are qualitatively quite different and readily distinguishable from the much more far reaching new facts that were the subject matter of the *G.K.* and *T.C.* cases respectively.

20. In the case of *DPP v. G.K* the Court of Criminal Appeal dealt with the issue of material coming to light post trial. The appellant in that case had also been convicted of acts of a sexual nature at a second trial. For reasons it is unnecessary to go into his convictions were later quashed on appeal, and a further re-trial was directed (the appellant's third trial). He was again convicted at the third trial and again appealed his conviction. One of the grounds of appeal on this occasion centred around a Victim Impact Statement that had been prepared by a psychologist prior to the sentencing hearing and which contained information relating to certain activities that the complainant had engaged in, and of which the defence were completely unaware until the report was produced at the sentencing hearing. The complainant had not informed the doctor who had given evidence on behalf of the prosecution of this information before the appellant's trial (his third trial in respect of the same matters and in which he was convicted). In the third trial there had been an application for leave to cross examine the complainant on her past sexual history on foot of the revelations in the Victim Impact Report at the sentencing hearing in the second trial. This application was refused and it was argued that this refusal had left to the appellant receiving an unfair trial. Counsel for the appellant argued that the activity that was concealed, and which he was not permitted to raise with the complainant in cross-examination, was capable of raising a reasonable doubt in the minds of the jury as to the plausibility of the account offered by the complainant. and it was argued that the jury ought to have been made aware of these new facts in considering whether the case against the appellant was proven beyond reasonable doubt. Further reliance was placed by the appellant on inconsistencies in the complainant's evidence with regard to other matters arising from this new information.

21. The Court of Criminal Appeal held in favor of the appellant and quashed the convictions. In doing so the Court commented on the *"sense of unease arising from the manner of the revelations"* and that this was heightened by the *"knowledge that the complainant withheld information from her parents, her family GP…. And also from the members of the Gardai to whom she first brought her complaint against the applicant".* The Court said the non-disclosure or concealment of the matters at issue gave rise to an anxiety that the appellant in that case might not have received a fair trial in circumstances where both the jury and the applicant had been deprived of relevant evidence which clearly could have affected the outcome of the case. Accordingly the decision not to permit a limited and carefully monitored form of cross-examination of the complainant was unfair to the applicant.

22. In *DPP v. T.C.* following a trial and conviction of the appellant in that case for rape, new information to the effect that the victim had been sexually abused in the past by a third party who lived close to the family home became apparent from the Victim Impact Statement. This was in circumstances where the complainant had stated to Gardai that before the alleged rape she was a virgin and had never had sex with anybody else. It was submitted on appeal that non-disclosure of the earlier sexual abuse by a third party prejudiced the appellant's ability to cross examine with regard to the complainant's credibility and breached the appellant's right to a fair trial. If it had been known about an application could have been made for leave to cross-examine the complainant as to her past sexual history. The case of *DPP v. G.K* was relied upon in support of that contention. The Court of Criminal Appeal was satisfied that as a consequence of non-disclosure of the information in question there was a real risk that it had had an effect on the fairness of the trial and thus breached the right to trial in due course of the law. Accordingly, *T.C's* conviction was quashed.

23. This Court does not find itself in the position of having the sense of unease that was expressed by the appeal court in each of those cases and we are not satisfied that even if the alleged new facts had been available to the appellant's counsel in the present case they would have resulted in a markedly different or more extensive cross-examination such as might have made a difference. The Court is not therefore disposed to uphold this ground of appeal.

24. The appeal is therefore dismissed.