THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

Record No: 41/17

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

PM

Appellant

JUDGMENT of the Court delivered on 3rd October 2018 by Mr. Justice Edwards.

Introduction
1. The appellant in this case was arraigned and pleaded not guilty in Cork Circuit Criminal Court to two counts of indecent assault contrary to common law as provided for under s. 10 of the Criminal Law (Rape) Act, 1981. On the 7th of November 2016, at the conclusion of a two day trial, the appellant was convicted on both counts by majority verdicts (10 to 2).

2. On the 10th of February 2017, the appellant was sentenced to a term of imprisonment of three years in respect of each count with the final twelve months suspended, with both sentences to run concurrently and to run from the 7th of November 2016, the date at which the appellant first went into custody.

3. The appellant now appeals against his conviction.

Background facts
4. The offences forming the subject matter of the present case were alleged to have occurred in 1988 when the appellant was 19 or 20 and the complainant was six years old. The complainant was the appellant's neighbour and the offences were both alleged to have taken place in the appellant's family home in County Cork. The appellant lived at home with his mother, his brother and two sisters, whilst the complainant lived at home with her parents and eight siblings.

5. The primary evidence relied on by the prosecution was that of the complainant. Her evidence was that the offences took place when she was on her summer holidays from school, that is during the months of June – August (incl.) of 1988. The evidence at trial was that the complainant's mother would lend her hair dryer quite regularly to the appellant's mother and sisters. The complainant would, on occasion, be asked by her mother to drop a hair dryer over to the appellant's house. On the date of the first alleged indecent assault, the complainant was asked to drop over the hair dryer to the appellant specifically. When the complainant knocked on the appellant's door, he answered and asked her to put the hair dryer on the bottom of the stairs. Initially, the complainant refused to do so but eventually she placed the hair dryer at the bottom of the stairs, after which the appellant *"locked the door behind me"*.

6. The complainant's evidence was that the appellant then asked her to go upstairs. She gave detailed evidence of the layout of the house. She stated that she remembered that *"the table was to my right with a telephone on it…he asked me to go up the stairs and I remember the toilet being directly in front of me…he then led me to a bedroom that was to my left…and when I went into the bedroom there looked like there was two single beds there…the walls [in the bedroom] were kind of a blue colour and the curtains were a brown, a dark brown, it could be even purple"*.

7. The complainant was then asked to sit on the bed by the appellant. Her evidence was that she was wearing a pink dress at the time. Evidence from the complainant's mother confirmed that she had purchased this dress for the complainant in or around Easter of 1988. A photograph of the complainant wearing the dress in question was also introduced into evidence. The complainant testified that after asking her to sit down on the bed, the appellant then asked her to lie down on it, but that she was *"kind of hesitant to do so. I didn't want to and he kind of like pushed me down"*. According to the complainant's evidence, the appellant then started to rub her vagina on the outside of her underwear with his finger. The appellant then took his penis out of his trousers and asked the complainant to stroke it. The appellant then pushed his penis into the appellant's mouth and her evidence was that *"as he was taking it out I had noticed a mole mark at the base of his penis and his pubic hair was a brown kind of a blonde colour"*.

8. After some time, the appellant let the complainant go and she went running down the stairs. He allegedly said to her *"don't tell anybody because they won't believe you"*. The complainant recalled that, as she was running down the stairs, she saw a picture on the wall in a brown frame of a *"little girl holding a Teddy bear wearing a blue dress". However, when giving evidence in his own defence, the appellant disputed that there was any such picture there, stating that there "were two print frames [on the wall by the stairs] and there was also two doves on the wall as well and I can tell you that the two frames were prints of a sea or kind of a lake and mountains in a brown frame."*

9. The complainant did not immediately tell her mother what had happened. Her evidence was that approximately two weeks later, her mother again asked her to bring the hair dryer over to the appellant's house. She initially refused to carry out this request for her mother, but eventually was persuaded to do so. She described feeling *"so sick in my stomach…. uneasy, nervous and scared."* The appellant once again answered the door on this occasion and the complainant's evidence was that he seemed a bit more aggressive this time. He asked the complainant to put the hair-dryer on the bed upstairs and her evidence was that, just as she was *"ready to leave, he just kind of grabbed me and threw me on the bed and then he pulled up my dress…. he pulled down my underwear and I remember him putting his fingers inside me and really roughly and it was very uncomfortable"*. The complainant also stated that she recalls the appellant beginning to open his pants, but being unsure as to what happened after that. The next thing the complainant

can remember is *"leaving the house and walking to my own house and feeling very uncomfortable and feeling that my underwear was on different"*. She also gave evidence that she remembers her underwear being ripped on the left side and there being three spots of blood on them.

10. The appellant gave evidence in his own defence. He denied both of the allegations made against him by the complainant. He said that his brother was working during that period as a roadie and that he himself had had a job at a sandwich bar during the summer of 1988. He said that his two sisters would have been on their school holidays, and that his mother did not work and would stay at home and that his brother would work at nights and would sleep during the day until 16:00 or 17:00 in the evening. When asked about the complainant's evidence that the appellant's family regularly borrowed a hair-dryer from the complainant's family, he stated *"That's lies, your honour, because basically, as all the family were living in the house, we basically had hair dryers. My sister had a hairdryer and my brother had his own hairdryer. I remember my brother's hairdryer at the time being a black one and my sisters had their own one as well so, basically, we didn't really need to borrow anything from anyone."* The appellant also denied that the complainant was ever in his house as his mother *"was very strict and you stood at the door, you couldn't go any further than the entrance of the door into the house because that's the way, when we were growing up, my mother was strict and [the complainant] was never, basically, in my house."*

11. In September 1988, the complainant told her mother of the abuse allegedly perpetrated against her by the appellant. However, her mother stated that she did not believe her because the complainant would not go into any detail as to what had happened. Several years later, when the complainant was around 25 or 26, she told her older sister about what had allegedly happened between her and the appellant. In 2014, she spoke to a counsellor at Cork Rape Crisis Centre.

12. On the 25th of May 2014, the complainant made a complaint in Blackrock Garda Station. On the 25th of July 2014, Garda June O' Shea and her colleague Detective Garda Stack arrested the appellant. He was brought to the Bridewell Garda Station where he was detained pursuant to s. 4 of the Criminal Justice Act 1984 for the proper investigation of the offence(s) for which he had been arrested. Garda O' Shea's evidence at trial was that the appellant was interviewed by herself, Detective Garda Stack and Sergeant O' Donnell from 20:15 until 23:20 on the evening in question

13. During this interview, the following exchange took place between the appellant and interviewing Gardaí:

> *"[GARDA] Have you a small brown freckle on the bottom of your penis?*
>
> *[APELLANT] No, not that I know of, I didn't really look*
>
> *[GARDA] Will you consent to being examined by a doctor to see if this freckle exists…"Do you consent if needs be to have that area photographed?*
>
> *[APPELLANT] Yes, no problem, to prove my innocence."*

14. Exhibit 2 in the evidence was the following signed consent form signed by the appellant: -

> *"On this date, 25/07/2014, [the appellant and his address], date of birth 04/12/1967, give my consent to be examined by a doctor to verify if I have a birthmark or a freckle at the base or around the bottom of my penis."*

15. Subsequently, the appellant was taken to the doctor's room to be examined by a General Practitioner, namely Dr. Nick Flynn. Dr. Flynn gave evidence at trial that, on the 26th of July 2014, he was asked to go the Bridewell Garda Station and examine the appellant's genitilia. He gave evidence that, upon examining same, he observed a three millimetre round tan coloured mole at mid shaft level on the appellant's penis. He stated that he would have retracted the foreskin when carrying out the examination which may have affected where the mark appeared on photographs taken at the time. Dr. Flynn's evidence was also that the mole was most likely a benign congenital mole of a type which would usually be present since birth, and that such marks can sometimes be caused by exposure to the sun. He also stated that he was of the opinion that the mole would have been present when the appellant was 18 or 19 years of age. Under cross-examination, Dr. Flynn accepted that he had not observed a mole or any such mark at the base of the appellant's penis and that such moles were common amongst individuals with fair or light hair. Garda Alan Crowley took the photographs of the appellant's penis on the date in question.

16. At the outset of the trial, counsel on both sides indicated to the trial judge that issue was going to be taken with the admission of these photographs into evidence. The trial judge stated that he would hold off making a decision on this issue until Dr. Flynn came to court to give his evidence.

17. However, at the outset of day 2 of trial, before Garda Crowley began giving his evidence, the following exchanges took place between counsel on both sides and the trial judge: -

> *"JUDGE: Now, you have an objection?*
>
> *[PROSECUTION]: -- of examination.*
>
> *[DEFENCE]: I do, Judge, I have an objection to the photographs being handed in as evidence.*
>
> *JUDGE: What are those objections?*
>
> *[DEFENCE]: Well, Judge, in terms of how the photographs came about, Judge, if I can refer you to the memo of entry, Judge, of [the appellant], at page 16, it's exhibit 1.*
>
> *JUDGE: Very well. Right, what have you to say about that?*
>
> *[DEFENCE]: Yes, Judge, and what's put to [the appellant], is that, in her statement, [the complainant] states that; 'After the occasion you put your penis in her mouth and as it was coming out, she noticed a small brown freckle on the bottom of your penis. Have you a brown freckle on the bottom of your penis?' [the appellant], is asked. 'No, not that I know of, I didn't really look.' 'Will you consent to being examined by a doctor to see if this freckle exists?' 'Yes, no problem, to prove my innocence.' And, 'Do you consent if needs be to have that area photographed?' And then, Judge, exhibit 2 is a consent form signed by [the appellant] and what it says is that, 'On this date, 25/07/2014, I, [the appellant],, Cork, date of birth 04/12/1967, give my consent to be examined by a doctor to verify if I have a birthmark*

or a freckle at the base or around the bottom of my penis.' And, Judge, what I would say is that the examination and the photograph -- the conclusion from that, Judge, is that [the appellant], does not have a birthmark or a mole or a freckle --

JUDGE: But you can say that to --

[DEFENCE]: -- at the base of his penis.

JUDGE: -- you can say that to the --

[DEFENCE]: Well, Judge --

JUDGE: -- the beak.

[DEFENCE]: -- what I'm saying is, that, if anything, it proves he doesn't and --

JUDGE: Well, then say that to the jury.

[DEFENCE]: Well, what I would say, Judge, is that what the jury would infer from that is, 'Ah well, the complainant was six years of age', but Judge, if you even look at the evidence given by the complainant, she was supposed to have spotted this as the penis was being taken out of her mouth, but if you look at the photograph, Judge, that clearly could not have been possible.

JUDGE: I'm sorry now. That's all fantastic, wonderful. The complainant was in the witness box, none of that was put to her?

[DEFENCE]: No, Judge, because we weren't sure where we were going with that evidence, Judge.

JUDGE: I thought that, but neither was it put to her, if you don't mind me saying so, now that it's -- we're all here together playing happy families, neither was it put to her that the house had changed in any way or that her recollection of the house was wrong?

[DEFENCE]: Perhaps, Judge, I put it to her --

JUDGE: All right, but anyway, what are you saying to me about -- that it wasn't put to her that she couldn't have seen the mark?

[DEFENCE]: No, Judge, what I'm saying is that as regards this examination that [the appellant], consented to --

JUDGE: Yes?

[DEFENCE]: -- it wasn't what he consented to, Judge, and it doesn't --

JUDGE: In other words, he only consented to his penis being examined for a birthmark?

[DEFENCE]: Well, more so, Judge, to verify if any birthmark or a freckle at the base or around the bottom, Judge. That is what he consented to and that examination will show he didn't. What it does show, if you go trawling then at the very other end, Judge, there was some evidence --

JUDGE: At what?

[DEFENCE]: At the very other end of his penis, there was some evidence of some small freckle, Judge. It's not what was put to -- it's not the evidence that was given by the complainant in her statement of complaint.

JUDGE: Now, what do you say to that?

[PROSECUTION]: It's a matter for the jury, Judge, as to what weight they place on the evidence that is to be adduced, but in terms of the consent, the consent is to the photograph and medical examination --

JUDGE: Of his penis, which wouldn't be a large area of the body anyway?

[DEFENCE]: No, Judge --

JUDGE: Like, whether you go from the stem to the start of it?

[DEFENCE]: The reason it was so specific was because of the evidence of the complainant. She says that she saw that at the bottom of his penis when she was taking it out --

JUDGE: He had no doubt they were examining his penis?

[DEFENCE]: Yes, Judge.

JUDGE: He had no doubt they were photographing his penis?

[DEFENCE]: Yes, Judge.

JUDGE: And he had no doubt that that's what he was consenting to?

[DEFENCE]: Yes, Judge.

JUDGE: I'm afraid, I think there is no way I can rule out this photograph.

[DEFENCE]: I'm obliged, Judge.

JUDGE: The point you make about the location of it, the visibility of it, vis-à-vis the complainant, her age, they're all very relevant and are particularly relevant to the jury and it may be very relevant to the jury that there is no mark at all on the base of the man's penis."

18. Thus, as indicated above, these photographs were ultimately admitted into evidence and the appellant was ultimately convicted on both counts by a majority verdict (10:2) on the 7th of November 2016.

Grounds of Appeal

19. The appellant appeals against his conviction on the following two grounds:

a) The trial judge erred in law in admitting photographic evidence which was more prejudicial than probative.

b) The trial judge erred in law in admitting photographic evidence which had been gathered without the required consent of the appellant.

Appellant's submissions

20. In relation to ground one, counsel for the appellant points to the fact that objection was made at trial to the admission of these photographs into evidence. The complainant's evidence was that, as the appellant removed his penis from her mouth during the first alleged indecent assault, she noticed a small mole at the bottom of his penis, whereas the photo taken by Garda Crowley of the appellant's genitilia, on foot of the examination carried out by Dr. Flynn, disclosed a mole on the mid-shaft area of his penis. Moreover, the mole was of *"a common variety"*. Thus, counsel for the appellant submits, the photographs at issue were of little or no probative value whilst simultaneously having a very significant prejudicial effect on the appellant, and should not have been admitted. The prejudice accruing to the appellant, it is submitted on his behalf, was that the jury might well have attached considerable and undue weight to the photographs, notwithstanding that they were of little or no probative value.

21. Further, the appellant argues that the photographs were not capable of giving any kind of accurate impression of what the complainant was allegedly describing. The photos were of the appellant's penis in a non – erect state and with the foreskin retracted. As such it is submitted that they were effectively valueless as a means of providing a comparison with the appellant's penis as described in the complainant's evidence.

22. Counsel for the appellant submits that, despite the apparent lack of probative value to be attached to these photographs, the prosecution placed great emphasis on this piece of evidence, both in cross-examining the appellant, and in closing the case to the jury, in which counsel for the prosecution referred to the evidence of the complainant of *"one unusual feature in relation to [the appellant] and it transpires that that unusual feature is borne out by what Dr Flynn finds and what you will see in the photograph, that there is a mole on his penis"*.

23. Counsel for the appellant submits that the trial judge, as part of his inherent jurisdiction, had an over-riding duty to ensure that the appellant received a fair trial and therefore had a discretion to exclude otherwise admissible evidence if, in his opinion, its potential prejudicial effect on the jury outweighed its true probative value. In this regard, this Court's attention was drawn to the statement of Geoghegan J. to that effect when giving judgment for the former Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Meleady (No. 3*) [2001] 4 IR 16 at 31; and to the following extract from Keane & McKeown *"The Modern Law of Evidence"* (Oxford: Oxford University Press, 6th edn.), where the authors state (at. p. 48) that:

"The judge must balance on the one hand the prejudicial effect of the evidence against the accused on the minds of the jury and on the other hand its weight and value having regard to the purpose for which it is adduced. Where the former is out of all proportion to the latter the judge should exclude it. In one sense, of course, all relevant evidence adduced by the prosecution is prejudicial to the accused and the greater its probative value, the greater its prejudicial effect. In some cases, however, there will be a serious risk that the jury will attach undue weight to an item of evidence which is, in reality, of dubious reliability or of no more than trifling or minimal probative value, and in these circumstances the judge should exclude"

24. Counsel for the appellant has submitted that the fact that the jury were asked to treat the mark or mole as an *"unusual feature"* supporting the complainants otherwise uncorroborated testimony was unfair and ought not to have been permitted as the danger was that the jury was likely to attach undue weight and significance to both the photographs and the evidence of Dr. Flynn, as it appears they in fact did. In such circumstances, it is submitted that both the photographic evidence as well as the evidence of Dr. Flynn ought never to have been admitted.

25. Further, counsel for the appellant complains that the trial judge, in ruling that he would allow the photographs to be admitted into evidence, did so without hearing evidence from Dr. Flynn on a *voir dire*, despite having postponed hearing the application on the first day of the trial until the second day when Dr. Flynn was going to be available. Thus, it is submitted, the trial judge erred by ruling on the admissibility of the evidence without properly appreciating the issues involved. Counsel for the appellant submits that the evidence given by Dr. Flynn was potentially relevant to, and could have influenced, the trial judge's determination as to the relevance and probative nature of the evidence, the admissibility of which was in dispute. In this regard, the appellant relies on the decision of the Court of Criminal Appeal in *People (DPP) v Carney* [2011] IECCA 53 at p. 9, and pointed to the *"balancing exercise to be carried out"* by a trial judge in making such an assessment. It issubmitted that the trial judge ruled on the question of admissibility in a rushed and trite manner, without the necessary evidence and without allowing the issues to be fully and fairly developed before him.

26. Counsel for the appellant also takes issue with how the trial judge characterised the complainant's evidence on the issue of the mole when charging the jury. He said to them: *"She noticed a mole or a mark on the penis and she noticed the hair was brown or blonde in colour"*, whereas in her evidence-in-chief, the complainant's evidence was that when *"he was taking it out I had noticed a mole mark at the base of his penis and his pubic hair was a brown kind of a blonde colour"*. Counsel for the appellant submits that the trial judge's mischaracterization of the complainant's evidence gave the jury the impression that the complainant had noticed a mole on his penis generally and opened up for them the possibility that her recollection of its placement may have been somewhere other than at the base. As such, they may well have concluded that her account was in fact consistent with the photographs and the evidence of Dr. Flynn, when this was evidently not the case.

27. Counsel for the appellant also points this Court to the fact that a requisition was raised, but was refused, on this specific issue.

This refusal, it is submitted on behalf of the appellant, *"compounded and copper fastened"* the very prejudice and danger which the admission of this evidence created i.e. that the jury would simply treat it as consistent with, and corroborative of, the complainant's account. Counsel for the appellant drew this Court's attention, by way of an analogy, to the decision of *People (DPP) v Cleary* [2006] IECCA 25. In that case, which involved a prosecution for the possession of drugs, a relatively important issue arose concerning the position of a particular bag in a car. In his charge to the jury, the trial judge referred to counsel having stated in his closing speech that the bag was in the back seat. However the trial judge had then gone on to say that *"in fact it was the other way around, that it was somewhere in the front of the car rather than the back of the car"*. The actual evidence in the case did not establish whether the bag was in the front or the back seat of the car. In quashing the conviction of the accused in that case, despite no requisition having been raised on the issue, McCracken J. held:

> *"An absolutely essential element in the applicant's defence was that the prosecution had not proved that he was aware either that the rucksack was in the car or that the rucksack contained drugs. The position of the rucksack in the car was absolutely vital to the first point and the court considers that the learned trial judge's remarks could have led the jury to the false belief that the rucksack had been in the front of the car and therefore, as the applicant was sitting in the front seat of the car, he must have been aware that the rucksack was in the car. As the case depends almost entirely on circumstantial evidence, this is a circumstance which could have been the deciding factor in the jury's decision to convict the applicant."*

28. It is submitted that, in the present case, the evidence that the complainant gave as to the specific placement of the mark on the appellant's penis was of vital importance, in light of the admission of the photographs into evidence and the evidence of Dr. Flynn. The appellant submits that, as the prosecution was not relying on any other evidence as being supportive of the complainant's account, this issue may well have been a crucial factor in the jury's decision to convict by majority verdicts of 10 to 2. Accordingly, it is submitted, the trial judge's mischaracterization of the evidence and his refusal to correct it, manifestly rendered both guilty verdicts unsafe.

29. The appellant's second ground of appeal relates to the alleged failure by the Gardaí to inform the appellant as to the potential consequences of consenting to undergo examination and to have photographs taken of his genital area. It is argued on his behalf that the manner in which the evidence in this case was obtained fell below the minimum required standards of fairness referred to by Griffin J *in the People (Director of Public Prosecutions) v. Shaw* [1982] IR 1, in circumstances where the appellant was not informed of the potential use to which any evidence gathered in the examination and photographing might be put, and in particular was not told that any such evidence might be used subsequently to convict him. It is also submitted on behalf of the appellant that no caution of the type required under the judge's rules was provided to him in respect of these specific procedures; and that at no point was he made aware of his privilege against self-incrimination in that regard.

30. In respect of the right against self-incrimination, counsel for the appellant draws this Court's attention, by way of illustration, to various statutory and common law-protections providing for the right against self-incrimination, for instance, s. 12 of the Criminal Justice (Forensic Evidence and DNA Database Systems) Act 2014, which allows for the taking of intimate samples, including from the genital region, with the consent of an arrested person. That provision sets out detailed safeguards regarding the nature of the consent required before such evidence can be used at trial. Counsel for the appellant also relies on the dictum of Murnaghan J in *Attorney General v Durnan* (No. 2) [1934] IR 540, when discussing Rule 4 of the Judge's rules and the caution required to be given to persons whom it is proposed to question, where he said (at 548) that:

> *"The proper caution will bring home to the mind of the accused when he has been charged that he need not make any statement; but, on the other hand, that, if he does volunteer a statement, it may be used in evidence at his trial. This caution enshrines the result of long experience and it is no idle formula. The first part in substance warns the accused that on an occasion when it might reasonably be expected that some answer should be made the law does not require any answer; while the second part of the caution warns the accused that if he makes any statement it should be no glib or untrue excuse, and, further, it being a principle that the prosecution must prove the guilt of the accused, it gives a warning that admissions made at the time may be used to prove the guilt of the accused."*

Respondent's submissions

31. In response, counsel for the respondent submits that the photographs in question were probative, and were capable of supporting the evidence of the complainant concerning what she claimed to have observed during the course of the first incident of indecent assault perpetrated on her by the appellant. The complainant said that the appellant had *"a mole mark"* on his penis and Dr. Flynn had confirmed that he had found a tan coloured mole on the appellant's penis at the time of the time of his examination and that it was likely to have been there at the time of the incident. It was true that the mole was not in the location recalled by the complainant, in as much as it was on the mid-shaft rather than at the base of the penis. However, this inconsistency would only go to weight rather than to admissibility and was the type of inconsistency that was quintessentially a matter for the jury to resolve.

32. Counsel for the respondent submits that the trial judge gave full and entirely appropriate consideration to the issue of whether it would be fair to admit this evidence and properly ruled that *"the point you make about the location of it, the visibility of it, vis-à-vis the complainant, her age, they're all very relevant and are particularly relevant to the jury and it may be very relevant to the jury that there is no mark at all on the base of the man's penis"*

33. In terms of ground two, counsel for the respondent submits that the appellant gave his consent both to being photographed and to being medically examined, and having done so he cannot now complain that there was a failure to administer a separate caution prior to the said photographing and examination by the doctor when he did not raise this as an objection before the trial judge. The appellant, having consented to the photograph and examination, clearly did so in the belief that it would assist his defence. That his motivation or hope for consenting was not realised cannot alter the fact that he consented.

34. Further, counsel for the respondent submits that the appellant was properly cautioned upon his arrest in the usual way. A further caution in relation to the taking of a photograph or a physical examination was not required. In that regard, we were referred by counsel for the respondent to the case of The *People (Director of Public Prosecutions) v. Raymond Walsh* [1980] 1 IR 294, where O'Higgins C.J., dealt with an analogous issue concerning whether a further caution was required to be administered before fingerprints could be taken from a suspect in Garda custody. He stated (at p.309):

> *"The purpose of a caution in relation to a confession or statement is to ensure that what is said or written is said or written voluntarily. An involuntary confession or statement, given out of fear or induced by hope, is tainted evidence of a quality not acceptable in our Courts. It is not so with a fingerprint. A fingerprint does not change. Whether the person*

concerned submits voluntarily to having his print taken or whether he fiercely objects and resists makes no difference to the probative value of the evidence obtained. His fingerprint remains the same and indicates always the same association or disassociation with the crime under investigation, irrespective of the circumstances under which it is obtained. Therefore, I cannot see why the administering of a caution, or anything resembling a caution, should be a necessary preliminary to the admissibility of fingerprint evidence."

Discussion and Analysis

35. The discretion spoken of by Geoghegan J in The *People (Director of Public Prosecutions) v. Meleady (No. 3)* [2001] 4 IR 16 is a well recognised and long standing one. The *Meleady (No. 3*) case, which had a long and convoluted history as recounted by Geoghegan J in the Court of Criminal Appeal's judgment, concerned an application by two convicted persons, a Mr Meleady and a Mr Grogan, to set aside their convictions for malicious damage and assault on the basis of new evidence. In that case the principal prosecution witness, a Mr Gavin Snr, who was the injured party, was brought by Gardaí to Rathfarnham District Court some days after the incident. |While there, he purported to identify two men, the applicants Meleady and Grogan, to the Gardaí as having been his assailants. Mr Gavin Snr's son also later identified one of the men involved, again in the precincts of Rathfarnham District Court. Evidence of these identifications was later given in support of the prosecution case at the men's trial. The new evidence with which the Court of Criminal Appeal was concerned was a memorandum discovered after the trial, which had been prepared by a solicitor in the Chief State Solicitor's office (the *"Walker memorandum"*), who had been dealing with the matter in its early stages in the District Court, in which he had stated that a Garda had informed him that prior to the courthouse identification, Mr Gavin Snr had been shown a book of fifty photographs and had identified one of the accused.

36. It has been necessary to set out some of the factual background in the *Meleady (No. 3*) case in order to place in context a reasonably lengthy quotation from Geoghegan J's judgment, which we think it may be helpful to reproduce for the purposes of the present case.

37. Geoghegan J stated (at pp 30-32):

"The only evidence which implicates the applicants is the evidence of the identifications in Rathfarnham courthouse. If that evidence were excluded by the trial judge, it is conceded by the respondent that there would be no evidence against the accused. If this court is satisfied that, as a matter of probability, that would have happened then the applicants have discharged the civil onus of showing that there was a miscarriage of justice within the intent of the Supreme Court judgments. It is therefore now necessary to consider whether the identification evidence by the Gavins in Rathfarnham District Court would have been excluded by a trial judge in a voir dire?

It is well established that, although there is no authority to permit a criminal court to admit, as a matter of discretion, evidence which is inadmissible under an exclusionary rule of law, the converse is not the case. A judge, as part of his inherent power, has an overriding duty in every case to ensure that the accused receives a fair trial and always has a discretion to exclude otherwise admissible prosecution evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value. Counsel for the respondent referred the court to the famous reference to that discretion, given by Lord du Parcq, in the advice of the British Privy Council in Noor Mohamed v. R. [1949] A.C. 182. That was an instance of the obvious example where the prejudicial effect of fairly trivial and only barely admissible evidence may be weighed against the probative value. In this particular case there is no question of a quantitative comparison. Obviously, evidence of identification in Rathfarnham District Court is substantial evidence. But if there was a real danger that Mr. Gavin senior had been shown photographs before the identification it would be right to exclude it. This court is of the view that any trial judge in such a voir dire would, on the present information, have to form a view that there was a danger, notwithstanding the denial by Mr. Gavin that photographs were shown to him. Given that neither Mr. Walker nor anybody from the Director of Public Prosecutions Office or anywhere else is able to give any plausible explanation for the existence and contents of the Walker memorandum, which could be consistent with no such photographs having been shown, this court is of the view that a trial judge would consider it unsafe to allow the identification evidence by Mr. Gavin senior in Rathfarnham District Court to go to a jury. Counsel for the applicants concedes that there would be nothing wrong in principle with identification evidence based on photographs, but that case has never been made. Far from it: Mr. Gavin, Sergeant Thornton and all the apparently relevant gardaí deny that photographs were ever shown to Mr. Gavin. Unlike the issue of the fingerprint which is clearly a jury issue, it would seem to this court to be completely inappropriate that a jury should be left to decide and effectively speculate as to whether possibly there could be some alternative explanation for Mr. Walker's memorandum, which was consistent with the evidence of Mr. Gavin. There is, however, a further point which this court has to consider. There is no suggestion in the Walker memorandum that the photographs were shown to Mr. Gavin's son who made an identification of one of the applicants in Rathfarnham District Court. But the court considers that the case could not be allowed to go to the jury on his identification evidence only, as it was done on the same morning and in the same place as the purported identification by his father and in circumstances where there would have been plenty of opportunity for conversation between himself and his father, between taking him out from school and bringing him to the courthouse. Counsel for the applicants argues that the two separate pieces of identification evidence, that of the father and the son, are so inextricably bound up in time and place that if the father's evidence was to be excluded the same exclusion would have to apply to the son's, even though there is no evidence suggesting that he might have been shown photographs. The court accepts this submission. The court considers that a trial judge in a voir dire would have to exclude all the identification evidence. There would then be no evidence against the applicants that could go to a jury. In these circumstances, one of the newly discovered facts, that is to say the Walker memorandum, shows that there has been a miscarriage of justice. The court will certify accordingly."

38. While *the Meleady (No 3)* case is indeed clear authority for the principle that a judge, as part of his inherent power, has an overriding duty in every case to ensure that the accused receives a fair trial, and always has a discretion to exclude otherwise admissible prosecution evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value, we are firmly of the view that the present case is readily distinguishable from *Meleady (No 3)* and that the trial judge in the present case properly exercised his discretion in favour of admitting the evidence.

39. The identification evidence at issue in *Meleady (No 3)* was arguably tainted by the fact that the identifier had been shown photographs in uncontrolled circumstances, and had isolated and picked out a particular photograph, in advance of picking out his assailants in the precincts of Rathfarnham District Courthouse. The fact that this had occurred would raise in the mind of any reasonable person the possibility that the courthouse identification was not independent and un-biased, but rather that the identifier may have picked out the assailants on the basis of a pre-determined idea of who he was looking for based on the photographs he had

been shown, and the particular photograph that he had isolated. In the present case, however, there is no such taint.

40. In the present case, the complainant was clear in her recollection that it was the appellant who indecently assaulted her, and that he had a mole on his penis. The objective extrinsic evidence, being the photographic evidence and the medical evidence, established that the appellant does now, and most likely did then, have a mole on his penis. This was manifestly probative. There was some inconsistency between the complainant's recollection on a point of detail, namely the location of the mole mark, and the objective medical and photographic evidence in that regard. That sort of inconsistency is classically a matter for a jury to resolve. The mere existence of a degree of inconsistency on an admittedly important point of detail would not have automatically served to undermine the credibility and reliability of the complainant's evidence. It might have given the jury cause to pause, and they might or might not have chosen to attach significance to her recollection of a mole mark. That her testimony as to her recollection of the location of the mole mark was inconsistent with the objective photographic and medical evidence was an issue for them to weigh up in their assessment of the complainant's overall credibility and reliability. It was perfectly open to them to conclude that while she might have been mistaken as to this point of detail she was nevertheless both credible and reliable as to her core account, and for them to have been satisfied beyond reasonable doubt as to the guilt of the appellant on that basis. However, these were matters for the jury.

41. There was no basis for withholding evidence from them on grounds of fairness. The objective photographic and medical evidence was what it was. It was probative as to the objective facts, and relevant in the context of the evidence given by the complainant. It may have been prejudicial in the light of the complainant's evidence but all relevant prosecution evidence is prejudicial. It was also potentially useful to the defence on account of the inconsistency as to the location of the mark. However, on any view of the matter, the evidence was relevant and potentially probative and it could not be said that its prejudicial effect so outweighed its potential probative value that the jury should be deprived of having it for consideration. The issues raised by the inconsistency were quintessentially matters for the jury to resolve.

42. In our assessment the trial judge was right to admit the evidence. He exercised his discretion correctly and gave an appropriate ruling. We find no error of principle and dismiss this ground of appeal.

43. Turning then to the second ground of appeal, we are prepared to dismiss this without hesitation. It is clear that the appellant willingly and voluntarily consented to being photographed and medically examined. There was no legal requirement that he should receive some special or additional caution before undergoing these procedures. He had been cautioned upon his arrest, had received a notice of his rights, and had been cautioned again at the commencement of the interview in the course of which his consent to being photographed and medically examined was sought and given. There was nothing unfair in how he was treated. Submitting to being photographed or medically examined did not involve self- incrimination. The evidence gathered was objective evidence, similar to the fingerprint evidence gathered in the *Walsh* case relied on by the respondent. In the circumstances we are not prepared to uphold this ground of appeal either.

44. As we have not seen fit to uphold either of the complaints made by the appellant in his grounds of appeal, we must dismiss the appeal.