



THE COURT OF APPEAL

Record No. 93/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

F.C.

APPELLANT

JUDGMENT of the Court delivered on the 31st day of October 2017 by Mr. Justice Mahon

1. The appellant has appealed his conviction on six counts of sexual assault, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s. 37 of the Sex Offenders Act 2001. He was convicted by a jury at the Central Criminal Court on the 15th January 2016 following a five day trial and was sentenced on the 11th March 2016 to, in total, five years imprisonment with the final fifteen months suspended on certain conditions. The complainant was W.H., the appellant's grand niece, who was fourteen years old at the time of the offences, while the appellant was then fifty years old.

2. The offences took place over a period of four months, between May and September 2012. On the relevant occasions, the appellant visited the complainant's grandfather's house while other family members were visiting a Sunday market in Lifford in Co. Donegal. The sexual assaults ranged from kissing the complainant on her lips, to touching her genitals, to rubbing himself against the complainant in a sexual manner and the digital penetration of her vagina. The appellant at all times denied the offences.

3. The complainant gave evidence via a live video link pursuant to s. 13 of the Criminal Evidence Act 1992 without objection from the appellant. The relevant statutory provision is as follows:-

"(1) In any proceedings...for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link:

(a) if the person is under 18 years of age, unless the court sees good reason to the contrary,

(b) in any other case, with the leave of the court."

4. In the course of her cross examination by Mr. Fogarty S.C., counsel for the appellant, the complainant (who was then seventeen years old) became distressed and was given a break. She was initially unwilling to return to the witness box and Mr. Devally S.C., counsel for the prosecution, was permitted by the Court, with the consent of defence counsel, to speak to her. In any event she was persuaded to return and her cross examination concluded in due course. Also called to give evidence was the appellant's wife and daughter. The appellant himself did not give evidence, but answers given by him in interview with the gardaí were provided to the jury. In the course of his charge to the jury, the learned trial judge gave a corroboration warning.

Grounds of appeal

5. The original grounds of appeal in the Notice of Appeal were subsequently reduced to two, namely:-

(i) In permitting the trial to proceed and in refusing the appellant's application to have the jury discharged in circumstances following the evidence of the complainant; and

(ii) in allowing the trial to continue for the jury's consideration in refusing the appellant's application for a direction.

6. At the opening of the oral hearing of the appeal, the Court was advised by Mr. Fogarty that the basis of the appeal was, in a nutshell, what he described as 'a fairness issue'. It was the appellant's contention that he was denied the opportunity to fully confront his accuser because of the complainant's attitude and reaction while being cross examined subsequent to her taking a break in the course of her video-link evidence.

Discussion and decision

7. Both grounds of appeal essentially arise from a single feature in the trial, namely, the contention that the appellant was denied a fair trial because of the reaction or attitude of the complainant to cross examination and the consequential lack of credibility on her part.

8. It is fundamental tenet of the criminal law that a person charged with a crime is entitled to a fair trial. Article 38 of the Constitution has been interpreted by the Supreme Court to the effect that a fair trial includes the right of an accused person to cross-examine his accuser. In *The State (Sherry) v. Wine* [1985] IRLM 196 at 199, McCarthy J. said:-

"An accused person must be given the opportunity of confronting his accuser and having whatever is the necessary and proper cross-examination carried out.."

9. In this Court, in *DPP v. Kelleher* [2016] IECA 277, Sheehan J., in delivering the Court's judgment described the ability to effectively cross examine witnesses called to give evidence against him as a key aspect of an accused's person's right to a fair trial. In *The State (Healy) v. Donohoe* [1975] I.R. 325 at 335, Gannon J. said:-

"Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the

rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser... The rights I have mentioned are such as would necessarily have a bearing on the result of a trial. In my view, they are rights which are anterior to and do not merely derive from the Constitution, but the duty to protect them is cast upon the Courts by the Constitution."

10. The complainant gave evidence on the first day of the trial by way of a live video link. This Court has taken the opportunity to view the recording in its entirety. Her examination by prosecution counsel was essentially uneventful. Cross examination by Mr. Fogarty S.C. then began and continued until the lunch break, and following the lunch break recommenced in the afternoon. After a short period had elapsed, the complainant's request for a break was acceded to. The Court was then advised that she did not wish to continue to give evidence. With the agreement of the learned trial judge and Mr. Fogarty, Mr. Devally spoke in private to the complainant whereupon she agreed to resume her evidence. The complainant's evidence then proceeded and concluded in due course. Many questions put to the complainant in cross examination were responded to by her to the effect that she was unable to remember. In particular, information and instances referred to by the complainant in her pre trial statements elicited such a response when asked about them. Furthermore, the complainant, on a number of occasions, when questioned about information provided by her to third parties also led in the response that she was unable to remember or that she did not know.

11. At the conclusion of the complainant's evidence and again at the close of the prosecution case, Mr. Fogarty sought to have the jury discharged. His application was couched in the following terms:-

"...what I would ask the Court to consider at this point is, and again, it's all thinking on your feet in respect of these type of things, but it certainly struck me afterwards that what I actually got, effectively, was a repeated assertion that she had no memory, but the difficulty is the memory that I was asking her to recollect was a memory that she gave to the guards in October 2010 and the events that she was taking about with her friends were also contemporaneous with that, and yet she recited almost verbatim the five points that she included in relation to her allegations, but yet gave nothing in the way of supporting documentation or recollection about how this happened. In my respectful submission, it seems to me that the jury are now left in a situation where they have somebody who left, who came back and undoubtedly from their point of view they are going to say well, what she does remember she remembers those five points and it is obviously going to be something that is going to be left, to a certain extent, her evidence been challenged because she simply replies repeatedly I have no recollection, I don't recall, in my respectful submission, it seems to me that she has done repairable damage to the process and in those circumstances I would ask that these - this jury - be discharged and the case be put back for hearing before another jury."

12. The "five points" referred to by Mr. Fogarty was a reference to the five separate incidents of unlawful sexual activity alleged by the complainant and said to have occurred over the course of the summer months of 2012, and in respect of which she gave evidence.

13. Mr. Fogarty strongly argued that his client had been denied the opportunity to confront his accuser because of the complainant's responses to many of his questions put to her in the course of cross examination. He suggested that the cross examination had almost become a mantra of *I don't remember, I don't remember*.

14. Mr. Devally S.C. submitted to the learned trial judge that the assessment of the responses provided by the complainant while being cross examined was a matter properly left for consideration by the jury, and that to the extent that such may have damaged the complainant's credibility it potentially stood to the benefit of the appellant.

15. The learned trial judge declined to withdraw the case from the jury. Before doing so, and in the course of exchanges between himself and counsel, the learned trial judge acknowledged there had been a change of attitude on the part of the complainant between her examination by the prosecution and her cross examination by the defence. He said:-

"As the jury are not here, the clarity and indeed the impressiveness of her recollection under examination in chief stands by way of severe contrast to her approach to cross examination. So, I mean that undoubtedly is there as a feature of the case."

16. In the course of his ruling, the learned trial judge stated:-

"...In essence, it seems to say that because they might be a case to be made that the complainant in the case didn't engage fully, properly or in a optimum fashion with cross examination, that that gives rise to an unfairness in the trial, the application for a direction, of course, is based on - is an application that focuses on the quality of the evidence. An application can arise in - at any stage of the case but typically not before all of the prosecution evidence is in. So, I don't propose to approach this on quite the same basis or by reference to the same criteria as such an application. Mr. Fogarty has referred to the impairment of the fairness of the trial. I'm not sure that this is a correct label to apply to the current situation. I'm very much of the point of view put forward by Mr. Devally that it, in fact, shows that it's a fair trial because Mr. Fogarty in my view conducted a very successful cross examination because the cross examination produced a reaction from the witness which was very, very different to have which was elicited under examination in chief and it seems to me therefore, Mr. Fogarty has set up a situation on behalf of (Mr. C.) whereby he can address the triers of fact in this case on the demonstrable difference in approach of the main witness to the various parts of the case and no doubt be say that at a minimum that much give rise to a reasonable doubt on their part as to the veracity of the evidence...I am satisfied that what has transpired is fair, its - a trial doesn't become fair simply because somebody doesn't do what one might anticipate they might have done. This hasn't created any detriment for the accused man. On the contrary, we now have a situation whereby what appeared to be a black and white account on examination in chief has been successfully, in my view, and in so far as that's relevant, has been impaired by the process of cross examination. I discern no unfairness in that situation...I do not regard it as unfair to present a jury with a witness who is in some respects unsatisfactory because almost every trial would be unfair if that where the case. It is for the jury to divide the sheep from the goats in these circumstances, if I might borrow that particular expression and there, Mr. Fogarty, I have to refuse the application because it is simply none of my business. The trial has been perfectly fair and indeed shows how a trial should be properly conducted on behalf of an accused man and it is ultimately for the jury to decide they approach (Miss H.) and her evidence, with particular reference to her attitude to cross examination..."

17. In response to the application for a direction at the close of the prosecution case the learned trial judge said:-

"There is of course perhaps from some points of view an unsatisfactory approach to the matters upon which (Miss H.) but that seems to me to feed into an issue of credibility and it seems to me to feed into a decision as to whether the evidence that certain offences were committed is capable of been subjected to analysis and supporting a conclusion beyond reasonable doubt. I cannot say that (Miss H.'s) evidence is so inherently weak, vague, or inconsistent or so infirm that a jury properly directed and properly directed means having their attention drawn to the specific difficulties that may arise in relation to the evidence and I certainly don't and won't flinch from that in whatever form I may regard as appropriate and that, of course, is not a direction to the jury, it's - it is drawing certain matters to their attention and if necessary inviting them to be particularly careful. Of course one presumes that a jury is always careful but particular care and caution may be required in the circumstances that arise in this case but that is the limit of my function. That is to deal with the matter on a legal basis and so give (Mr. C.) a fair trial to highlight matters that may give the jury pause for thought. The ultimate decision is theirs. They could quite legitimately say in my view, in making a selection, that the matter of inability to remember, was because of the passage of time, perhaps the youth of (Miss H.), something of that kind. On the other kind, they could quite legitimately say that her approach to cross examination is such that - her evidence in chief ought not to be relied upon beyond reasonable doubt and that too would not be a surprising conclusion, but that's not for me to say one way or the other. What I might think or what I might do if I was sitting over there is entirely irrelevant. The case, reasonably comfortably, passes the standard that is required for me so I refuse the application.

18. In general terms, having viewed the complainant's entire evidence, this Court is of the view that the complainant came across as a competent, indeed impressive, witness confident in her ability to recall much of the detail of the five separate occasions in the summer of 2012 when she maintained she was sexually abused by the appellant. Again, in general terms, the complainant appeared to listen attentively to questions put to her by both counsel over a period of in excess of one and a half hours, and in most instances her responses were careful and considered.

19. What was evident was that the complainant increasingly exhibited a degree of hesitancy and distress in the course of a long and detailed cross examination, and more particularly, more frequent instances of failure of memory than had been the case in the course of her examination in chief. It is important however to consider the complainant's evidence in the following context:-

(i) The complainant was fourteen years old at the time of the offences (over the summer school holidays in 2012), some three and a half years before giving evidence.

(ii) The complainant's statement to the gardaí, in which she provided significant detail of her allegations of sexual abuse against the appellant, was made within weeks of the incidents of abuse having taken place and when their detail and surrounding circumstances would have been particularly fresh in her mind and nearly three and a half years prior to the trial. The same can equally be said as to information provided by the complainant to her school friend in or about the same period.

(iii) The complainant was just seventeen years old when she gave evidence in 2016. In the ordinary way, her memory of events which occurred over three years earlier then could not reasonably be expected to be as strong as it might have been in 2012, and at a time much closer to the dates of the alleged offences. Fragility in memory due to passage of time is a natural feature of the human condition at any age. Indeed, it might be said that the ability of a child (as the complainant then was) to recall the detail of events which occurred earlier in their childhood may be less than that of an adult.

(iv) A seventeen year old girl giving evidence over a prolonged period in relation to sexual abuse suffered by her as a fourteen year old, and being required to provide intimate details of that offending, is particularly difficult and stressful for her. The degree of difficulty and stress was likely to increase and become more pronounced over a period of ninety minutes of close questioning by lawyers.

20. The complainant displayed an impressive recollection of the detail of the sexual nature of her encounters with the appellant and she portrayed a good recollection of the surrounding circumstances of each of the five occasions of abuse, including where they occurred. She was also in a position to reasonably accurately date the offences; being on five separate Sundays over a three month period during the summer school holidays of 2012 and on occasions when her grandfather and other relatives had attended a local market while she remained at home alone.

21. Where, arguably, the complainant was a less than impressive witness was in her ability to recall or recount some of the detail provided in her statement to the gardaí soon after the events complained of, well over three years previously, such as, for example, the clothing she wore, the order in which she and the appellant entered a particular room and what precisely and when precisely she had confided in a school friend. She did however remain steadfast in her recollection of the intimate detail of the sexual abuse complained of. Her lack of memory during cross examination related to, at least to a significant extent, what might be described as peripheral matters. That is not to say that such 'peripheral matters' are not matters of importance and relevance in the context of closely testing or challenging allegations of a most serious nature.

22. It appeared to the Court that her professed lack of memory in response to some questions put to her in cross examination was simply down to the passage of time, and a lack of opportunity to refresh her memory by reading her October 2012 statement to the gardaí close to the trial date. It did not appear to the Court that her professed lack of memory or inability to recount accurately some of what she had stated over three years earlier was in any way intentional, contrived or orchestrated. On the contrary it appeared to the Court that the complainant made considerable efforts to recall some of the detail provided by her to the gardaí in October 2012 and information disclosed to a school friend. Her memory of the specific detail of the sexual offending and of being told by the appellant not to tell anyone was vivid and unwavering.

23. Equally clear from the video recording was the extent to which the complainant showed signs of stress, anxiety, discomfort, exhaustion and frustration, especially in the course of the final thirty minutes. However such ought not be conflated with an unwillingness to answer questions or of any intention not to co-operate with her cross-examination.

24. A trial judge should not lightly discharge a jury or grant a direction. In *DPP v. M.* [2015] IECA 65. Edwards J., in delivering the judgment of this Court stated (referring to the decision in *R. v. Galbraith* [1981] 1WLR 1039):-

"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."

25. Archibold, *Criminal Pleading Evidence and Practice 2014* at p. 484 suggests that:-

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

26. The existence of issues relating to the reliability and / or the credibility and / or inconsistencies in the evidence of the complainant are matters which ordinarily ought to be left to the decision of the jury where they feature in a trial, as they frequently do, it is the accused who stands to benefit. In *DPP v. M* (Unreported, Court of Criminal Appeal, 15th February 2001), Denham J. (as she then was) said:-

"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 to trial then the judge in the exercise of his or her discretion should stop the trial..."

27. In the course of his lengthy charge to the jury the learned trial judge addressed the subject of the complainant's cross examination in the course of his detailed corroboration warning. He told the jury, *inter alia*:-

"...I am deciding to give you a corroboration warning in relation to the evidence of (W.H.) and it is my duty to contextualise that and it would be obvious to you from what was said to you earlier by both Mr. Devally and Mr. Fogarty that my reason for giving you the warning in this particular case in relation to the danger of convicting on the uncorroborated evidence of (W.H.) arises from certain contrasts that may have become apparent to you in terms of how she gave evidence in chief to Mr. Devally and how she responded when challenged upon aspects of that evidence under cross examination by Mr. Fogarty.

...They said, the feature of the evidence in this case that gives rise to what I think, in fairness, must be brought to your attention if it is not obviously already has been a question - a question mark over the evidence or potentially suspect to borrow the phrase I have just used. Is the approach of (W.H.) to the questions that were properly and fairly put to her by Mr. Fogarty, and again - now, I am perhaps going into a slight area of comment here, so you can accept or reject anything I say in terms of comment on (W.H.'s) evidence, but what I say about the warning stands as a matter of law and is ultimately a matter for yourselves...But it did seem to me that, you know, you saw - I mean, I am not going to transgress on your area of the case, you saw and heard her giving evidence and the manner in which she responded readily to the questions put by Mr. Devally and she gave her account of the five instances in some detail and I dare say by way of comment in quite a cogent and clear manner. That clear recollection in relation to those matters changed, and again this is comment but I don't think it is very controversial comment, it did change in terms of her ability to recollect other details when Mr. Fogarty raised other details other than the ones that she readily provided to Mr. Devally and I am not going to go back over that, because you saw it, it was there and she frequently said I don't remember and then, you know, there was a break and then her cross-examination finished, but members of the jury, it is a matter for you to decide what the cause, if there is a change of the kind that I have suggested to you, what the cause of that is. I mean, it should be borne in mind, I suppose that Ms. (H) is still only seventeen or something of that kind. It can also be borne in mind that she was pressed as to why she was having such difficulties and she pointed out that, well you know, it's all quite some time ago and indeed that is a legitimate observation, but again this is a comment by me, that only goes so far because it didn't prevent - the lapse of time didn't prevent her being clear in the details that she furnished to Mr. Devally when he was asking questions.

... If you are satisfied with her evidence and having considered everything you are entirely at liberty to act upon her evidence, I simply have to give you the necessary legal guidelines and thereafter it falls into your lap and I don't want you to interpret this as saying, coming from me, accept or reject her evidence. You do what you will, please just take on board what I am saying in terms of a legal warning."

28. It is clear that the learned trial judge was mindful of what he perceived to have been unsatisfactory aspects of the cross-examination of the complainant because of her lack of memory and hesitancy in answering some of the questions put to her. He however decided that the assessment of the complainant's evidence was ultimately a matter properly left to the decision of the jury, having carefully reminded them of how the complainant's memory had 'changed' between her examination in chief and her cross examination. While this Court is inclined towards the view that the cross-examination of the complainant in the context of answers given by her to questions put to her by Mr. Fogarty was less unsatisfactory than suggested by the learned trial judge, the Court very firmly takes the view that the decision to refuse to accede to the applications made on behalf of the appellant was entirely correct and that it was appropriate that the issue be left for the decision of the jury.

29. To the extent that the complainant was hesitant or unable to answer some questions or exhibited lack of memory, the appellant stood to benefit from same. In his closing speech to the jury Mr. Fogarty took particular care, as he was quite entitled to, to remind the jury as to the manner in which there was a change, as he perceived it, in the attitude of the complainant between her examination in chief and her cross examination. This was undoubtedly done for the purposes of undermining the complainant's credibility in the minds of the jurors. When addressing the jury, Mr. Fogarty expressly referred to that change and spoke about the complainant's *inconsistencies* and *how she couldn't remember things that she'd remember and she couldn't remember what other people had said to her...*

30. The Court is satisfied that the trial was fair, and that the complainant made herself available for cross examination and was comprehensively cross examined in relation to all aspects of her evidence. In the circumstances the Court will dismiss the appeal.