THE COURT OF APPEAL

The President
Birmingham J.
Edwards J.

214/12

The People at the Suit of the Director of Public Prosecutions
V
George Arundel

Appellant

Judgment of the Court (ex tempore) delivered on the 27th day of January 2015, by Mr. Justice Edwards

1. This is a case in which the appellant was convicted by a jury on the 29th February, 2012, following a twelve day trial in the Central Criminal Court of offences of attempted rape contrary to common law, sexual assault contrary to s. 2 of the Criminal Law Rape (Amendment) Act 1991, rape contrary to s. 4 of the Criminal Law Rape (Amendment) Act 1991 and false imprisonment contrary to s. 15 of the Non Fatal Offences Against the Person Act 1997. The jury were unanimous in convicting the appellant on the counts of attempted rape, sexual assault and false imprisonment respectively. The appellant was convicted by a majority verdict of 10/2 on the count of rape contrary to s. 4.

2. The case was concerned with the detention against her will and sexual molestation of J N on the 23rd May, 2011, at a location in the southern half of the country. Following his conviction on all counts on the indictment, the appellant was sentenced on the 7th June, 2012, to imprisonment for a term of ten years on each count, to run concurrently back dated to the date on which he went into custody. The appellant was also directed to undergo a period of eighteen months post release supervision and was declared to be a sex offender for the purposes of the Sex Offenders Act 2001. The appellant appeals to this court against both his conviction and sentence in respect of all matters.

3. In respect of the conviction aspect of the case the appellant contends that his conviction is unsafe and unsatisfactory and seeks to have it set aside on one ground and one ground only. He contends that the verdict of the jury was against the weight of the evidence and was accordingly perverse.

4. It is necessary at this point to briefly rehearse the nature of the evidence that was before the jury and in that regard I am adopting the summary of para. 12 of the appellant's written submissions which seems to me to represent a succinct summary of the complainant's evidence. There was other evidence in the case to which I will also allude in a moment. The complainant's account of events was that she went out to an off-licence at approximately 21.15 on the 23rd May, 2011, to purchase alcohol and cigarettes. There was a male at the counter in the off licence at the time. She left with her purchases, stopped to light a cigarette and was grabbed from behind by a male who stated "you are keeping me company tonight". She was then dragged through a gap in a ditch into the adjacent field. She realised that it was the same male who had been at the counter in the off-licence shortly beforehand. The complainant was forced to sit on the ground on a flattened area of grass. She made repeated attempts to escape but was prevented or overpowered each time. The complainant alleged that her assailant then proceeded to attempt vaginal rape and to force her to perform oral sex. She then managed to overpower her assailant and called for help at the nearby shopping centre, and indeed the evidence was that she ended up at the entrance to the (named) public house and off licence in a state of some dishevelment and distress, and also covered in mud.

5. There was, as I have already mentioned, other evidence in the case of a forensic nature, and in particular concerning a subsequent medical examination of the injured party at the Sexual Assault Unit at a particular hospital. The injured party was found to have a significant number of bruises. In addition, the usual post alleged sexual assault medical examination was carried out and various swabs were taken from her. She was found to have semen on her vulva and abdomen that was later identified by means of DNA analysis as having the same DNA profile as that obtained from the blood of the appellant in this case.

6. Insofar as the case is made that the verdict of the jury was against the weight of the evidence and was perverse, this case is based entirely on alleged inconsistencies and matters of confusion that are said to have become apparent following the cross-examination of the complainant at a very considerable length by counsel for the appellant. The court finds it unnecessary to comment with respect to the propriety of the cross examination. However, in specific terms, the first complaint made is that considerable confusion arose with regard to the location of the alleged offences and in particular concerning the location of the specific entrance or gap leading into the field where the alleged offences were said to have taken place.

7. This is responded to by the respondent to this appeal in written submissions. Counsel for the respondent has invited the court to adopt his written submissions in respect of this complaint, and indeed the other complaints which the court will come to in a moment. The court readily does so in circumstances where it seems to this court that the points contained in those written submissions are entirely well made.

8. The point is made with respect to the first complaint that the locations of precisely where within the field the alleged offences were perpetrated, and the precise location of the entrance or gap into that field through which the complainant was dragged, were somewhat collateral issues. The respondent asks the court to note that, in any event, the locations at which the offences were committed within the field were in fact identified to the investigating members of An Garda Síochána by the complainant and the said locations were properly preserved and investigated by the gardaí. The point is further made that the complainant's evidence was that she had accurately pointed out the said locations to the investigating members without having re-entered the field. The court's attention has been drawn to various extracts from the transcript as supporting that contention. It was further submitted that it was the complainant herself who, whilst giving her evidence in chief, first highlighted to the court that the point of ingress identified on the maps produced was not that through which she had in fact been dragged. Once again, the court was referred to the transcript in support of that. The respondent contends that the complainant's evidence on this aspect of matters was both consistent and reliable, and that if there were indeed any inconsistencies on the evidence as a whole, it was a matter for the jury to consider the effect of those inconsistencies. This Court entirely agrees.

9. A second complaint is made that the complainant initially ruled out the suggestion that she had returned to the alleged crime scene with the guards in the aftermath of her complaint, and then later changed her evidence in regard to that. The appellant submitted that on day 2 of the trial, she gave evidence that she had not returned to the scene of the alleged incident with Garda O'Shea; and that she later then seemed to accept that she might have returned with Garda O'Shea, but suggested she had no memory of it as

she had been traumatised. Responding to this, the respondent points out that there was no inconsistency in the evidence of the complainant. A number of specific passages in the transcript are identified to support this contention, in particular a transaction or exchange on day 2, p. 29, line 29 to day 2, p. 30, line 9 of the transcript where in cross examination the complainant was asked:

> "Q. So it was the 24th May that you were in the garda station and made your statement and having made your statement did anything else happen?
>
> A. I don't understand.
>
> Q. Did the guards bring you back down to the (named) off licence and ask you to retrace your steps.
>
> A. No."

10. It was also pointed out that on day 3, counsel for the appellant examined the witness on the basis of her having identified the locus immediately following the incident i.e on the 23rd May, 2011. The transcript at day 3, p. 8, lines 10 and 11, reflects this. The complainant was asked:

> "Q. But you just had this experience that has traumatised you and you're back in the (named) pub, the guards arrived and you've told them that you had been sexually assaulted and then they ask you to show them where it actually happened.
>
> A. I remember pointing back to the two gardaí that it was -- behind there in the (named) field."

11. The respondent submits that any confusion arising out of the matter was due to the fact that the questioning on day 3 involved an incorrect premise being put to the complainant. It was again submitted that the complainant's evidence was in fact consistent but that if indeed there were any consistencies it was entirely a matter for the jury to consider the effects of same. Once again, this court agrees with those submissions in their entirety.

12. There is a third complaint that the complainant gave confused and contradictory accounts of the various attempts that she made to escape the control of her assailant. In response to this the point is made that it was unreasonable to expect the complainant to provide an account which was precisely accurate in minute detail. It was further submitted that in any event the complainant, in her evidence, was consistent in detailing three attempts to physically escape together with an account of having made constant efforts to extricated herself from a terrifying situation through persuasion and coaxing. Once again the respondent has submitted to the court, and the court accepts, that the complainant's evidence on the issue appears to have been consistent on the whole. Moreover, the Court agrees with the respondent that if, indeed, there were any inconsistencies it was a matter for the jury to consider the effect of them.

13. The fourth complaint made in terms of alleged inconsistencies is that the complainant maintained that her assailant was too fast to permit her to escape, even though on another account she insisted that her assailant was legless, disorientated and that his eyes were popping out of his head. In regard to this, counsel for the respondent points out that there is fact no inconsistency in the complainant's description of her assailant as being both under the influence of intoxicants and at the same time strong and overpowering. The court is asked to note that the appellant was at the time of the offences a male in his mid twenties, while the complainant was a female in her mid forties. It was again submitted, and the court agrees, that there is in the circumstances no ostensible inconsistency of any substance, but that if a jury had had any concern in regard to that they were entirely capable of resolving it.

14. The next and fifth matter of which complaint is made is that the complainant was unable to offer any credible explanation for the mechanics of how her assailant was able to grab and forcibly drag her, whilst simultaneously holding two 2 litre bottles of cider. The evidence in regard to that was that the bottles came as a pack, and that they were bound together with tape which incorporated a handle.

15. The court was asked to note that on day 3, p. 37, between lines 28 and 30, the injury party responded to a question asked of her concerning this issue, in the following way. She said:

> "A. I can't -- the last remembrance of the cider is when he was pricing it in the off licence … I can't remember the cider in his hands going out to the field, I don't know where -- whether he had them in his hand or not."

16. Some importance is attached to this. It was submitted by counsel for the respondent that the essence of the complainant's testimony was that she was not focusing on what the her assailant was doing with the cider, that her last memory of the cider was in fact when the man, whom she believed to have been her assailant, had been pricing it in the off-licence. The respondent submits that if indeed this does represent an inconsistency, it was a matter for the jury to consider the effect of same. This Court entirely agrees.

17. The next and sixth complaint is somewhat similar. In this instance the concern was with the eight cans of Carling that the complainant herself was carrying. The suggestion is that the complainant was unable to proffer any credible explanation concerning how her eight cans of Carling managed to remain intact during the attack and travel safely with her to the area of flattened grass. Responding to this, counsel for the respondent points to the evidence given by the witness Lisa O'Connell, who was the girl who had served the complainant in the off licence, stating that the cans of beer purchased by the complainant came in two separate packs of four, and that they were secured by plastic ties. The court is reminded that the complainant herself stated that the cans of beer were contained in two separate carrier bags. The court is further reminded that the complainant does not record having kept the beer in her possession at all times, but rather says that she dropped them while making the first of her three escape attempts. It was submitted that there are in fact no significant inconsistencies, and that the complainant's evidence on this aspect of the case was consistent and reliable. However, it was contended, if indeed there were any inconsistencies in her evidence on this issue, those were matters for the jury to consider. This Court entirely agrees with that submission.

18. The appellant also complained that the injured party accepted that she was plámásing her assailant even though she was also insisting that she was unable to scream or otherwise attract the attention of other people on account of being paralysed with fear. Addressing this complaint, the respondent submits that the precise meaning of the word "plámásing" is obscure, that it is amenable to different usages in different contexts, but that in the context of the complainant's evidence it was quite clear that the complainant was trying to coax and persuade the assailant so as to extricate herself from the situation in which she found herself. In support of this the court was directed to various parts of the transcript, which it considers unnecessary to rehearse with particularity for the purposes of this ex tempore judgment.

19. The respondent submits that the appellant was trying to invest the word "plámásing" with a meaning which was entirely unintended by the complainant in choosing to use that word. It was submitted that the meaning contended for by the appellant is unsustainable when the word is viewed in context. This Court agrees with that submission.

20. It was further submitted that if there were any inconsistencies arising out of the complainant's use of the word "plámásing" those were matters for the jury to consider; and again the court agrees with that submission.

21. The penultimate complaint in relation to alleged inconsistencies relates to her evidence that she had crossed her legs, and that this accounted for her assailant's failure to penetrate her. In response to this, the respondent submits to this court that the evidence of the complainant given in chief was clear, consistent and unambiguous and that the complainant maintained that position under strenuous cross examination. The case is made that there were not in fact any inconsistencies in this aspect of the evidence. The court has been referred to various parts of the transcript in respect of that, and in particular with respect to the cross examination of the complainant. The court's attention is drawn to an exchange on day 2, p. 11 between lines 27 and 31 of the transcript where, in answer to a question from counsel for the appellant, the complainant said

> "I kept my legs crossed because I was afraid in case that he'd enter me. So I said 'please, please'. So when he knew he was getting nowhere on entering my vagina, he made me – me caught me by the head and pulled me forcibly down on to his penis and he made me -- he was trying to make me suck it."

22. There was a further exchange also on day 4, p. 13 lines 18 – 22 which went as follows:

> "Q. He's frustrated and unable to achieve his intended end simply because you crossed your legs?
>
> A. I crossed my legs. He intended to - he had intentions of trying to get his penis into my vagina that night because he was - that's how he had me pinned down forcibly and when he was getting nowhere for entering my vagina, that's when he dragged me by the head to have oral sex with him."

23. The respondent submits once again that the complainant's evidence is in fact consistent and reliable on this issue, but that if there were indeed any inconsistencies these were quintessentially matters for the jury to determine. Once again, the Court agrees that it was a matter for the jury.

24. The final complaint based on alleged inconsistency in the complainant's account is that she told the jury that she somehow gained the strength to overpower the assailant after the alleged sexual assault took place and that this was in complete contra distinction with her account given up to that point, that she had in fact been powerless to escape from the her assailant.

25. In regard to that, the respondent draws attention to the following evidence on day 2 of the trial, where the complainant was being examined in chief:

> "A. I just knew he was coming limp, he was limp from the struggle and all this and --
>
> Q. And when you say he was limp --
>
> A. He -- his actions stopped for a second because I was pushing to try to get off him.
>
> Q. Okay, yes.
>
> A. And then I just got the strength to get one push and push him off."

26. The point is made that although the appellant contends that the complainant was inconsistent in this aspect of her testimony, no alleged inconsistencies were in fact put to her in cross examination. The respondent submits that her account concerning how she effected her escape was consistent throughout, and it was in accordance with what one might expect having regard to the events detailed in the account as a whole. This Court agrees with that submission. The respondent further contended, once again, that if there were any inconsistencies these were matters for the jury to consider and adjudicate on. The court also agrees with that submission.

27. In conclusion the court is not satisfied that it has been established that the verdict of the jury was against the weight of the evidence and perverse. There was substantial consistency in the complainant's testimony, but it would wholly unrealistic to expect that in a case lasting twelve days, and where a complainant was cross examined for between two and three days, that there would be no inconsistencies at all. The court agrees with the submission made by counsel for the respondent this morning that the fact that there are residual inconsistencies to a degree, is something that is only to be expected.

28. Such inconsistencies as may have been demonstrated were entirely matters for the jury to resolve in this Court's view. The jurisdiction undoubtedly exists to set aside a verdict on the ground of perversity, but the bar is set at a significantly high level in respect of that. There is no dispute as between the appellant and the respondent as to the relevant law. It is set out succinctly and well on p. 2 of the appellant's written submissions. In circumstances where it is uncontroverted it is unnecessary for this Court to go into it in any detail. It is sufficient to say that the court endorses the statement at para. 7 of the appellants' written submissions where he quotes Mr. Thomas O'Malley in his recent work "The Criminal Process" at para. 23.13 to the effect that while, on existing jurisprudence, the possibility of setting aside a verdict on the ground of perversity is not entirely ruled out, it is clearly intended to be an exceptional measure.

29. There are no exceptional circumstances in the present case that would justify this Court in setting aside the verdict of the jury on the grounds of perversity and the court dismisses the appeal against conviction.

At 11.52:

30. The court has considered the submissions of counsel for the appellant on sentence, and the respondent's submission in reply, and it is not satisfied that there has been any error of principle in the sentencing process in this case. The learned trial judge was entitled to take the view that the circumstances of this case mandated an immediate and substantial custodial sentence. While counsel for

the appellant has identified a number of matters that he contends were potentially mitigatory, it seems to this Court that the learned sentencing judge was entitled to take the view that the de facto mitigating effects of those circumstances were slight, or as he put it, "effectively non existent", in the circumstances of the particular case. In the court's view the sentence imposed was within the range of available sentences that might have been imposed. Accordingly, there was no error of principle.

31. The court therefore dismisses the appeal.