THE COURT OF APPEAL

[290/18]

The President

Peart J.

Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PP

APPELLANT

JUDGMENT of the Court delivered on the 3rd day of July 2019 by Birmingham P.

1. On Friday 2nd November 2018, after a trial which had commenced on 30th October 2018, the appellant was convicted of a single count of indecent assault. Subsequently, on 3rd April 2019, he was sentenced to a term of 14 months imprisonment. The conviction on the single count of indecent assault was recorded in a situation where the appellant had stood trial in relation to three counts of indecent assault relating to two complainants: GMcP, in respect of whom a conviction was recorded, and her sister, CMcP, in respect of whom no conviction was recorded. The count on which a conviction resulted was a majority (10:2) verdict.

2. By way of background, it should be explained that the trial was concerned with events that occurred in the early 1980s which resulted in a conviction being entered in respect of the appellant. In the summer of 1980, the two complainants were living with their two brothers and their parents in Scotland. Mrs. GMcP Snr, mother of the complainants, hailed from Donegal and as a result, members of the McP family visited Donegal regularly; perhaps a couple of times a year. At the time, the appellant was married to a woman called HP. HP was the first cousin of the complainants' mother and apart from being related were also, it seems, close friends. The P family and the McP family would socialise together when the McP family would visit from Scotland.

3. In July 1980, HP was pregnant and was expecting the birth of her third child whose arrival was imminent. At that time, she was the mother of two young boys. The complainant, GMcP, who was fourteen years old, just shy of her fifteenth birthday at this stage, was asked to help out. GMcP agreed and stayed over in the P household for two nights. The two incidents which gave rise to charges involving GMcP as a complainant were alleged to have occurred on these two nights in the P home. Given that HP gave birth to her third child on 20th July 1980, and also because the complainant, GMcP's birthday is 21st July, it is possible to date the alleged offences with a greater particularity than is usual in the case of historic sex abuse cases. The complainant's recollection was that she slept in a bed that was slightly larger than a single bed and slightly smaller than a double bed in the same room where the two young boys slept in bunk beds. Her evidence was that she was wearing a nightdress and underwear, that she was sleeping only to be awoken by the appellant shaking her and saying "come on, come on". He grabbed her by the hands and wrists and he then pulled and dragged her into the room that was his room and his wife, H's, room and threw her onto the bed, a double bed. He was wearing underpants. Having thrown her onto the bed, he got down on top of her and pinned her down on the bed and pulled her nightdress up. He held her hands with one of his hands when he was doing this and he pulled her underpants down. He started putting his head down about her breasts, he was kissing them, and he was pushing his hand and his erect penis into the inside of her thigh and then put it to the vagina area. The complainant's evidence was that she was scared and frightened and said "you're going to make me pregnant, you're going to make me pregnant". She said that she had never had a sexual relationship before and had never before seen an erect penis. After she said this, he continued his activity, and with his hands started rubbing her vagina and her clitoris. When he was finished, he got up off her and she jumped up and went back into the boys' room and got into bed.

4. The complainant said that the same thing happened the next night. On this occasion, she did not sleep, she lay awake because she was frightened that the appellant was going to do the same thing again. The appellant took her out by the hands and wrists into the hall and then into the same room where the first incident had occurred. What happened then was "just the same as the night before".

5. In the course of the trial, evidence was adduced from a number of witnesses, friends and family members of the complainants regarding disclosures made to them about the appellant. It seems this evidence was adduced by agreement between prosecution and defence. The prosecution was not simply adducing evidence of the first complaint made under the doctrine of recent complaint, but were also adducing evidence of subsequent disclosures to rebut an allegation of recent fabrication. The suggestion of recent fabrication first arose during the course of the Garda interviews with the appellant. It was an issue that was raised with the complainant during cross-examination and one that was addressed by the appellant in evidence. It will be noted that this was a case where the appellant both called evidence and gave evidence in his own defence.

6. There was evidence at trial that the complainant: GMcP, first made a complaint to a friend of hers: SG, within a few days of the alleged offences. There was also evidence given of a conversation around the Sunday lunch table in or around 1983 when the complainant: GMcP, spoke about what had occurred to her in the presence of her sister and later co-complainant, C, her then boyfriend: MW, and also her brother: McP. There was also evidence given of a discussion she had with a friend of her sister's: KM, which occurred some years later. The prosecution's interest in these later disclosures arose from the fact that the defence were putting forward the suggestion that the complaints were manufactured or fabricated in or around 2004, and arose out of jealousy at

the success in life that had been achieved by the appellant including the buying of land which, it was suggested, the McP family might have aspired to do.

7. Some nine grounds of appeal, along with multiple sub-grounds, have been addressed in the written submissions. If one excludes a ground relating to how the Judge dealt with the issue of recent complaint in his charge, which was not pursued when the transcript became available, the Grounds of Appeal can be boiled down to these three issues:

> (i) certain criticism of the Judge's charge, in particular that he failed to put the defence case to the jury and that he failed to remind the jury of the inconsistencies in the evidence which had been identified by the defence, those inconsistencies being central to the challenge to the credibility of the complainant that was mounted by the defence;
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> (ii) that the verdicts were inconsistent, acquitting on two counts and convicting on one, and more particularly, that the verdicts were inconsistent, to the extent of being perverse, when acquitting in respect of one count and convicting in respect of another involving the same complainant, and
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> (iii) that the jury were under pressure, or at least may have felt themselves under pressure to come to a verdict.

8. Of these three grounds, it is grounds (i) and (iii) on which emphasis was placed by leading counsel for the defence, though there was a reference to the question of inconsistent verdicts by junior counsel for the appellant when replying to submissions on behalf of the Director of Public Prosecutions. Moreover, leading counsel for the appellant makes the point that grounds (i) and (iii) should not be viewed in isolation, but collectively as each feeds into the other. He is prepared to concede that while the criticisms he makes of the Judge's charge are weighty, that the view might be taken that the criticisms in isolation of the charge would not get the defence case "over the line". Rather he says that whatever doubt there might be about getting the case "over the line", that the criticisms certainly bring the case up to the line. He says that if the concerns about the inadequacies in relation to the Judge's charge are viewed in the overall context of the concerns which he says arises about the circumstances in which the jury deliberated and came to their verdict, that it leads to the inescapable conclusion that the trial was unsatisfactory and the verdict unsafe.

9. A number of criticisms are presented of the trial Judge's charge. It is said that, unusually, he dealt only with the answers to questions put in cross-examination rather than the questions themselves. It is said that as a result, the impact of the cross-examination was lost and there was no effort to highlight, isolate, or draw attention to the potential significance of what is said were crucial inconsistencies that were exposed during the cross-examination of the complainant, in particular, but also other prosecution witnesses. The appellant has instanced examples of the inconsistencies which he says were significant. He points to the issue as to the circumstances in which the complainant first made a statement of complaint on her own behalf to Gardaí, as distinct from making a witness statement in the context of the complaint that had been made by her sister. In doing so, he highlights the fact that the complainant had suggested that the two young children were in the house, and indeed in the bedroom from which she was taken in order to be abused, when there was cogent, and indeed, unchallenged evidence that there was only one child in the house at the time and that the other boy had been brought to Dublin. The appellant, in written submissions, points to what he says is an inconsistency and shifting of ground in that, on the one hand, the complainant was saying that she saw the appellant as a man who would "vent his sexual lust" on any female, and yet when challenged why, if this was so, she would not have alerted her younger sister in order to prevent her being put in a situation of danger a year later, she responded by saying that she had thought that the appellant had taken a fancy to her i.e. the complainant, GMcP. The appellant suggests that an inconsistency is to be found in the fact that her and her sister's friend, KM, had told the jury that the complainant had told him that the accused had tried to rape her, in circumstances where the complainant denied saying that the accused had tried to rape her. On behalf of the appellant, it is said that this is a significant inconsistency but, with respect, we cannot agree. The account that the complainant gives of what occurred is one which, quite understandably, could be characterised by someone to whom it was recounted as an attempted rape.

10. Particular emphasis is placed on what it is said were significant contradictions and inconsistencies between the evidence of the complainant and the evidence of her friend, SG. So, the appellant points to the fact that the complainant says that the he was initially wearing underwear, whereas SG says that the complainant told her that the appellant was naked. The complainant says that the appellant did not attempt actual penile penetration, whereas SG says that she was told that the appellant tried to put his "willy" inside the complainant. Perhaps the point on which greatest emphasis is placed is that the complainant says that she was sexually assaulted on two consecutive nights in a similar manner, whereas her friend, SG, recalls being told about only one sexual assault.

11. At another level, the trial Judge is criticised for failing to draw the jury's attention specifically to the variations in accounts forthcoming in relation to the discussions over Sunday lunch. In considering the extent to which any substance attaches to these complaints, it is necessary to bear in mind that the trial was a short one. The evidence was dealt with in less than three days and the case could not be described as a particularly complex one involving, as it did, allegations by two complainants and a defence case which was that the incidents alleged to have occurred had not in fact occurred.

12. The Court has read the charge in full and has not been at all persuaded that the criticisms advanced of the trial Judge are justified. A jury that had heard the evidence, had heard both prosecution and defence counsel comment on the evidence, were reminded of the evidence. The jury were reminded of the fact that the defence were contending that there were inconsistencies and of the significance that the defence were attaching to those inconsistencies.

13. The Court is not at all convinced that there was anything unusual or inappropriate in reviewing the evidence by reference to the answers given to questions. It is not at all unusual for judges to explain to juries that the evidence in the case is what is said by witnesses in the witness box and questions posed by counsel do not constitute evidence. In this case, the questions were, to a somewhat unusual extent, sometimes argumentative and contained elements of comment.

14. While counsel for the appellant eschews any suggestion that what he was looking for was a second speech on behalf of the defence, the Court is driven towards the view that this was, indeed, what was desired. Reading the charge as a whole, the sense the Court has is that it was a fair one, that it reminded the jury of the evidence, to the extent that any reminder was needed, and equipped the jury to deal with the issues in the case, issues which were not, it must be said, particularly complex.

The Jury Deliberating

15. In this case, the trial began on 30th October 2018, a Tuesday, and a verdict was returned at 18.43 hours on Friday 2nd November 2018. On behalf of the appellant, it is pointed out that the jury first retired at 15.22 hours. At that point, as is usual, the Judge dealt with requisitions and the jury was brought back to Court at 15.46 hours. The jury was recharged briefly by the Judge and

retired once more at 15.50 hours.

16. Some time around 5.00pm, or perhaps a little later, the exact time does not appear on the transcript, the Court reconvened in the absence of the jury. The trial Judge informed counsel that the jury had communicated that they had a verdict on two out of the three counts and were saying that they were having difficulty reaching agreement in relation to the third. The Judge observed that he thought that the jury had gone out at about 3.50pm and that it was too early to give them any assistance in relation to their disagreement, to which defence counsel said "yes". The Judge continued his remarks, making the point that it was too early to give assistance until about 6.00pm. He asked whether he should take the two verdicts that the jury already had and ask them to continue their deliberations in relation to the third.

17. Significantly, in terms of what subsequently transpired, is the fact that the trial Judge indicated to the parties that he could ask the jury to persevere in relation to the third count. Senior Counsel for the defence asked whether the Judge would give him some minutes to discuss the development with his client, to which the Judge said that he would, certainly, and rose for a few minutes to facilitate same. After a few minutes, the Judge was told by defence counsel that the accused would like to hear the verdicts on the two counts that the jury had agreed upon. The Judge indicated that, technically, the jury had been out two hours and four minutes at that point, but he felt that his preference would be to leave them a bit longer because there had been a period of twenty-four minutes between the time they withdrew initially and the time they came out to hear additional matters.

18. The jury returned to Court at 17.33 hours, at which stage they had been deliberating for two hours and eight minutes. The jury, in response, indicated that they had reached a verdict on certain counts. The Foreman was asked by the Judge whether he had brought the issue paper and indicated that he had not. The Judge then explained to the jury that it was proposed to take the verdicts that were available and that he would then address them in relation to the position regarding the third count. He commented:

> "I see some of you with your coats, that is a little premature."

When the issue paper had been retrieved, the Registrar confirmed that the verdict on Count 2 was a verdict of not guilty, and likewise, the verdict on Count 3 a verdict of not guilty. At that stage, the Judge observed that these were unanimous verdicts and in due course the Foreman would be asked to sign the issue paper in relation to these, but that he understood that they had not reached a verdict in relation to the third matter. He said that he was going to ask them to persevere in seeking to reach a unanimous verdict for some time longer, adding that after a certain period of time, he would be able to give further assistance in that regard, and at that juncture he asked them to return to the jury room. The jury retired once more at 17.37 hours.

19. At that stage, the transcript records the following exchange between the trial Judge and defence counsel:

> "Judge: Yes, would anyone like to say anything, make any observations on the position at this time?
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> Defence Senior Counsel: We've a bit to go yet.
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> Judge: Yes, well, I'll just leave them for about another 20 minutes and at 6.00pm I'll then be in a position to give them –
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> Defence Senior Counsel: Yes, and then we can see if there's any – likely to be any movement.
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> Judge: Yes, indeed.
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> Defence Senior Counsel: I'm happy with that Judge, yes.
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> Judge: Very well, thank you, I'll rise."

20. At 18.06 hours, the jury returned to Court. At that stage, the Registrar indicated that they had been deliberating for two hours and thirty-seven minutes. They were asked whether they had reached a verdict on which they were all agreed in relation to the remaining count and the Foreman said "no". At that point, they were given the majority verdict direction. The jury retired once more at 18.08 hours and returned to Court for the final time at 18.43 hours, having been deliberating at that point for three hours and twelve minutes.

21. It is said that the procedure followed in relation to the taking of a verdict was unsatisfactory in several respects. On the first day of the trial, the jury were told that the norm was that the Court sat from 10.30am until 4.00pm. There was no reference to the possibility of late sittings. In particular, there was no indication that a late sitting on Friday 2nd November 2018 was a possibility. It is pointed out that the jury did not have a substantial break from shortly after 14.00 hours, when the Court resumed after the lunch break, until delivery of final verdict at 18.46 hours. It is said that the Judge failed to act in accordance with good and established practice which, it was contended, would have seen the jury given a substantial break after a period of three and a half hours. No substantial meal was provided after the lunch break and no account was taken of the risk of jury fatigue. In breach of good practice, the jury were not informed as to how long they would be required to deliberate. It is pointed out that weather conditions on 2nd November 2018 were very poor with very heavy rain and high winds and with wind and rain warnings in place. It was pointed out that on the first day of the trial, the Foreman had raised the position with respect to shift workers on the jury and it followed there had to be a possibility of shift workers being seriously discommoded by the late sittings. The Court can say immediately that it sees little merit in this point and the manner in which it has been raised at this stage. On Friday 2nd November 2018, the jury had heard closing addresses from prosecution and defence counsel. If either side had any concern about the Judge delivering his charge in a situation where the jury would be commencing their deliberations mid-afternoon, there was every opportunity to say so. If the jury or any individual jurors had concerns, there was nothing to prevent them communicating those concerns to the Court. As indicated, the position of shift workers on the jury was raised with the trial Judge on the first day of the trial.

22. Very significantly indeed, before any verdicts were returned, there was a communication from the jury indicating that they had reached verdicts on two counts and were having a difficulty reaching agreement in relation to the third. There followed a discussion as set out above between Senior Counsel for defence and trial Judge in which the latter specifically adverted to the fact that some further time would have to pass before there could be any developments in relation to the possibility of a majority verdict. At the request of defence counsel, the Judge rose so as to give defence counsel an opportunity to discuss the development with his client.

23. When the Judge asked the jury to resume their deliberations, he asked, addressing counsel, whether anyone would like to say anything or make any observations on the position at that time. As we have seen, the response of the defence Senior Counsel was to say "we've a bit to go yet". In response to the Judge's comment that after about twenty minutes, at what would be 6.00pm, that he

would be in a position to give them the majority verdict, the response of defence counsel was to say "yes, and then we can see if there's likely to be any movement", causing the Judge to comment "yes, indeed". For good measure, defence Senior Counsel then said "I'm happy with that Judge, yes".

24. It seems to this Court that if one side or another has concerns about the likely progress of jury deliberations, that it is incumbent on them to raise those concerns and make clear to the Court how they would wish to see matters proceed. In this case, if there was concern, whether because of the length of the sitting day, prevailing weather conditions or a combination of these and other factors, the option was there for counsel on either side to ask the Judge not to conclude his charge, but to leave over some aspect, perhaps the requirement for unanimity, and so allow the jury to re-commence their deliberations first thing on Monday morning.

25. Alternatively, when the jury returned to Court with verdicts on two counts, if there was any concern whatsoever about the jury deliberating further that evening, the question of asking the jury to resume deliberations on Monday morning, or indeed on Saturday morning, could have been canvassed.

26. The position here is that the jury returned a verdict at 18.43 hours, having been deliberating for three hours and twelve minutes. It does not seem to this Court that the period spent in deliberation was particularly burdensome. We do not believe that the suggestion of a jury coerced to reach a verdict through fatigue is made out. The Court adjourned for lunch between 12.57pm and 14.07pm. During that break, lunch was provided in a nearby local hotel. One hour and fifteen minutes after the jury had returned to Court after the lunch break, they were being invited to retire and consider their verdict. The deliberation was interrupted by the Judge bringing the jury back to recharge them, by the jury returning to Court to deliver verdicts on the two counts on which they had initially agreed, and returning to Court to receive the majority verdict direction.

27. This Court has not been persuaded that the procedure followed, culminating in a deliberation for three hours and twelve minutes, was inappropriate. The period of deliberation would not be regarded as particularly lengthy for a trial involving a three-count indictment and a trial involving two complainants. Accordingly, the Court will not uphold this ground of appeal.

Inconsistent Verdicts

28. It is said that it was impossible to ascertain a consistent thread of reasoning in order to establish how the jury could possibly have acquitted on one count and convicted on the other. It is said that the verdicts were so inconsistent that it can be inferred that the jury could not have applied its mind properly to the evidence in the case. It is said that it is reasonable and logical to conclude that jurors were so fatigued during their final deliberations that they made irrational determinations, arriving at a result which was inexplicable.

29. Jurors dealing with multiple counts on an indictment are invariably told that each count has to be considered separately, that, really, multiple trials are taking place and that it is for reason of convenience that they are being dealt with at the same time. It is not at all unusual for jurors faced with a multi-count indictment to reach different verdicts on different counts. Often, this is an indication of the care with which juries approach their task. In this case, it may be that the jury were influenced by the fact that it was clear from the evidence of SG and the complainant: GMcP, that the latter had made a complaint and had reported being sexually assaulted within days of the first occurrence. Insofar as there was uncertainty as to the extent of the complaint and whether the complaint embraced the second incident, this may have caused the jury to take the position that as regards the second incident, they should not be satisfied of the guilty of the accused beyond reasonable doubt. The fact that the jury acquitted on Count 2 does not raise any doubts about the safety of the conviction on Count 1.

30. In summary, the Court has not been persuaded in relation to any of the grounds of appeal advanced. The Court has not been persuaded that the trial was unfair or unsatisfactory or that the verdict was unsafe.

31. Accordingly, the Court will dismiss the appeal.