THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

[Appeal No. 286/2012]

The Director of Public Prosecutions

RESPONDENT

V

B. O'R.

APPELLANT

JUDGMENT of Mr. Justice Sheehan delivered by on the 11th day of May 2016

1. This is an appeal against conviction.

2. On 29th February, 2012, following a seven day jury trial the appellant was convicted by a 10-2 majority of indecent assault contrary to common law, and as provided for by s.10 of the Criminal Law (Rape) Act, 1981

3. On 30th July, 2012, appellant was sentenced to 2 years imprisonment with the final 12 months suspended.

4. The offence was alleged to have occurred on a date unknown between the 1st September, 1986 and 31st October, 1987, when the injured party, who was then nine to ten years old, was at the home of the appellant receiving music lessons.

5. The appellant challenges his conviction on two separate grounds:

> "1. The learned trial judge erred in fact and in law in failing to discharge the jury in circumstances where witness number 3 in the book of evidence, [CH], gave highly prejudicial evidence which amounted to evidence of criminal conduct not the subject matter of any count on the indictment and which had no probative value.
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> 2. The learned trial judge erred in fact and in law in failing to withdraw each of the counts on the indictment from the jury at the conclusion of the prosecution case."

6. In order to consider these grounds of appeal it is necessary to set out the background to this case. The original indictment in which the appellant was tried comprised of four counts in total and alleged offences of indecent assault upon a single complainant MH who was ten years old.

7. The said offences were alleged to have occurred over a period between September 1986 and October 1987 at three different locations.

8. At the material time the appellant was single and resided alone in a cottage. He was employed in credit control with a public company, but also gave music lessons in his spare time, a fact which was relevant to the circumstances of the alleged offences. The complainant lived with her parents, her twin sister CH and her brother JH who was twelve years old.

9. At some point in 1985, the injured party, her sister and brother commenced music lessons with the appellant. Initially the tuition took place on premises known as the Old School which was then being used as a community centre. The lessons subsequently moved to the home of the appellant and there was also evidence that the appellant occasionally visited the home of the complainant.

10. Essentially the particulars that were alleged and described in evidence were that the appellant kissed the complainant, undid her clothing, removed her trousers and undergarments kissed her around her genitalia and pushed himself whilst clothed with his penis against her genital area. As part of his modus operandi it was alleged that on one occasion he tickled the complainant as an act preparatory to the indecent assault.

11. There was evidence that the complainant had initially disclosed to a teacher in 1992 that her old music teacher had touched her but nothing further was done other than being referred to the ISPCC in Drogheda with whom she attended for five sessions of counselling. The complainant subsequently attended at Drogheda garda station on an occasion in 2000 where she spoke to a female garda but apparently broke down and was unable to advance the complaint. However while attending third level college in Waterford the complainant met with a counsellor with the Rape Crisis Centre from October 2002 to February 2004 and on the 2nd May, 2003, she made a formal complaint to the gardaí at Waterford.

12. The appellant gave evidence at his trial and maintained his innocence of the charges as he had done during his garda interviews. Apart from the guilty verdict in respect of count 4, the jury found the appellant not guilty on counts 1 and 3 and disagreed on count No. 2.

13. The application to discharge the jury arose in circumstances where the injured party's twin sister was giving evidence. She along with her sister and brother had all received music lessons from the appellant.

14. In the course of being examined by counsel for the prosecution the injured party's sister CH was asked as follows:-

> "Q. How was Mr. O'R towards you during the course of taking music lessons?

> A. He was friendly. He had this habit, I suppose, you could call it, of tickling us, tickling each of us, he would come over and just tickle us, and I didn't -- I wasn't very comfortable about it. He would tickle and he would put his hands under your clothes and he would just have to get his hands down on to your skin and feel your skin, and I do remember pushing him away on one occasion and just not wanting him near me, and he was kind of cold towards me after that.
>
> Q. Thank you, [CH] If you answer any questions from my friend, please."

15. Counsel for the appellant submitted that what CH had described implied unwanted touching of an intrusive nature, which amounted to evidence of criminal conduct and further that the only way of undoing the damage caused by this evidence was to discharge the jury. Counsel further submitted that directions by the trial judge could not deal adequately with this "inadmissible evidence" and further submitted that the manner in which this evidence was ultimately dealt with by the trial judge in his charge demonstrated this. Counsel maintained that his argument was supported by the fact that the prosecution was not relying on this evidence.

16. Counsel for the respondent submitted that the trial judge was correct in refusing to discharge the jury and further submitted that the evidence of tickling and touching given by CH did not amount to criminal conduct nor did it demonstrate a proclivity towards criminality. Counsel submitted that the evidence in question specifically related to how CH had found the appellant formally and pointed out that there was other evidence in the case in relation to the appellant tickling pupils at music lessons including admissions to that effect by the appellant himself when he was interviewed by the gardaí in respect of the complaints made in this case.

17. Counsel for the respondent submitted that the trial judge dealt with this evidence in his charge in a common sense way and submitted that the judge's direction to the jury to the effect that this evidence did not corroborate the injured party's evidence was sufficient to ensure that the appellant was not unfairly affected by the evidence. The respondent on the other hand maintained that the trial judge by mentioning the matter in his charge to the jury in the context of corroboration only served to highlight the adverse impact of this evidence.

18. Finally counsel for the respondent submitted that the fact that the appellant was ultimately acquitted on two counts of indecent assault demonstrated that the appellant had not been prejudiced.

19. The first thing to be said about the evidence which is now impugned is that the defence were on notice of this evidence and did not object to it prior to it being led. Secondly, insofar as it referred to tickling, the applicant himself admitted in unchallenged garda interviews that he tickled children. At one point he was asked did he ever tickle pupils in class and he answered yes. At a later point when asked if he tickled the injured party he replied that he did not remember doing so, but that he had tickled children who enjoyed fun.

20. In the course of dealing with the impact of prejudicial evidence or remarks and whether or not a jury should be discharged, Prof. O'Malley states at para. 20.44 *The Criminal Process*:

> "Evidence may sometimes be given accidentally or otherwise which has a less harmful impact than the disclosure or indication of previous convictions. A witness might for example make a statement which had been ruled out during an earlier voir dire. The appeal courts have generally expressed a preference for the continuation of the trial in these circumstances provided of course the trial judge gives an appropriately strong warning to the jury. (See *People (DPP) v. Moulder* [2007] IECCA 6, [2007] 4 I.R. 796 in which the Court of Appeal referred to 'the well established rule that courts will be reluctant to discharge a jury that has embarked on a trial'."

21. Prof. O'Malley goes on to say:-

> "This preference stems in turn from the high level of confidence traditionally reposed in juries to obey judicial instructions and ignore evidence which they are not meant to take into account. Even in these circumstances if the evidence was of a gravely prejudicial nature or it was such as to create an appearance of bias as that term is understood in Irish law the judge would be justified in discharging the jury. The interests of justice remain paramount in any judicial decision as to the appropriate response to the introduction of prejudicial evidence interference with the jury or whatever the problem may be."

22. We have considered the evidence of CH. We consider that the level of prejudice contended for by counsel is significantly diminished by the appellant's own admissions to tickling. Bearing in mind these admissions and taking them in conjunction with the clear direction to the jury that the impugned evidence neither constituted a complaint nor amounted to corroboration lead us to conclude that this evidence did not render the trial unfair and that the trial judge was correct in refusing to discharge the jury. Accordingly this ground of appeal fails.

Second ground of appeal

23. This ground of appeal relates to the trial judge's refusal to stop the trial because of the alleged prejudice suffered by the appellant arising out of the delay as well as the prejudice that resulted from the alleged failure of the gardaí to thoroughly investigate all matters. In support of his submission on this ground of appeal counsel for the appellant also contended that the trial judge's charge did not sufficiently emphasise the adverse impact that arose for the appellant as a result of the delay and that this demonstrated further why the trial judge should have withdrawn the case from the jury when the prosecution evidence concluded.

24. Counsel for the appellant submitted that the gardaí had failed to follow up on a number of matters which might have supported the defence case. At the relevant time the appellant was a part time music teacher and the complainant and her siblings were among groups of children who were taught by him. The gardaí did not in the course of their investigation interview the parents of any other children. The question of whether or not the appellant was driving a red or blue van in or about the time of one incident of alleged abuse had not been investigated by the gardaí. No inquiry was made of the appellant whether or not he had kept records regarding the classes he gave. Equally the gardaí had failed to establish whether or not the appellant travelled with the complainant and others by coach to an event in Dublin at one of the relevant times.

25. In the course of her submissions on behalf of the Director of Public Prosecutions counsel replied that it was entirely speculative as to whether or not the colour of the appellant's van at the relevant time could have been used to test the complainant's credibility. Counsel also pointed out that the evidence that the appellant had kept a diary was first introduced to the case by him when he was giving evidence. Finally counsel pointed out that the complainant had been cross examined in front of the jury about the reasons why she had taken so long to report these matters to the gardaí.

26. In the course of his charge to the jury the learned trial judge gave a corroboration warning and a delay warning. He related the delay warning to the appellant's defence. Immediately prior to giving the jury a delay warning the learned trial judge had referred to the complainant's evidence in light of each of the counts on the indictment and stated as follows:-

> "Now by virtue of the complaint having been made so long ago – that's 2003 – and made in such a way as to be considered vague, not as to the alleged happenings but as to the dates they occurred and the detail as perhaps peripheral to these alleged offences and therefore it could be considered and may be considered by you that important matters perhaps are not available to the defence for the purpose of their defence."

27. The trial judge went on to explain what he meant by that and then went on to refer to the missing notes which had been recorded by the complainant's English teacher in 1992. The trial judge also referred to the fact that the counsellor in the Rape Crisis Centre had kept few notes. Referring to these matters the learned trial judge told the jury that there was a paucity of detail on foot of which the complainant could be cross examined. Following these observations the learned trial judge then quoted extensively from the charge given in the *R.B.* case by the late Judge Haugh. This charge was subsequently endorsed by the Court of Criminal Appeal. (See in *People (DPP) v. R.B.* (Unreported, CCA 12th February, 2003)).

Conclusion

28. The judgment of the Supreme Court in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575, is relevant to this ground of appeal. The facts of that case are summarised in the head note and indicate that S.H. was a primary schoolteacher who sought to prohibit his trial on 50 counts of indecent assault alleged to have occurred over 30 years prior to the first formal complaint being made. The applicant brought judicial review proceedings. He was unsuccessful in the High Court. He appealed and in dismissing his appeal, the Supreme Court held *inter alia*, that the test to be applied in applications to prohibit criminal trials on grounds of complainant delay was whether the delay had resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. It was no longer necessary for the Court to inquire into the reasons for the delay or whether the accused had exercised dominion over the complainant or make assumptions as to the truth of the complaints. The Supreme Court also held that exceptional circumstances where it would be unfair or unjust to put an accused on trial were not wholly excluded.

29. The gardaí interviewed a number of relevant witnesses including the complainant's former English teacher as well as a person who worked for the ISPCC in 1992 and to whom the complainant had confided at that time. The fact that the gardaí had not investigated the colour of the appellant's van was immaterial given that both the complainant and the appellant (in garda interviews) accepted that transport was involved on more than one occasion. Furthermore the gardaí cannot be criticised for not interviewing other parents. In this context it needs to be noted that there was nothing to prevent the appellant's solicitor making his own inquiries about the colour of the van he drove, nor was there anything to prevent him from interviewing parents or taking photographs of the various locations. That said we do not see how any of these matters could have advanced the appellant's defence. Again it was the appellant who introduced his diary for the first time during the course of his own evidence. Had he so decided or wished he could have furnished this diary to the gardaí prior to his trial. In light of these matters we hold that the alleged inadequacies of the garda investigation are of no import.

30. We also hold that the learned trial judge dealt adequately with the issue of delay when he charged the jury and in the course of that charge it is clear from an examination of the transcript that the defence case was summarised fairly.

31. During the course of the oral hearing before us, counsel for the appellant laid emphasis on the prejudice that arose from the missing notes. While those notes might have enabled the credibility of the complainant to be tested especially if there were differences between what the complainant had told her English teacher in 1992 and what she told the jury, this argument was essentially a speculative one. It was also weakened by virtue of the fact that the maker of those notes was available for cross examination, a right that was availed of at the trial in a minimal way. The witness from the ISPCC was tendered in evidence but not cross examined. We find therefore that the prejudice relied on by the appellant is minimal.

32. At the time of the direction application there was sufficient evidence before the jury in respect of each complaint on foot of which a jury properly charged could reasonably convict. The evidence at that stage did not disclose that there was a real risk of an unfair trial and the trial judge was therefore correct in refusing to stop the trial. This ground of appeal also fails. Accordingly we dismiss this appeal against conviction.