THE COURT OF APPEAL

[98/14]

The President

Finlay Geoghegan J.

Peart J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

PROSECUTOR/RESPONDENT

AND

P.C.

APPELLANT

JUDGMENT of the Court delivered by the President on 20th July 2015

Introduction

1. On 25th September 2013, the appellant was convicted of two counts of sexual exploitation of a child contrary to s. 3 of the Child Trafficking and Pornography Act 1998, as amended by s. 6 of the Criminal Law (Sexual Offences)(Amendment) Act 2007, and as substituted by s. 3(2) of the Criminal law (Human Trafficking) Act 2008. On 24th March 2014, he was sentenced to five years imprisonment on each count, to date from 24th September 2014, with the final three years suspended on conditions in each case. He now appeals those convictions.

The Facts

2. On 9th September 2011, two 12-year old schoolgirls were having lunch outside a café near their school. Their names have been redacted in this judgment to L.G. and C.R. They were approached by a man whose composite witness description was that he was old, chubby, having a harelip and driving an old green Jaguar car. He threw a €5 note on their table, returned to his car and stared at them. He then got out of his car and again approached the table when, according to one of the girls, he asked them to spend the night in bed with him. He said "youse would love that". She said that he touched the other girl on the back. The other girl recalled him saying "is there any chance of me and you two lovely ladies tonight?" They said no. A witness from the café noticed him putting his hand on one of the girls' hands before he left. He got back into his car and drove away.

3. The girls returned to school in a distressed state following the incident and reported what had happened to the Principal and Vice-principal, to whom they gave the money. The Gardai were contacted.

4. Gardaí viewed CCTV footage which showed a grey haired man leaving the scene in a green Jaguar. A witness told the Gardaí that she believed the man's name was C. A Garda enquiry revealed a green Jaguar registered to P.C. and accordingly he became a person of interest. At this time, the appellant was being detained in Castlerea prison in respect of other matters and the Gardaí needed a warrant from the District Court to authorise his removal to a Garda station for questioning.

5. On foot of the above and other information, Superintendent Curley applied for and was granted a warrant under s. 42 of the Criminal Justice Act 1999, as amended, on Wednesday 12th October 2011, which he endorsed to Sergeant Sheridan. On Saturday 15th October 2012, Sergeant Sheridan and Garda Costello travelled to Castlerea Prison, where the Garda arrested the appellant on foot of the s. 42 warrant and he was brought to Castlerea Garda Station where he was detained and questioned.

6. The suspect requested a solicitor, Mr. Conor MacGuill, and the gardaí made contact with Mr. MacGuill who spoke to the appellant for 14 minutes. The solicitor also spoke to Sergeant Sheridan. The consultation on the phone between solicitor and client took place before any questioning occurred.

7. It is relevant to note that the account given by the two schoolgirls was not challenged by the defence. Counsel did not cross-examine either of the complainants. The only issue in the case, accordingly, in relation to the facts was evidence that it was the accused who approached the girls. Relevant to that proof was that he had been connected with the incident by information about his unusual car.

Grounds of Appeal

8. The appellant appeals his conviction on the following grounds which will be considered in turn.

> The learned trial judge erred in law in holding that the particulars of the offences charged on the indictment constitute an offence contrary to s. 3 of the Child Trafficking and Pornography Act 1998 (as amended by s. 6 of the Criminal law (Sexual Offences) (Amendment) Act 2007, and as substituted by s. 3(2) of the Criminal law (Hunan Trafficking) Act 2008 ('the 1998 Act").

9. This ground, on the face of it, appears to be wholly unstateable. The statement of offence in each case is sexual exploitation of a child contrary to s. 3 of the Child Trafficking and Pornography Act 1998, as amended by s. 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007, and as substituted by s. 3(2) of the Criminal Law (Human Trafficking) Act 2008. The particulars to offence are "The appellant, on the 9th day of September 2011 at Church Street, Dundalk, in the County of Louth did sexually exploit a child to wit L.G. in that you did invite the said L.G. to participate in a sexual act". The 2008 Act inserted s. 3 provides at sub-section (2) that a person who sexually exploits a child shall be guilty of an offence and liable on conviction on indictment to imprisonment for life or a

lesser term. Under sub-section (5), sexual exploitation means "(d) inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act".

10. The evidence was that the accused approached L.G. and C.R. and gave them €5 and asked them to "spend the night in bed with him" – according to the evidence of L.G. C.R. said that the man approached them, threw money on the table and said "is there any chance of me and you two lovely ladies tonight?" These were young teenage girls who were in school uniforms and who went back to school in a quite troubled state and reported the matter to the Principal of the school.

11. It seems almost too obvious to say that it was a matter for the jury to decide whether the statement or statements by the accused man amounted to an invitation to engage or participate in a sexual act. Indeed, it seems that it would be eccentric to decide that the words, if accepted by the jury, could have amounted to anything other than an invitation to participate or engage in a sexual act.

> The learned trial judge erred in law and in fact in holding that the arrest and detention of the appellant was lawful.

The appellant's arguments on this ground point out that the warrant was issued to the Superintendent who applied for it but it was executed by Garda Costello. Nobody other than the Superintendent could execute the warrant. Secondly, it was not shown to the trial judge that the arrest and detention of the appellant were necessary.

12. Superintendent Curley obtained the warrant from the District Court, and in accordance with the Rules of the Court, he was nominated as the person to execute it. He endorsed it to Sergeant Sheridan, who travelled with Garda Costello to Castlerea prison on the Saturday morning, where the Garda arrested the appellant.

13. Section 42 of the Criminal Justice Act 1999 provides for the arrest and detention of persons in prison in connection with the investigation of other offences. Section 42(2) provides:

> "(2) A member of the Garda Síochána may arrest a prisoner on the authority of a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that the following conditions are fulfilled."

Those conditions are:

> "(a) there are reasonable grounds for suspecting that the prisoner has committed an offence;
>
> (b) the arrest of the prisoner is necessary for the proper investigation of the offence."

14. The warrant was issued to the Superintendent for execution, but that is not required under the section. It is the information supplied by the Superintendent that provides the statutory basis for the issuing of the warrant by the judge of the District Court, but under the section, there is no requirement that the Superintendent should himself execute the warrant by arresting the person. When the warrant has been obtained, any member of An Garda Síochána may arrest the prisoner on the authority of the judge of the District Court. The section envisages two separate processes. The first is obtaining the warrant, which is done by a garda officer of specified seniority. This is a feature of protection of rights by requiring that it must be somebody of Superintendent rank or higher who makes the application. The arrest of the person on foot of the warrant is a separate matter. It cannot be considered to be an absolute requirement that the Superintendent and he alone is the person to execute the warrant. It follows that he is entitled to direct another member of the gardaí to carry out the arrest and that is entirely in accordance with sub-section (2). Once the warrant is issued, s. 42(2) permits "a member of the Garda Síochána" to arrest the person in respect of whom the warrant has issued. Nothing in the section requires that the Superintendent or a person to whom he has endorsed the warrant is the only person who may execute the warrant. A member of An Garda Síochána may make the arrest under the authority of the warrant. It is clear that the arrest in this case by an investigating Garda in the company of the Sergeant nominated by the Superintendent was lawful.

15. The Gardaí had information to connect the appellant with the offence that they were investigating. He was on remand in Castlerea Prison. They wished to interview him and they wanted to do so in a location that had recording facilities for interviews, and that, again, was entirely proper. It is a protection for the accused, as has been emphasised on many occasions by the Court of Criminal Appeal, and indeed in the ECHR, that interviews be fully recorded.

16. Neither is there anything in the point about the Member in Charge at Castlerea Garda station being in default. The section expressly provides that a person can be detained under s. 4 of the 1984 Act, once he has been arrested on foot of the warrant. It was sufficient, therefore, that the Gardaí should notify the Member in Charge of the general circumstances, but in fact the evidence is that the Garda in charge, Garda Kenny, was satisfied that it was necessary for the investigation of the offence.

17. As to what was necessary for the investigation of the offence, that is not an absolute, in the sense of establishing that without such a process i.e. an interview, the case could not be investigated. It is practically an invariable step in the investigation of a crime that the person suspected of committing it is interviewed. It does not follow that every person suspected of a crime, or that every person suspected and then interviewed, is going to be charged. The purpose of questioning a suspect is to consolidate or dispel suspicion. The next step, therefore, in the case of a suspect when the evidence materialises from what he says to be sufficient to charge him, is that he may be brought before the District Court. Otherwise, he has to be released. That is what happened in this case.

> The learned trial judge erred in law and in fact in allowing the prosecution to call evidence from Mr. Hamill as to the demeanour of the children when they returned to the school.

Mr. Hamill was the school Principal and his evidence was that the girls were in a distressed state. The judge held that the jury were entitled to have a certain amount of background information and he did not see that it was in any way prejudicial and had a certain probative value. The appellant submits that there was no basis for considering the evidence relevant or connected to the offence. The respondent says that the evidence was probative of events which, as a matter of fact, might well have the effect of upsetting or putting the children into a distressed state.

18. This evidence was admissible. The condition of the girls on their return to school was relevant to show the effect that the words used by the appellant had had on them. The children who were approached with lewd suggestions were made. It might nevertheless have been suggested to the jury to question whether the children took this as a joke or as something that was not to be taken seriously for some other reason. The appellant's submissions refer to the evidence of one of the girls that she was annoyed, but this

independent testimony was different. The fact that they were in a distressed condition indicated that the persons who heard the words had taken them seriously.

> The learned trial judge erred in law and in fact in holding that when the appellant was asked did he understand the caution that had been given to him prior to interview, that it was of no consequence whether he answered 'Yeah, I think I do' or 'Yeah – indeed I do'.

The appellant claimed that the recording had the appellant saying, after he had been cautioned and he was asked whether he understood the caution, "yeah, I think I do", whereas the prosecution maintained that on its hearing of the recording, he actually said "yeah, indeed I do". The evidence was that Garda Costello went on to explain in ordinary language the meaning of the caution. The trial judge decided that whatever the appellant had actually said on the recording, it was clear that he had acknowledged by saying "yeah" before the further words, and that he had understood the caution. On any view, the evidence is that Garda Costello went on to explain it in ordinary language. In those circumstances, it can scarcely be said that there was any failure on the part of the Gardaí, and neither can it be said that there was any incapacity or impossibility of understanding on the part of the appellant.

19. It is also to be remembered that he had a conversation lasting for some 14 minutes with his solicitor, and if the latter had thought that there was some lacking of understanding in the appellant, he would surely have communicated that to the gardaí and taken steps to deal with it. Alternatively, he could have had longer in advising his client.

> The learned trial judge erred in law in allowing the prosecution to adduce evidence of any of the memoranda of interview in circumstances where the appellant did not have access to his solicitor prior to the interview.

The appellant was brought from Castlerea Prison where he was on remand to Castlerea Garda station for questioning by Sergeant Sheridan and Garda Costello. He requested a solicitor, Mr. MacGuill, and the Gardaí made contact with Mr. Conor MacGuill who spoke to the appellant from 12.10 until 12.24 hours on Saturday 10th October 2011. The solicitor also spoke to Sergeant Sheridan. The consultation on the phone between solicitor and client took place before any questioning occurred.

20. Neither the solicitor nor the appellant asked for the interview to be postponed until Mr. MacGuill could get to Castlerea Garda station from Dundalk. Neither did the appellant or Mr. MacGuill ask to have a solicitor present during the interview itself. There was some question raised in the conversation between Mr. MacGuill and Sergeant Sheridan as to getting a local solicitor but that did not proceed. What happened, therefore, was that the solicitor had a 14-minute conversation with his client.

21. The appellant was given a form designated C72, which is the standard form that tells him about his rights as a person in custody in a Garda station. That included information about access to a solicitor. It did not say that he could have a solicitor present during the time when he was being interviewed. That is a later development in the law.

> The learned trial judge erred in law and in fact in allowing the prosecution to adduce evidence of any of the memoranda of interview in circumstances where the solicitor was not present during the interview, and the defendant was not informed of his right to have his legal representative present throughout the course of the interview.

The legal position about having a solicitor present during questioning has changed over the years. In a judgment of the Court of Criminal Appeal in *Lavery v. Member in Charge Carrickmacross Garda Station* [1999] 2 I.R. 390, the Court declared that there was no right on the part of a suspect to have a solicitor present while he was being interviewed. He was, of course, entitled to legal advice before the interview, and even intermittently during his period of custody, but there was no right to have a solicitor present. That statement appears to be obiter in the particular circumstances but nevertheless the case remained the authority for that proposition down through the years.

22. This an area of developing jurisprudence, having regard to decisions of the ECHR as well as other common law jurisdictions. It was previously considered that the Gardaí did not have to wait for the arrival of a solicitor whom they had notified and requested to attend before they commenced questioning – see *DPP v. Buck* [2002] 2 I.R. 268, holding that it was a matter for judgment in the circumstances of the particular case and the Supreme Court was satisfied to leave the matter to the discretion of the trial judge. That was subject, of course, to review if exercised unreasonably in the circumstances. However, in *Salduz v. Turkey* [2008] 49 EHRR 421, the Court held that there was a requirement for access to a lawyer in order for the subsequent trial to be considered fair. This was subject to exceptions in particular circumstances, but that does not concern us here. It may be remarked that like many other cases that give rise to general principles, *Salduz* was an extreme case, a situation where the suspect was deprived of any access to a lawyer over a lengthy period during which he was questioned. Nevertheless, the point is that the Court emphasised the need, unless there were special exceptional reasons for a lawyer to be available to give advice, and that meant that the suspect was entitled to be advised by a lawyer before he was subjected to questioning. At para. 55, it was stated that:

> ". . . the Court finds that in order for the right for a fair trial to remain sufficiently 'practical and effective', Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless . . . [there are compelling reasons to restrict the right]."

24. In *Cadder v. Her Majesty's Advocate* [2010] UKSC 43, which is quoted in the appellant's submission, para. 48 says that:

> "The Contracting States are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case, there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subject to police questioning."

25. This line of authority was adopted by the Supreme Court in *DPP v. White & Gormley* [2014] IESC 17, in which Clarke J. held that where a person asked for access to a solicitor, questioning could not commence until the solicitor was present. The submissions note, correctly, that "it was not necessary to decide whether or not this right extended to a right to have the solicitor attend during the interview".

26. Since 7th May 2014, in response to the implications of the Supreme Court judgments, solicitors are permitted to be present during interviewing of suspects. This is because of an administrative decision made by the Department of Justice and obviously follows the pattern of the development of law, as indicated in these earlier cases. The appellant's submission says that this was merely a recognition of the law, as it stood at October 2011, when the appellant was brought to Castlerea Garda station under arrest. That was not the law as it stood at that time. The position was as declared by *Lavery v. Carrickmacross.*

27. A developing area of law, such as this is, cannot be retrospectively imposed on a situation that obtained years before the

development took place. Moreover, the fact that the Supreme Court, in 2014, was not prepared to go further but merely to leave the question open is an indication of the uncertainty of the present situation were it not for the decision to permit lawyer access during questioning. Thus, the issue now does not arise in cases where people are arrested and brought to a Garda station and questioned. It is quite correct to say that in the situation as it obtains at present, a person who is arrested and going to be subjected to questioning has a right to have his solicitor available for consultation before the questioning begins, and also, if desired, to have the solicitor present during the questioning.

28. The Gardaí at Castlerea Garda station cannot be accused of ignoring this right in circumstances in which it did not actually exist because it had not been declared. It is worth noting, first of all, that the ECHR cases are very extreme and very different from anything that the Irish courts have to deal with. Furthermore, the Court of Human Rights has itself not actually declared that there is a right to have your lawyer present throughout the period of questioning. So, it is to going much too far to suggest that that entitlement existed in October 2011.

29. Having said that, the evidence at the trial in the absence of the jury on the admissibility question was that the Gardaí understood that the appellant did indeed have that right, and Sergeant Sheridan understood that the Member in Charge had explained that to the appellant. It is true, as Counsel pointed out in cross-examination, that the C72 form did not contain any such declaration of entitlement, about which there is no dispute. Garda Kenny, who was the Member in Charge when the appellant was brought to the station and when the interviewing began, said that the appellant was entitled to have his solicitor present during the interview and that he would have been told.

30. The position, therefore, was that the appellant had a right to consult his solicitor and he did so when he spoke with Mr. Conor MacGuill on the phone. The solicitor did not ask to be present during the interview or to hold off while he arranged for another solicitor to attend and neither did the appellant.

31. In all the circumstances, therefore, there is no ground under this head for invalidating the custody and questioning of the accused man. That, of course, is without taking into account the impact of the recent decision of the Supreme Court in DPP v JC 15th April 2015. The fact is that on the existing law before that decision there would have been no ground for invaliding the questioning of the appellant.

> The learned trial judge erred in law and in fact in allowing the prosecution to adduce evidence of edited and ambiguous portions of the memorandum of interview of the appellant, and in particulate to allow ambiguous questions to be edited to favour a meaning favourable to the prosecution.

The defence objected to the admissibility of certain portions of the memorandum of interview that contained the questions or comments by the Gardaí and the appellant's answers. There was disagreement between prosecuting Counsel and defence Counsel as to the mode of putting the memorandum of what he said to the jury. In normal circumstances, this is something that happens by agreement. It is generally acknowledged that there can be difficulties. Sometimes a suspect will say something that is damaging to him by, for example, revealing that he has committed another crime and that has to be excluded. There may be difficulties if the videotape of the interview is being shown to the jury in making sure that matters agreed to be excluded are in fact not played. That did not arise in this case, but there was the issue about the memorandum.

32. In the face of the disagreements between Counsel, the trial judge made a ruling on each disputed item as to what materials were to go in and what not. He allowed some objections and disallowed others. He permitted the text to be adapted so as to exclude prejudicial material but to include relevant statements or admissions by the appellant. In each instance, the trial judge gave his reasons. He dealt carefully and in detail with each point.

33. It is not the function of this Court to rehear the case or to decide whether it is possible to come to a different conclusion than the trial judge in respect of some of the parts of the memorandum on which he ruled. The Court is satisfied that the trial judge approached this task in a proper and careful manner with a view to doing justice. In fact, this Court does not find any significant area of the memorandum on which it would take a different view. In any such exercise of judgment, it is possible to come to a different view or to conceive of another solution to the one actually adopted but that does not make the decisions in question wrong.

34. It is obvious that questions in themselves are not evidence, but the information in a question may become evidence in light of the person's answer to the question. It is just the same as in the cross-examination of a witness in Court. What Counsel says is not evidence unless the witness says, yes, I agree. Alternatively, the witness may agree subject to some qualification. In those circumstances, both question and answer are receivable by the Court, whether judge or jury, to consider.

35. The appellant objected to two statements in the form of questions, or rather, introductory comments or information being given to the suspect. The judge allowed them to be included in the memorandum and it was reasonable to consider those as giving information to the appellant for the purpose of the interview. Another judge might have ruled the other way but that does not make the ruling defective. On balance, it may have been preferable not to have that material included in a memorandum going to a jury, but it is not an important matter in the context.

36. The appellant objected to the following excerpt from the interview:

> "Question: I have to ask you do you recall this particular incident?
>
> Answer: I've done do many that I can't remember. I probably did"

The objection to this is that the jury could not be asked to find anything as a matter of probability, but that is a complete misunderstanding. This was the appellant's answer to the question. It was a matter for the jury to decide whether the case had been proved beyond reasonable doubt, but the mere fact that somebody used the word "probably", particularly the person accused of the crime, could not be a reason for deciding that the statement was inadmissible. The respondent is right in saying that this has nothing to do with the standard of proof.

37. It can be suggested that the trial judge made some errors of judgment but this Court is satisfied that any such decisions were minor in the circumstances and can find no serious or substantial errors on the question of admissibility.

> The learned trial judge erred in law and in fact in allowing evidence to be led by the prosecution of the registration certificate of motor vehicle registration number [XXXX] in circumstances where there was no evidential nexus between it and the offence.

38. The two girls described a green car and there was evidence that it was an old car and another witness, Ms. Kirk, also described it as an old green car. Garda Costello looked at CCTV footage and saw a green Jaguar which he thought was linked to the incident and he could see that the partial registration was XXX and it was a green Jaguar and he made investigations and established that the owner of the vehicle XXXXX was the appellant, but at a previous address and there was discussion of this in the interview with the accused who could not remember all the digits of his number. In those circumstances, the evidence was clearly material and it seems that on the last day of the trial, the defence was served with additional evidence regarding the registration. Although the accused himself was unable to confirm all the features of the number of the car, there was sufficient evidence to legitimise the proof of the registration number of the car, namely, the green Jaguar owned by the appellant. It was a misunderstanding to suggest that this evidence was inadmissible.

> The learned trial judge erred in law in refusing the application for a direction at the close of the prosecution case.

39. This ground is that the trial judge should have given a direction on the ground that there was no evidence that the appellant had invited either of the children to participate in a sexual act. This ground is utterly unstateable. It was obviously a matter for the trial judge to rule in the first instance whether the words proven to have been used were capable of constituting a crime under the section and then it was for the jury, if the judge decided they were so capable, to decide whether they did in fact mean such an invitation as constituted an offence under the section. Any decision other than the one the judge made would have been wrong.

> The learned trial judge erred in law when charging the jury then that while it was wrong to convict an innocent man it was equally bad to acquit a guilty man.

40. The judge's comment that it was equally bad to acquit a guilty man as it was to convict an innocent man is an unusual and it might be thought unhelpful way of expressing the duty of the jury. The onus of proof and the burden of proof rest on the prosecution. The jury's duty is to find the accused not guilty if they are not satisfied beyond reasonable doubt of his guilt. It is true that judges often used to admonish juries to be ready to convict an accused if they were satisfied he was guilty. That happens less nowadays, but there was sometimes a feeling that juries might be overcome by sympathy for the accused or atavistic hostility to the prosecution or the law. But it is not a happy equivalence to express and would be better if not said.

41. Having made these criticisms, however, the judge's comment has to be seen in context. It comes at the end of a substantial charge. The Director submits that the trial judge explained in a thorough fashion the duties and responsibilities of the jury and how they should approach the task. He dealt with all the requirements of proof and gave what is overall a full, fair and satisfactory charge. It seems to this Court from the context that the comment is infelicitous but not important and it does nothing to detract from the full and proper instruction given to the jury.

> The learned trial judge erred in law in failing to recharge the jury in respect of the memorandum of interview and the presumption of innocence.

42. The judge did not recharge the jury to tell them that the questions that were asked in the interview were not themselves evidence. This is in the realm of what is obvious, as referenced above by comparison with questions by Counsel. The charge as a whole was satisfactory, emphasising the burden of proof and the standard beyond reasonable doubt. The Director submits that the judge was correct in not inviting the jury to try to give meaning to answers without looking at the questions. This Court is satisfied that the trial judge was entitled to take the view he did and refuse this requisition.

Conclusion

43. The appeal is, accordingly, dismissed.