THE COURT OF APPEAL

Appeal No: 159/11

Birmingham J.
Sheehan J.
Mahon J.

The Director of Public Prosecutions

Respondent

- and -

T.Q.

Appellant

Judgment (ex tempore) of the Court delivered by Mr. Justice Mahon on the 10th day of July 2015

1. This is an appeal against both conviction and sentence. This judgment relates to the conviction appeal only.

2. The appellant was convicted by a jury at the Central Criminal Court of eleven counts of rape and thirty six counts of sexual assault following an eleven day trial. The sentences imposed on 1st March 2010 were concurrent fourteen year prison terms (with the final eighteen months suspended) in respect of the rape offences, and concurrent sentences of ten and three years for the sexual assault offences.

3. The victim and complainant of these offences is the son and eldest child of the appellant now aged twenty five. This young man gave graphic evidence of having been subjected to appalling acts of sexual violence and abuse at the hands of his father over a period of two or three years, from the age of twelve. These incidents took place in the family home. They included acts of oral and anal rape. The victim himself at the age of about eighteen in turn engaged in the serious sexual abuse of a younger sister, and in respect of which he was granted immunity from prosecution by the respondent shortly prior to the commencement of this trial. The complainant gave evidence of having watched, from the age of twelve, his mother who was then a prostitute engaging in sexual activity.

4. Clearly the overall family situation in the appellant's household was seriously disturbing, dysfunctional and abusive. Knowledge of the sex abuse only came to light when one of the complainant's younger sisters whom he accepts he sexually abused, made an allegation of sexual abuse against him. It was only after this complaint had been made, that the complainant made the complaints concerning his father.

5. A number of grounds of appeal were put forward by the appellant, including:-

> *1. Failing to adequately charge the jury in respect of the grant of immunity to the complainant and to his mother.*
>
> *2. Failing to adequately warn the jury in respect of the credibility of the complainant and his mother.*
>
> *3. Failing to adequately charge the jury in relation to the evidence of the complainant's mother and the extent to which such evidence may have provided corroboration of the complainant's evidence.*
>
> *4. Failing to warn the jury in relation to the evidence of what was described as protected witnesses.*

6. Corroborative evidence of the allegations made by the complainant was given by the appellant's wife. The two most important witnesses for the prosecution were the complainant and the appellant's wife. Both received immunity from prosecution from the respondent, the complainant shortly before the trial, and the appellant's wife in the course of the trial during a break in her cross examination. While immunity from prosecution has an obvious value to the recipient in any circumstances, and undoubtedly would have been welcomed by both recipients in this case, it is reasonable to observe the following in respect of these grants of immunity

> *(i) In neither case did it appear that they were given as an inducement to co-operation. Both witnesses had already given statements and indicated their willingness to co-operate. The statements generally supported the prosecution case.*
>
> *(ii) In the complainant's case the subject of the grant of immunity concerned allegations by his sister that he had sexually abused her while he was barely into his teens, so that the prospect of a prosecution arising in those circumstances must be regarded as unlikely.*
>
> *(iii) In the appellant's wife case, she had already been prosecuted, convicted and imprisoned in respect of serious charges, including neglect of her children. A further prosecution was therefore unlikely.*

7. In these circumstances the grants of immunity might be said to have been of limited value, and very different to the circumstances which prevailed in the case of *DPP v. Gilligan* [2005] IESC, 78, to which the court was referred by Counsel for the appellant. It is perhaps for this reason that counsel for the appellant did not unduly prolong the cross examination in relation to the grants of immunity with the relevant witnesses in the course of the trial.

8. Nevertheless it remains a fact that these two crucial witnesses received grants of immunity and this required to be appropriately addressed by the learned trial judge in his charge to the jury. The prospect that the evidence of one or both of these witnesses might have been influenced by their respective grants of immunity was a possibility that had to be brought to the jury's attention. It was necessary that the jury would assess the credibility of their evidence in these particular circumstances.

9. The immunity issue was not addressed by the learned trial judge in his charge to the jury, nor indeed was it specifically referred to in the closing speeches by both counsel. The issue however was, and quite rightly so, raised by way of requisition by the appellant's

counsel following the completion of the charge. He addressed the learned trial judge, thus:-

> *"..I have two concerns. One is that the two principal witnesses in the case for the prosecution have been granted immunity, immunity from prosecution. I am particularly concerned that the immunity was granted in the case of DQ just the day after the trial started, I think, and I respect of MQ, after the court had warned her. The point being that there is an encouragement by them and an encouragement given to them by the State to give evidence against Mr. Q. It is particularly important in the case of MQ because she had taken up the stance, for something in the region of twelve months or more, that she was supporting her husband's in these allegations and she had said .. she made particular comments to Ms. B of the Health Board that if she had any way to believe that these allegations had any truth to them, she would be neither next nor near to him. She would have run him out of it, something to that effect. I think that the question then of her changing her mind and coming to court to give evidence against her husband is coloured against the denial is that she made for that length of time and it is also coloured by the fact that she was given immunity from prosecution."*

10. This concern was readily acknowledged by the learned trial judge, who again addressed the jury on this (and other issues raised by way of requisition) in the following terms:-

> *"In relation, ladies and gentlemen, to both D and to his mother, you heard that D was granted immunity from prosecution in respect of his behaviour towards his sisters. It is a matter for you, ladies and gentlemen, as to whether or not that immunity from prosecution in relation to those matters have been any form of encouragement to D not to tell you the truth. Equally, ladies and gentlemen, Mrs. Q had been given immunity from prosecuting in respect of the events that she alleged she observed. Again, ladies and gentlemen, it is a matter for you as to whether or not the granting of that immunity was in any way an encouragement to Mrs. Q not to tell the truth."*

11. Counsel for the defence did not again refer to the matter. The learned trial judge's remarks concerning the immunity granted to both witnesses was one of the final issues referred to in any detail by him and would have been therefore fresh in their minds as they commenced their deliberations.

12. The learned trial judge's charge to the jury in relation to immunity was clear and unambiguous. The jury were left in no doubt but that they had to satisfy themselves that the immunities granted to the two witnesses did not serve to encourage them to give untruthful evidence. It is difficult to suggest as to how much more clear the learned trial judge's charge could have been in relation to this issue.

13. In relation to the issue of the credibility of the same two witnesses and the criticism of the learned trial judge's charge in relation thereto, no requisition relating to any such concern was raised by counsel for the defence at any point in the trial.

14. In *DPP v. Cronin* [2006] IESC 9, it was held by the Supreme Court that (as *per* the head note):-

> *"That only in circumstances where the court was of the view that, due to some error or oversight of substance, a fundamental injustice had occurred should the court allow a point not raised at the trial be argued on appeal. In addition an explanation must be furnished as to why it was never raised at trial."*

15. In this case, the court is not satisfied that the threshold of a fundamental injustice has been met, and it cannot see any basis therefore on which it can properly consider this ground of appeal in the face of the failure to raise that point at the trial, or any attempt to so do.

16. Having so stated the foregoing, however, it is nonetheless the court's view that firstly, the credibility of the witnesses was such a central theme of the case having regard to the nature of the evidence that such would have been foremost in the jury's deliberations and, secondly, the subject was referred to generally by the learned trial judge in his charge, and specifically so in relation to his warning to the jury in respect of their consideration of evidence given by the witnesses following their receipt of immunity from prosecution.

17. For the reasons stated therefore, the appeal against conviction is dismissed.