THE COURT OF APPEAL

[66/16]

Birmingham P.
Hedigan J.
Baker J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

KEVIN CARROLL

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2018 by Birmingham P.

1. On 26th January 2016, the appellant was convicted by a majority verdict (10:2) of counts of rape and s. 4 anal rape. He was subsequently sentenced to a term of ten years imprisonment. He has appealed against his conviction and the severity of sentence. This judgment deals only with the conviction aspect of his appeal.

Background
2. The case involves events alleged to have occurred on a single occasion at a primary school in Tullamore, County Offaly. The offences were laid on the indictment as having occurred between 1st September 1997 and 30th June 1998. The complainant was between six and eight years during the time covered by the indictment and was a pupil in the school where the events are alleged to have occurred. The accused, now appellant, was a drama teacher who came to the school to hold drama classes and put on shows after school hours.

3. The complainant told the jury that the appellant could be sharp with children, but had always been kind to her. She went on to describe an occasion when she was in the school hall with the appellant. She was on the stage and the appellant asked her would she like to play a game. He then proceeded to penetrate her, vaginally, and then anally. According to the complainant, at that stage, she saw the school caretaker, 'Martin', enter the hall. She says that Martin "went for" Mr. Carroll; she was not sure whether he punched him or not, but he was angry. She left the hall and encountered a black-haired cleaner. Another female member of the school staff, a friend of her mother's, told the cleaning lady to bring the complainant to the toilet and to clean her up. She says that when she emerged from the toilet, Mary Berry, the school Secretary, told her not to tell her mother, that it would upset her.

4. In November 2012, the complainant reported matters to Gardaí and an investigation commenced. As part of that investigation, Mr. Carroll was arrested in September 2013, and, when interviewed during the course of detention, he emphatically denied the allegations. Indeed, he indicated that he had no recollection of the complainant as a participant in his after school classes.

Grounds of Appeal
5. Essentially, three Grounds of Appeal are relied upon:

> (i) That the judge erred in failing to discharge the jury, when a witness, Mary Berry, in the course of giving evidence, introduced hearsay of a prejudicial nature;
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> (ii) that the case should have been withdrawn from the jury and a verdict of not guilty by direction recorded and
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> (iii) that the judge erred, on 22nd January 2016, Day 3 of the trial, in failing to hold an enquiry into an issue raised by the defence legal team that a juror, upon returning to Court during the course of the jury deliberations, interacted with the injured party and other people in her company.

6. It may be noted that a motion was brought seeking to add two grounds: one relating to the failure to adjourn the case against a background of late disclosure and the other seeking to argue that the verdict of the jury was perverse. The issue about late disclosure was not proceeded with as it was accepted that the documents in question had been disclosed at an earlier stage, and insofar as the contention that the verdict was perverse is concerned, counsel acknowledged that this overlapped with the ground that suggested that the case should have been withdrawn from the jury.

The Application for a Discharge of the Jury
7. On the morning of Day 2 of the trial, Mary Berry, the former school secretary, was called to give evidence. Prosecution counsel asked her about an occasion when the complainant rang the school in November 2012, seeking a telephone number for the school caretaker, Martin Smith. This gave rise to the following exchange:

> "Q. And I think that you had a word with Mr. Smith and asked him that if he recalled anything to let you know: isn't that right?
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> A. I went to Mr. Smith's house because I couldn't give out the number, under confidentiality rules. I went up to the house and I asked Matty, I said 'Matty, would you remember anything got to do with KD and Kevin Carroll?'
>
> Q. Yes?

A. And Matty, at the time –

Q . Sorry, I beg your pardon, yes?

A. Yes, Matty, at the time, said to me 'well' he said, 'Mary, all I'd remember' he says is, 'Kevin, when the kids would be up on the stage, looking under the skirts, right?'

8. Defence counsel immediately indicated that he had an issue which he wanted to raise in the absence of the jury. When the jury withdrew, he then sought the discharge of the jury. He contended that what Ms. Berry had said was "absolutely prejudicial"; was of no probative value; he did not know how the judge was going to address what had happened and he felt that he did not think that it could be put out of the jury's mind. The only application he could make was that the jury be discharged. The application was resisted by the prosecution and the judge then ruled as follows:

> "[a]lright, well, Ms. Berry got into the witness box, we'd hardly started the evidence. Mr. Dillon [Senior Counsel for the prosecution], in fairness to you, I think she did get ahead of you and I'm not sure that you even heard it initially as she said it, I'm not sure that you did, but that's neither here nor there. She said what she said and it's unfortunate that she said it. However, the position is she has attributed this to Marty Smith, Marty has already given his evidence. It's not something he said in his evidence. He made no reference whatsoever to that as Mr. Smith [counsel for the defence] here representing the defendant says about Marty Smith, he was clear in what he said. It's unfortunate that it was said, it shouldn't have been said and it does create a difficulty for Mr. Carroll.

But I have to look at the overall situation and what I'm being asked to do is to discharge the jury in this light and I'm not disposed to doing that so I'm not going to discharge the jury. Now, from time to time in trials, these types of things arise. One way of dealing with it is that no reference is made to it whatsoever in the summing up, in my summing up to the jury of the evidence as given, but because it's a short case, it is, in fact, something that might have made an impact on them. They might have heard it, I don't know whether they did or not, but I have to suppose that, in favour of Mr. Carroll that they did, so I think I'm going to have to say to them that Mary Berry said something in her evidence, she was attributing that to Marty Smith, that was not what Marty Smith said in his evidence, and so, in that specific respect, I'm going to have to specifically tell them that they must disregard that because it wasn't evidence that was given by Marty Smith, although she attributed it to him and I'll leave it at that."

Then, in the course of her charge on Day 3 of the trial, the judge commented:

> "[s]he said the [phone] conversation was about the caretaker, Mr. Smith, and this person who was on the phone was looking for his number, but because of confidentiality, Mary Berry couldn't give out the number and she had to go up to Marty and ask him if she could give his number out. Then she said, and I'll just get it here now, then she said – she was asked 'and I think you had a word with Mr. Smith and asked him if he recalled anything to let you know' and she said 'yes, Matty at the time said to me – well, he said, Mary, all I'd remember, he says is Kevin, when the kids would be up on the stage, looking under the skirts'. Now, Mary Berry has attributed this to Marty. You've heard the evidence from Marty, you've heard me give Marty summary. Marty never said that in his evidence and I'm directing you now to disregard that. You are not to take that sentence into your deliberations in reaching your verdict in this case. It's not something that was said by Marty in his evidence here in the trial, it was something that another witness attributed to Marty, Marty did not say that and it's in these circumstances that you disregard it completely, do you understand that, Ladies and Gentlemen? Alright."

9. The Court is quite satisfied that the trial judge was fully entitled to decline to discharge the jury. In this jurisdiction, prosecution counsel does not discuss with witnesses the evidence that they will be giving at trial. Indeed, with the exception of the complainant, the general position is that counsel will not even meet with witnesses in advance. This practice is regarded as contributing to the fairness of the trial and to the integrity of the trial process. There are other jurisdictions where it is standard practice for witnesses to be "prepped" by lawyers, but that has never been the way in this jurisdiction. One side-effect of our system is that it does mean that, from time to time, a witness will say something unexpected, or use language other than that which was anticipated. However, the occasions when that will require a jury to be discharged are likely to be very rare. Discharge should be seen as very much a last resort.

10. If one looks at the background against which Mary Berry made her remarks, further strong support for the view that it was not a case for a discharge emerges. The defence was, and indeed are now, suggesting that the jury should have been discharged because they had learnt that the school caretaker believed that Mr. Carroll looked up the skirts of girls while they were on stage. The school caretaker, Mr. Smith, had given evidence on the first day of the trial. In his direct evidence, he had told the jury that he recalled an occasion when he had entered the school hall; the complainant was on the knees of the accused; there was no-one else in the hall at the time; he saw Mr. Carroll pulling up the zip of his trousers; there was a bulge in his trousers and Mr. Carroll had an erection.

11. In cross-examination, he was challenged on this account. Counsel for the defence also asked whether he had told a meeting attended by Father Donnelly, the Curate with responsibility for the school, Mary Berry, Finnoula Doheny, and Mairead Naughton, senior school figures. He was asked about the fact that Father Donnelly's notes of the meeting record that Mr. Smith had said that he came into the hall on a date unknown when he was a caretaker, and he saw the drama teacher, Kevin Carroll, acting inappropriately with a student; that Mr. Smith said that he punched Kevin Carroll, broke his glasses, and that he brought K away to fix her up. Mr. Smith denied that he had said what Father Donnelly recorded him as having said and denied that he had acted in the way described. What he was recorded as saying was broadly consistent with the account of the incident given by the complainant. Counsel for the prosecution, in the presence of the jury, offered to call those mentioned by Father Donnelly; Finnoula Doheny, Mairead Naughton, and Maura McRedmond, who are witnesses on the book of evidence, but defence counsel did not require them. The relevance of this is that it provides context for the observation that Ms. Berry was attributing to Mr. Smith. It is not the case that the remarks about looking up skirts were being attributed to someone who had never had a bad word to say about Mr. Carroll. Rather, they were being attributed to someone who had much more serious things to say about Mr. Carroll and were being attributed to someone who had given extremely damning evidence at trial about what he had personally witnessed. This introduces a certain unreality to the suggestion that this was a case for the discharge of the jury, and for that reason, whilst taken alone this evidence given by Ms. Berry might be prejudicial, it was far less so that direct evidence given by the person whose words she allegedly recounted. The likely impact of the evidence must be weighed against, and seen in the light of, the totality of the evidence in order to assess whether it was sufficiently prejudicial for the trial court to discharge the jury. In our view, it was not.

12. Accordingly, the Court rejects this ground of appeal.

The Application for a Direction

13. At trial, there was an application for a direction which was refused. This unsuccessful application now forms the basis of a Ground of Appeal. The ground has been rolled up with the proposed new ground that the verdict was perverse. Counsel for the appellant, accepting that if he was able to establish that a verdict of guilty would be perverse, that the case should not have been left to the jury.

14. The contention that this was a case where there should have been a directed verdict of not guilty is based on the second limb of Galbraith. It is acknowledged that there was evidence that the offences occurred, but it is said that the evidence was tenuous and contradictory. It is said that the complainant's evidence was inconsistent with that of Mr. Smith; he does not accept that he "went for" Mr. Carroll; that it was inconsistent with that of Mary Berry who denies being present in the aftermath of the incident and denies telling the complainant not to tell her mother what had happened, and also denies being in the complainant's home at a later stage, speaking to the complainant, when her mother had left the room temporarily and then pretended to be reading a book with the complainant when her mother returned.

15. At trial, it was contended that the account given was utterly implausible. There were echoes of this on appeal. Indeed, at times, the submissions of counsel for the appellant took on something of the tone of a jury address. It is said that if anything of the sort occurred, that the complainant would have been in such a state of extreme distress that this would have been obvious to anyone having contact with her, in particular, to her mother, yet her mother was not called as a witness at trial. It is said that it is inconceivable that any group of adults or school authorities would have responded in the way the complainant alleges occurred. Had the caretaker witnessed anything untoward happening, the appellant contends that Mr. Smith would undoubtedly have reported the incident without delay to the school principal.

16. It is contended that it is incredible that any school secretary would, in 1997/1998, have reacted in the way the complainant said occurred. It is said that it is just inconceivable that any school Secretary or authority figure within a school, becoming aware of an incident of such gravity, would have told a child not to report it. Stress is laid on the fact that the alleged incidents are said to have occurred in 1997/1998, not in the distant past or in the dark ages. Counsel for the appellant focuses on the absence of the school cleaner and says that her absence rendered the trial unfair and unsatisfactory. It is, however, to be noted that there was no PO'C-type application i.e. no application to stop the trial on the basis that in the absence of the cleaner, there could not be a fair trial.

17. Undoubtedly, there were unusual features in the case. If Mr. Smith witnessed the untoward activity that he gave evidence that he did, it is surprising that there was no report to the school principal. On the other hand, if Mr. Smith did not interact with Mr. Carroll, it is surprising that he would have told a meeting attended by Father Donnelly and other authority figures from the school that he did. It is, of course, the case that Mr. Smith denies telling the meeting that he did intervene physically, but if he did not say that, it is strange that Father Donnelly would make the record he did and that the other attendees would, as seems to have been the case, been prepared to support him. However, in the Court's view, these were quintessentially matters to be addressed by a jury. There was clear, indeed, stark evidence that the offences had occurred. In these circumstances, it was for a jury to consider that evidence and for a jury to consider whether the response to the incident described by the complainant was so different to what one would expect as to cause one to doubt whether the incident described had in fact occurred. The trial judge is not to take over, in effect, to usurp the functions of the jury.

18. This ground of appeal is rejected.

Ground (iii)

> "The trial judge erred in law or in a mixed question of law and fact in failing to hold an enquiry on 22nd January 2016 following a complaint made to the Court by the applicant's legal team that a juror, upon returning to Court during the course of the jury's deliberation, interacted with the injured party and other people in her company present in Court, and in so failing to do, deprived the applicant of enquiry being made as to the suitability of the juror to continue as a member of the jury"

19. At the outset, it might be noted that despite the reference in this ground to the jury deliberations, the issue relates to a matter that was raised by counsel for the defence when the Court sat on Day 3 of the trial, the day on which the jury was going to hear closing speeches from both sides and the trial judge's charge. When the Registrar called the case, defence counsel stood up and said:

> "[J]udge, just before the jury comes in, there's a matter which I think I have to bring to the attention of the Court. I understand that – I've been informed by two witnesses who were or – not two witnesses, two people, who were supporting Mr. Carroll, that when the jury was filing out yesterday evening, one of the jurors, who has not been immediately identified to me because I have to – I'd have to be informed as to which – where precisely the juror was sitting and the particular juror involved apparently smiled and winked in the direction of the injured party and two guards were seated behind. Now, whether the wink or the smile was to the guards or to the injured party I don't know, but it's a matter of some concern that there should have been some contact. Now, I've told my friend about this, since it's a matter that I have to raise.
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> Judge: These are the two people here?
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> Defence Counsel: Those two people here and they're prepared to be interrogated in relation to that, under oath if necessary, but I've told Mr. Dillon [prosecution counsel] yes, I think that's the appropriate course to take, subject to your own view on the matter, of course, that those who had instructed that they saw this conduct on the part of a juror should, in fact, give evidence on oath to establish that fact. I have taken instructions from Sergeant Quinn who has been in Court all day long, who has watched, who has seen the jury come and go, he wasn't watching, but he saw them come and go and he certainly can say that there was one juror who looked with a neutral to possibly stern expression at the injured party and he can identify that by virtue of the glasses that this gentleman is wearing, this juror is wearing, so I think if we could just have a quick hearing of evidence from these two people and from Sergeant Quinn, and then maybe you might call in the jury and I'm afraid you handle it as best you can, whether it's necessary to discharge a juror or not I think depends on what you hear. I suppose it will depend upon what you hear in terms of evidence.
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> Judge: Alright, Mr. Dillon, thank you.
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> Defence Counsel: Might I just suggest this, Judge, that when the jurors come back in the normal way, they would have been polled or their names taken and they answer their names, at that stage, I could from my –
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> Judge: You know, Mr. Smith, the two people that were in Court are two people that were allowed into Court.

Mr. Smith: That's correct.

Judge: Who wouldn't normally be in Court?

Mr. Smith: That's correct.

Judge: And bearing all of that in mind –

Mr. Smith: Yes?

Judge: Now, do I really go into all of this or am I simply going to carry on with the case as we had intended?

Mr. Smith: Well, I've raised it Judge, and there it is, so I've been instructed to raise it.

Judge: Yes, and you've heard what I said.

Mr. Smith: And I've heard what you said, but –

Judge: And the two people in Court have heard what I said.

Mr. Smith: They have, and –

Judge: Alright, and it was by agreement and by using my discretion that I had allowed all of that.

Mr. Smith: Oh I appreciate that, Judge, but that doesn't remove the fact –

Judge: Alright, well then in those circumstances, we're going to continue on.

Mr. Smith: But it doesn't remove the fact, Judge, and I just want to put it on the record that despite the fact that they were allowed in, they were here and they witnessed what they witnessed and there does raise some –

Judge: They're not parties to the case.

Mr. Smith: Oh, of course, but it does raise some concern, Judge, that there might be some –

Judge: And as you've said yourself, fairly – in fairness to you, that there were Gardaí sitting behind them and it's uncertain as to what was viewed so we'll carry on with the case.

Mr. Smith: Fair enough."

There was postscript to this at the sentence hearing. On that occasion, counsel said:

> "[J]udge, I want to draw your attention is, you recall during the trial, I raised an issue about one of the jurors who were winking and laughing at the Gardaí, on one occasion leaving the jury box to go into the jury room. It's a somewhat troubling feature of this case, although I accept that that juror is entitled to be, that juror is here today and has been in consultation with the Gardaí throughout the morning. And I just want to put that on the record because it is a matter which will form one of the issues for an appeal."

It will be noted that this intervention diverged very appreciably from what had been said on Day 3 of the trial.

20. In the Court's view, the judge was entitled to deal with the matter in the way that she did. We do not believe that issue raised crossed the threshold mandating a further enquiry. On the basis of what counsel was indicating to the judge, the two friends of the accused, a husband and wife, who had been permitted to attend Court by the judge, believed they had witnessed a smile and/or a wink, though whether that was in the direction of the complainant or Gardaí was not clear. The Sergeant in Court believed that he observed a particular identifiable juror looking at the complainant with a neutral to possibly stern expression.

21. Neither a stern expression nor a wink or smile could have amounted to communication with a juror, and even taking the description of counsel for the defendant at its height, the judge was entitled to take the view that any engagement was minimal and not did not amount to the sort of communication that would involve an interference with the trial process.

22. The humanity that a juror brings to the process is an essential element of the right to trial by a jury of one's peers. The members of a jury bring their humanity and human responses to the process, and this is the essence of their engagement.

23. If someone decided to monitor the facial expressions of jurors throughout a trial, it is likely that they would observe many different expressions: sympathy; amusement; horror; disgust and anger, not to mention blank expressions and boredom are some that come to mind. The fact that a particular juror reacted in a particular way would not, in general, give rise to any response from the observer.

24. In this case, the height of what was being suggested did not involve any real contact or communication. One senses from the transcript that the judge's reaction may have been tinged with impatience or perhaps irritation; one would speculate, perhaps linked to the fact that the judge had exercised her discretion to admit friends of the accused to Court. The Court does not believe that the issue raised is of such substance as to give rise to concern that the trial was unsatisfactory. The Court is not prepared to uphold this ground of appeal.

25. In summary, the Court rejects all grounds of appeal that have been argued. We have not been persuaded that the trial was unfair or unsatisfactory or the verdict unsafe.

26. We, therefore, dismiss the appeal.