THE COURT OF APPEAL

Record Number: 73/2014

Edward J.
McGovern J.
McCarthy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -
M. (ORSE J.) D.

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 26th day of March 2019 by Mr. Justice McCarthy

1. The appellant was convicted of sexually assaulting B. S. on the 29th August, 2011 at her home. Ms. S. was acquainted with the appellant and was involved in a long term relationship with a Mr. S.

2. On the evening in question the appellant was socialising in McKee Barracks in the company of the complainant, her partner and other acquaintances and sometime after midnight the appellant's partner, having had so much to drink that he remained there, she accepted the offer of a lift on the appellant's motorcycle to her home. The complainant retired to bed; she sent texts to one J. M. communicating her concerns about the presence of the appellant downstairs.

3. He, at his own request had been permitted to stay on a couch and she sought to sleep. She had largely undressed for this purpose. At a certain stage the appellant entered her bedroom, pulled her duvet away, forced himself on top of her, spread her legs and said "you are going to give me what I want" and proceeded to pull down her top and suck on her breast. He also sought to move his hands in the direction of her vagina, a movement which she stopped. She thereupon sought to fight him off but he tore her top as she did so and he beat her extensively. She received a second beating a short time afterwards when she informed the appellant that she had contacted the gardaí.

4. The appellant admits the beatings and gave an explanation of them whilst denying sexual assault. After the incident the complainant, who was naked, grabbed what was described as a poncho to cover herself and ran out onto the street ultimately obtaining the assistance of a neighbour, D. H.

5. The case was a strong one because of her extensive physical injuries, her condition immediately afterwards when she meet her neighbour, that an immediate neighbour, one M. B., at a relevant time, was awakened by her screams and noise from her house accompanied by vulgar abuse, that when she contacted the emergency services she was heard to be in distress, that damage had been caused to her top and also that she had made an immediate complaint which had a sufficient degree of consistency.

6. Application was made to the trial judge for a warning to the jury about the dangers of convicting the appellant on the uncorroborated evidence of the complainant. The trial seemed to proceed (as did counsel) on the mistaken basis that there was no evidence capable of being viewed as corroboration.

7. The application was briefly made by counsel and dealt with briefly by the judge. Some criticism was advanced in this regard but it is perfectly plain from the transcript that all concerned knew as one might expect in the case of the judge and counsel in a short case what is involved both factually and legally, on the erroneous premise, admittedly. We nonetheless deal with it.

8. The issue is whether or not the judge was wrong in refusing the application. Effectively, it was based on a number of alleged discrepancies in the complainant's evidence and I now seek to deal with those in summary form.

9. D. H. said in the course of her evidence that when she met the complainant immediately after the incident she had told her that she had been raped when, in fact, that was not in the ultimate allegation and the complainant's version of the conversation was at all times that she told Ms. H. that the accused had attempted to do so.

10. It was also said that the complainant had supposedly told a certain Dr. Cooney at St. James' Hospital in the small hours of the morning that she had been sexually and physically assaulted and that the assault included "digital penetration of her vagina and palpation of her breasts but no penile penetration".

11. It might be noted that the evidence pertaining to Dr. Cooney amounted to no more than the fact that she had made a note of what had supposedly been said and she, of course, was not called: the relevant evidence (of a Dr. Cleary) was read and it contained such information.

12. The complainant had denied that she had told anyone in St. James' Hospital anything to suggest that there had been digital penetration and when she was taken a short time later from St. James' Hospital to a Sexual Assault Treatment Unit she apparently gave the same history in as much as no examination was done in the genital area and there was, according to the examining doctor, a Dr. Columb, of that Unit, "no history of genital assault" and "genital examination was not carried out because there was no allegation of penile genital assault".

13. When taxed in cross-examination to the effect that there was a discrepancy between what she had told or not told Dr. Cooney and what she said later, she repeated that there was no question of penile or digital penetration or palpation and she repeatedly reasserted her core evidence to which we have made reference above.

14. It was further put to her that there was a distinction between palpation and sucking which is what she alleged in the context of the use of that word and also the use of the term "digital penetration" she asserted that they were not the types of words which she (generally) used. We are not impressed by this point as the terms used are not part of the common parlance of lay people.

15. It seems that the trial was the second. In the first, we are told that D. H. initially gave evidence to the effect that she was told by the complainant in the immediate aftermath of the events that the appellant had tried to rape her but had changed her evidence in cross examination to the proposition that the complainant said she had been raped. Of course the complainant's evidence had been to the effect that the accused tried to rape her as aforesaid.

16. It was suggested to the complainant that there was no forensic evidence to support the proposition that some form of penetration had occurred. There was no basis for suggesting that there was any inconsistency in her evidence in this regard by virtue of speculation on a matter of expertise as to what the tests might have shown or what evidence they might have produced. It was not a case accordingly where the absence of evidence is of evidential value.

17. We cannot see how much significance can be attached to what was said by the victim either said or not said by her having regard to her condition at the time in the small hours of the morning, nor do we think that the supposed inconsistency in the evidence of D. H. reflects upon the complainant.

18. We have stressed before and stress again that whether or not a corroboration warning should be given is in the wide discretion of the trial judge in the first instance. It is obvious that a trial judge is well placed compared to this Court to make a judgment on the evidence having regard to the run of the case on issues of credibility or reliability relevant to a decision as to whether or not a warning should be giving.

19. The inconsistencies here were of a type which is not uncommon especially in sexual offence cases. In any event, all such matters were addressed in her charge. Before a warning could be triggered and the discretion of the trial judge interfered with by this Court, a great deal more than the supposed discrepancies here would be necessary.

20. A number of authorities have been quoted to us both as to general principles and by way of example where this Court has intervened. Examples of intervention are of modest assistance since each case must depend on its own facts, but the thread running through all of the authorities is the recognition of the trial judges' discretion and the primacy of the jury as judges of fact including credibility.

21. We are therefore not disposed to uphold this ground of appeal since we find no error of principle.

22. Certain photographs were put in evidence of the complainant in an injured state and it is suggested that the prejudicial effect of them exceeded their probative value. We think there is no doubt but that such photographs were properly admitted is clearly relevant and probative. We also accordingly dismiss this ground of appeal.

23. Finally, it has also been submitted to us that there were deficiencies in the garda investigation and in particular in relation to the need to request the forensic science laboratory to undertake tests as to whether fibres might have been transferred from the bedding to the clothing of the appellant and, in particular, Velcro patches on his motorbike leggings.

24. There is nothing in the evidence to suggest that the fact that no such request was made could give rise to any prejudice in this instance also as we cannot speculate firstly on the expert question of whether or not fibres might have been transferred and secondly because close physical contact had taken place between the complainant and the appellant on any view of the evidence.

25. Therefore, on this ground also we cannot find any error and we accordingly dismiss this appeal.