THE COURT OF APPEAL

[95/2017]

Birmingham J.
Mahon J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

K.K.

Appellant

JUDGMENT of the Court delivered on the 10th day of May, 2018 by Mr. Justice Birmingham

1. On 12th December, 2016, the appellant was convicted following a trial in the Central Criminal Court on four counts of sexual assault. He has now appealed against that conviction. Two issues are raised on the appeal. First it is said that the judge erred in declining to give a corroboration warning. Secondly, it is said that the judge erred in failing to accede to a so-called P.O'C. application to have the trial halted.

2. By way of background, it should be explained that both the complainant and the appellant are Congolese nationals. The complainant came to Ireland in 2001 along with her sister who was two years older than she was. They arrived as "unaccompanied minors". At all material times she lived in the family home in Tallaght with her parents and her siblings. While the complainant regarded the adults with whom she lived as her parents and so referred to them, it emerged during the course of the trial that the complainant's mother was not, in fact, her biological mother. Nothing particularly turns on this, and this is mentioned only for the sake of accuracy in a situation where there will be references during the course of this judgment to the complainant's mother and father. The appellant also lived in the Tallaght area and had done so for many years. It appears that the appellant and the complainant's mother were acquainted in the Congo and for that reason he was a regular visitor to the family home of the appellant. The bulk of the incidents that were in issue in the trial were said to have occurred in the complainant's family home. It is the case that the four offences in respect of which convictions were recorded are all alleged to have occurred in that family home. The indictment contained 15 counts in all, 14 counts of sexual assault and one count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, oral rape. The alleged offences were said to have occurred between May, 2004 and December, 2010. The indictment included offences that might be described as general or representative sexual offences, reflecting the fact that the complainant said that she was abused on a very regular basis over that period, but the indictment also included a number of offences which were of a more specific character. Guilty verdicts were returned in respect of counts one, four, seven and eight on the indictment.

3. Count 1 on the indictment, which was the first in time on the prosecution case, related to an incident in September 2004. On the occasion in question the complainant was at home, her parents were out and she answered a call at the front door. The appellant was there and he is alleged to have touched her breasts over her clothing on this occasion. Count 4 related to an incident alleged to have occurred in May, 2005 when the complainant was 11 years of age. The incident is linked to a gathering in the home of the complainant, it was referred to at trial as "a wake" linked to the death of the complainant's grandfather in the Congo. The prosecution case was that on this occasion the appellant touched the breasts of the complainant and tried to unzip her trousers. Count 7 on the prosecution case related to an event in the summer of 2006 during the soccer World Cup of that year. The prosecution case was that the complainant, who was aged 12 at the time, was watching a football match on television. She believes Brazil was playing, as she has a recollection that she was wearing a Brazilian soccer shirt. She stated that the appellant came into the room when there was nobody else in the room, he stood behind her and started to touch her vagina area, touching her under her trousers but over her underwear. The prosecution case in relation to count 8 was that it occurred when the complainant was 14/15 years of age. The allegation is that she was in the kitchen of her home, as was her mother who was sewing at the kitchen table. The appellant came into the room, sat at the table and digitally penetrated her vagina.

4. On 20th April, 2013, the complainant, Ms. N.K., who by that stage was a student in university, made a formal statement of complaint in the course of an interview with Gardaí. Some days earlier she had informed her parents by letter about what she said had occurred. On 29th August, 2013, the appellant was arrested and detained. In the course of that detention he was interviewed and the allegations were put to him and he denied them. Certain comments or observations or remarks made by him during the course of interviews are identified by the defence as being significant in the context of a P.O'C. application which was made to the trial judge and which arises as an issue on this appeal.

5. In accordance with standard procedures, the Gardaí reported the matter to the HSE which led to Ms. N.K. being interviewed by a HSE social worker, Ms. Sarah Garrigan in September, 2013. The purpose of that interview was to assess whether there were risks relating to other children in the area, as well as to address the question of the provision of support to Ms. N.K. Ms. Garrigan's practice was to take handwritten notes during meetings of this nature, and then within a day or perhaps a day and a half, by reference to these handwritten notes, Ms. Garrigan would create a document as the record of the meeting or interview. It was not her practice to read over the notes she had taken during the interview or to ask the interviewee to sign an acknowledgment of the notes, nor was it her practice to retain the handwritten notes. The typed document would constitute the only record of the meeting or interview.

6. Some weeks before the matter came to trial, the existence of the typed document became known. The document then featured prominently at trial. Ms. Garrigan was called by the defence, late in the trial, the trial judge facilitating the defence in that regard by issuing a witness summons at a stage in the trial when it had appeared that the defence evidence had closed. The introduction of the typed document into the trial resulted in the complainant being recalled on two occasions so that she could comment on what the document recorded her as having said. The defence's interest in the document arises from the fact that what is recorded in the document diverges in certain respects from the account given to the Gardaí and then later given at trial. It is submitted that the significance of the divergence is that it was central to the defence application for a corroboration warning. The emphasis that was placed on the divergence between the account given to Gardaí and the account given to the HSE arises in a situation where there

was broad consistency between the account given by the complainant to Gardaí and what was said in court. While not disputing that broad consistency between what was said to Gardaí and what was said in court, the defence draws attention to the fact that in court the complainant said that the oral rape, which she says took place in a car driven by the appellant, was preceded by the appellant getting the complainant to touch or stroke his penis which he had produced for that purpose. This was not something that had been mentioned to Gardaí.

Corroboration warning

7. This issue first surfaced in the context of the P.O'C. application. In replying to the application to halt the trial counsel for the prosecution referred, almost in passing to the subject of corroboration. This caused the judge to raise with counsel whether there ought to be a warning. Counsel for the defence immediately responded by saying that he was indeed seeking such a warning. He said that he was doing so in a situation where the abuse was alleged to have occurred over a protracted period of time, and where there were no independent islands of fact to confirm the position articulated by the complainant. He then referred to the fact that there was a suggestion of inconsistent narratives, adding that that might well be clarified the next day. This was a reference to the fact that Ms. Garrigan was expected to give evidence the following day, a witness summons having issued at the start of business that day. As counsel began to address the issue of divergences or discrepancies in the evidence, the judge intervened to suggest that this could be dealt with in a very practical way, and proposed that they await the evidence of Ms. Garrigan. There was ready agreement for this course of action. The Court did take the opportunity to enquire of prosecution counsel whether he accepted that there was, in fact, no corroboration in the case, to which counsel responded "Yes, in terms of the offences in the strictest possible sense." The judge stated that it seemed to him that it was only if inconsistency was demonstrated that the Court had to look at the issue, adding that he accepted that counsel had advanced evidence of inconsistency. This was a reference to the fact that counsel had begun his submissions by pointing to the fact that while dealing with the s. 4 oral rape incident that the complainant had referred to the incident beginning with the appellant taking her hand and putting it on his penis.

8. The Court regards this intervention as very significant, it demonstrates that the judge was very alive to the discretion that he had to exercise and to the importance of the decision that he had to make. The following day, the complainant was recalled for a second time to deal with what the social worker had recorded. Evidence was then heard from the social worker. The Court also heard submissions in the absence of the jury on this point. Counsel recapped and highlighted the manner in which what the social worker had recorded diverged from what the complainant had to say to Gardaí. These were that the first incident was recorded by the social worker as occurring at age 14. Said incident, as recorded by the social worker, involved the introduction of a hand under the clothing. The digital penetration in the kitchen was recorded as being in the context of a meal at the kitchen table, as distinct from an occasion when the complainant's mother was sewing there. Further, there was a reference to oral sex three or four times and there was a reference to receipt of a text message when the complainant had not mentioned this to Gardaí. The judge ruled as follows:

> "I am not disposed to give a warning on the basis of that particular matter. I have heard the evidence of Ms. Garrigan today and while there are differences between the evidence that she [the complainant] gave to the jury and the accounts that were noted in the typed note, the fact of the matter is that the complainant disputes that she actually spoke the relevant words to the witness and the witness accepts that she doesn't have her original contemporaneous notes. She accepts the note wasn't read back and it wasn't signed off on. And in those circumstances I am not disposed to give a corroboration warning."

9. Given the contents of the document generated by the social worker, the Court does not find it at all surprising that defence counsel would seek a warning. However, the Court is not persuaded that the matters identified militate in favour of a warning, or that the application for such a warning could be dealt with only in one way. The judge was anxious to hear from the social worker before deciding on the matter. Having heard from the social worker and having heard again from the complainant, the judge ruled as he did. The Court has not been persuaded that he was not entitled to come to the view that he did. The fact that some other judges might have reached a different view is not the point. The decision reached by this trial judge was one that was open to him, he had a discretion to exercise and it is clear that he exercised it carefully and conscientiously. The Court rejects this ground of appeal.

The P.O'C. application

10. At the outset it is useful to recall that P.O'C. applications have their origin in the Supreme Court decision of P.O'C. v. DPP [2006] 3 IR 238. In that case the Supreme Court was invited, pursuant to s. 29 of the Criminal Justice Act 1924, to consider the question whether the judge sitting in the Central Criminal Court had jurisdiction to hear an application to stay or quash an indictment on grounds of delay. The Supreme Court confirmed that a trial judge did not have jurisdiction to hear an application to stay or quash an indictment on grounds of delay. Such an application could only relate to technical legal issues on the indictment. The trial court had a general and inherent power to protect its process from abuse which included a power to safeguard an accused person from oppression or prejudice, however that applied during the course of the trial and did not allow for the holding of a discrete, preliminary process at the commencement of the trial to enquire into the issues of delay.

11. So far as the P.O'C. application at issue in this case is concerned, at trial there were really three legs to the application, an issue in relation to telephone records, an issue in relation to whether a particular garage shop sold flour at a particular time, and thirdly and most centrally, an issue in relation to the appellant's employment status and work situation during the World Cup of 2006. In the course of this appeal, counsel on behalf of Mr. K.K. has indicated that it is accepted that only the 2006 employment situation really remains live. For completeness' sake though, and to provide context for the trial judge's ruling, we will refer briefly to the two other issues that were canvassed during the course of the trial as well as to the World Cup issue.

Telephone records

12. During her interview with the Gardaí, the complainant, Ms. N.K., said nothing about any contact by phone or text with the appellant. However it was an issue that was raised by the Gardaí when they interviewed Mr. K.K. following his arrest on 29th August, 2015. At one point in an interview the following exchange occurred:

> "Q. So phone records would show no record between your phone and [N.K.'s] phone?
>
> A. No.
>
> Q. Are you sure?
>
> A. Yes.
>
> Q. Why are you so sure?

A. Because I know."

13. No attempt was in fact made to access phone records, and it is not clear what, if any, phone records existed between the complainant and appellant. However, the HSE document that became available very shortly before trial did contain a reference to phone contact. The document generated by Ms. Garrigan reported the complainant as saying "He [K.K.] texted her to meet up". In cross examination the complainant accepted that what the social worker had recorded in that regard was accurate. The judge dealt with this aspect in the course of his P.O'C. ruling as follows:

> "If you look at the particulars that have been canvassed before the Court, the first issue is that of phone records. The plain fact of the matter is that the complainant made no reference whatever to telephone contact with the accused in her statement to the Gardaí. Accordingly, the issue of telephone contact was not one that was brought about by her. Insofar as the issue of telephone contact has come into the case, it has done so on foot of disclosure material that first became available three weeks before the commencement of the trial, and as a result of a question that was put to the witness by Mr Bowman [senior counsel for the defence]. In those circumstances it is very difficult to see how criticism can be made of the Gardaí to pursue this matter and for that reason, it seems to me that the complaint is not made out in limine."

14. The Court finds itself in complete agreement with the approach of the trial judge with regard to this issue. Indeed, in fairness to the appellant, any suggestion that this issue in isolation would provide a basis for stopping the trial is not pursued on appeal.

15. The issue of whether flour was sold in a particular garage shop arose in the following circumstances. The complainant stated on an occasion in summertime, perhaps the summer of her first year in secondary school, that there was a day when she was sleeping upstairs, her mother was cooking and ran out of flour. The complainant was the only one at home so her mother told her to go to the shop with Mr. K.K. to buy flour. He took her to the Topaz garage on Old Belgard Road to buy the flour and then on the way back, they stopped off at some industrial estate and he parked the car. There he unzipped his trousers, took her hand and had her masturbate him. She said this was at Unit 13, Cookstown Industrial Estate.

16. The issue of going to buy flour was raised with Mr. K.K. during the course of his detention. He recalled that there was an occasion when he was asked to get flour. He said he went to Lidl in Fortunestown, he said that he went in the car. Ms. N.K. and her sister Ms. T.K. were in the car. At one point during the course of discussion with Gardaí on the topic Mr. K.K. is recorded as having said "Where did she buy flour, petrol station? I do not know what petrol station sells flour." The Gardaí are criticised for failing to establish whether flour was sold in the shop attached to the garage at the time the offence is alleged to have been committed. Following the appellant's release from the detention, his wife made enquiries. Flour was not sold at the time the enquiries were made, but it was not possible to establish what the situation had been at an earlier stage. The issue was touched on by the mother of the complainant when giving evidence. In the course of her direct evidence, she referred to baking and running out of flour, of sending the complainant, Ms.N.K., with Mr. K.K., of waiting because it was taking longer than expected, calling them to say she was waiting. She commented that they just came back, she thought the shop was closed, that there was no flour at the nearest shop and she thinks they came back without bringing flour, whereas her statement to Gardaí had seemed to suggest that flour was obtained.

17. The judge dealt with this aspect as follows:

> "A second matter raised is that of the purchase of flour and as already stated, the evidence offered by the prosecution is in fact equivocal on this issue, whereas the complainant in her evidence to the jury said that she did indeed go to the garage and purchase flour, her mother's evidence contradicted this insofar as the statement to Gardaí would appear to have said that she returned without flour and insofar as sworn evidence to the jury was that she had no recollection of whether her daughter returned with or without flour. Mr Carroll [senior counsel for the prosecution] submits that it is a peripheral issue and it seems to me that looking at the evidence, while it is an issue, that has been issued by the complainant, it is not an intrinsic fact to the abuse that is alleged and it seems to me that for that reason it doesn't create a matter of defence in the way that was spoken of by Mr Justice Hardiman in the original P.O'C. decision of – I think it was 2000."

18. The Court agrees with the categorisation of the issue as a peripheral one. Everyone, the complainant, the appellant and the complainant's mother agree there was an occasion when Mrs K. while baking ran short of flour and that Mr. K.K. and Ms. N.K. were asked to pick up some. Ms N.K. says this provides a backdrop to a specific act of abuse. Mr K. firmly denies that anything untoward occurred, and indeed he says that he and N.K. were not alone in the car, that T.K. was present also. In the Court's view the key issue is not resolved by information as to whether the shop at the garage was selling flour at the time, or whether the attempt to purchase flour was successful or unsuccessful. Whether flour was purchased in a particular shop or elsewhere is really neither here nor there. Certainly, the Court is in no doubt that a failure to establish conclusively whether flour was or was not available for purchase would not provide a basis for halting a trial.

The Brazilian football match

19. As has already been indicated, this was the most substantial issue raised in the context of the P.O'C application. The direct evidence on this issue is to be found at day 2 of the transcript at p. 6. There, the following appears:

> "Q. Now, I think after that then in May 2015 [an apparent reference to "the wake"] did Mr K. continue top visit your house?
>
> A. Yes he did.
>
> Q. And how often was that?
>
> A. Usually the same, every Sunday he'd come by.
>
> Q. And from after May 2005 when he visited at these weekends, did anything else happen?
>
> A. Yes. There was one time I was watching a football match and he came by. I think the door was open so he just walked in and went to see my mum. And then he came back to the living room, which is the door to the left here and he started to unzip my trousers and touch me.
>
> Q. And do you remember, you mentioned you were watching a football match, do you know?

A. Brazil was playing because I was wearing my Brazil shirt.

Q. And what competition were they playing in?

A. In the World Cup.

Q. And do you remember when that was?

A. Yes, sometime in the summer, June or July.

Q. Of what year?

A. 2006."

That exchange with prosecution counsel might seem to contain a suggestion that the incident may have occurred in the context of a weekend/Sunday visit. However in cross examination defence counsel asked her:

"Q. And I think in your statement to Gardaí you recollect that this was a weekday, is that correct?

A. Yes.

Q. And I think in due course, the jury will hear, maybe they already know, the World cup took place in Germany in 2006. It started in June and ended in July, and you're quite correct that Brazil were playing on a weekday, they were playing on three weekdays in fact, but there was one in particular when they were playing Ghana, Brazil played Ghana on 27th June 2006. Do you recollect who they were playing?

A. No.

Q. But it was a weekday, it appears, is that correct?

A. Yes."

It appears counsel's focus on the Ghana match was because he felt that a match involving an African nation was likely to be of greater interest than others. At a later stage in the trial the jury was told by the investigating Garda that based on her research she was in a position to tell the jury that Brazil played five games during the World Cup, playing Croatia on Tuesday, 13th June 2006 in Berlin, kickoff 9pm local time, on Sunday, 18th June 2006, they played Australia in Munich at 6 pm local time, on Thursday, 22nd June 2006 Brazil played Japan at 9pm local time in Dortmund, on Tuesday 27th June 2006 they played Ghana at 5pm local time in Dortmund, and on Saturday, 1st July 2006, they played France at 9pm local time in Frankfurt.

20. In the course of the appellant's detention while being asked about his use of a particular car, a Nissan, he answered "No I had to give this car back because I lost my job." He was then asked in what year he lost his job and he replied "2006/2007. I think so."

21. As one would expect, the question of untoward activity during the World Cup was specifically raised with the appellant during the course of his detention. He was asked, "In Summer 2006, the World Cup was on, the soccer World Cup. It was on from the 9th June 2006 until the 1st July 2006, did you watch any of the matches in Mrs. K.'s house." He answered "No, I never did, what kinda games would I have watched. I would have been working in VOW. It is a warehouse." Gardaí returned to the 2006 World Cup in the course of a later interview. This exchange is recorded as follows:

"I am just going to bring you back to the summer of 2006 when the World Cup was on. You said that there was no way I could have watched a match because I was working at the time, but you also told us in September 2006 when N. alleges that you brought her to the Old Belgard Road, in a silver or grey car which we believe to be your Nissan, you say you couldn't be in your silver in summer 2006, because you had lost your job. So how could it be that at the same time you could not have watched the match because you said you were working."

He replied,

"Well, I just remember now that I had a job when the World Cup was on. I was working in a warehouse.

Q. Was it shift work?

A. No, not shift work, 2 pm to 10 pm.

Q. Where was the company based?

A. It was in Cookstown Industrial.

Q. How long did you work with VOW?

A. I worked for three years, then left, then went back for a year and a bit."

A little later Gardaí asked:

"During the World Cup in 2006 were you 100 per cent sure you were working?"

To which he answered:

"Yes."

He was then asked

Q. If these enquiries were made for records for your employment and with the Department of Social Welfare could show

that you were not working throughout this period, what would you have to say?

A. I would be shocked."

22. The appellant at trial and before this Court is very critical of the failure of Gardaí to seek out and obtain records to establish whether he was or was not an employee of VOW at the relevant times and the hours that he worked during the relevant periods.

23. The respondent says that no prejudice was visited on the appellant, as his wife gave evidence to the jury that he was employed at the relevant time and worked from 2pm to 10pm. The prosecution say that the criticism of the Gardaí is unjustified, that it is speculative to suggest that work records could ever have been obtained putting him on the premises for the entirety of a particular shift. They point to how the judge dealt with this issue when he came to address the jury. At that stage the judge said:

> "In this case delay has been compounded by an omission on the part of the Gardaí to investigate certain matters which were asserted by the accused in his interviews and upon which the Gardaí were cross examined by counsel for the accused. The onus of proof is at all times on the prosecution. The prosecution has not brought forward evidence to negative the accused's assertion that he was in employment in June/July of 2006 or to negative his assertion that phone records would show that he had no contact on his phone during the relevant period. Now the accused's wife has given evidence to you that her husband was in employment during the relevant time so that there must be a reasonable doubt as to whether this was so. It seems to me that absent Garda investigation of this matter you should give the benefit of that doubt to the accused and to conduct your deliberations on the relevant charge, which is count 7, on the assumption that the accused was in employment at the relevant time."

24. The Court is not persuaded that this issue was as crucial as the defence suggested. First of all, it is worth bearing in mind that there was no suggestion that Mr. K.K. was present in the complainant's home to watch the entire or any substantial portion of the match. Her evidence was that he came into the house, she thinks the door was open, went to see her mum, and he then came in to the sitting room where she was and started to unzip her trousers. The incident lasted three or four minutes, as when her mother called, she went to the kitchen. Given the proximity of the appellant's work place, the possibility of a brief visit to the complainant's home during a break could not be excluded. [The prosecution established that the appellant's bank card was used on many occasions at a time when Mr. K.K. said he would have been working.] The judge in the context of the application to stop the trial and, indeed, the jury at a later stage would have been entitled to have regard to the fact that the complainant was not claiming to have a vivid recollection of the game, she doesn't remember who was playing, her memory relates to the fact that she was wearing a Brazilian soccer shirt. The Court has already drawn attention to a degree of equivocation as to whether this occurred in a weekday or in the course of a regular weekend visit. Brazil played two weekend matches when it is not suggested that the complainant would have been working with VOW. The Court hastens to acknowledge that in cross examination defence counsel did succeed in having the witness confirm that the incident had occurred on a weekday. In a situation where the complainant's memory is linked to the shirt she was wearing, it is not without significance that during the early stages of a soccer World Cup, Brazil went out at the quarter-final stage, and there were several matches played on any day. The Court's overall impression is that while the issue of what shifts the appellant worked in June/July 2006 was understandably a subject of considerable interest to the defence, the issue was not of such enormous significance as to require that the trial be halted, in particular if one bears in mind that there is no certainty whatever that had work records been sought in 2013, any further information would have been obtained. The Court has already drawn attention to what the judge had to say to the jury when charging them in relation to this issue. The Court is quite satisfied that the judge's approach to the application was a proper one. Yes there had been delays, but they were not of the same order of magnitude as had arisen in many other cases. The issues raised by the defence were carefully considered. The judge was entitled to conclude that this was not a case for halting the trial but that it was a case for giving particular directions to the jury. The Court cannot and does not criticise the approach of the trial judge and must reject this ground of appeal.

25. Overall, the Court has not been persuaded that the trial was unfair or unsatisfactory or that the verdict is unsafe. Accordingly, the Court must dismiss the appeal. It does so because it is firmly of the view that the judge was entitled to conclude that this was a case that was an appropriate one to be considered by a jury.