THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 137

The President
Sheehan J.
Edwards J.

342/12

The People at the Suit of the Director of Public Prosecutions

Respondent

v

C.D.

Appellant

Judgment of the Court delivered on the 18th day of June 2015, by Mr. Justice Sheehan

Introduction
1. On the 2nd November, 2012, the appellant was convicted of four counts of sexual assault contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990 and four counts of 'rape under section 4' contrary to section 4 of the Criminal Law (Rape)(Amendment) Act 1990.

2. On the 11th November, 2012, the trial judge imposed a sentence of nine years imprisonment on each of the counts of 'rape under section 4' and three years imprisonment on each of the counts of sexual assault, all of which were to run concurrently.

3. The appellant now appeals his said conviction on the grounds that the trial judge erred in (i) allowing a particular presentation of the video of interview of the appellant, (ii) in refusing to discharge the jury at the close of the prosecution case, and (iii) in refusing to discharge the jury at the close of the case.

Background
4. The facts of the case can be summarised as follows. The offences complained of were committed at the complainant's family home on three occasions between the 1st January, 1999 and the 31st December, 2002, while the appellant was babysitting for the complainant's family. The appellant was aged between sixteen and twenty years during the relevant period of offending and the complainant was aged between three and seven years.

5. The appellant, while babysitting for the family, on three occasions entered the complainant's bedroom and sexually assaulted the complainant by touching the complainant's penis, by exposing his own penis to the complainant, by having the complainant touch his penis and by placing his own penis into the complainant's mouth. On the third occasion, the appellant also inserted his penis into the complainant's anus.

6. On the 24th May, 2011, the complainant brought these matters to the attention of the gardaí. The appellant was arrested on the 7th June, 2011, and detained. He was interviewed on two occasions and these interviews were taken down in writing and videotaped. The appellant made admissions during the course of the interviews in respect of all the matters of which the complainant had made a complaint.

7. The complainant gave evidence on the first day of trial. He testified to three occasions where he was subjected to sexual offences including sexual assault and rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act 1990.

8. Detective Garda Long, the arresting member, testified at the second day of the trial and the edited notes of both interviews were read into the record during the course of his examination-in-chief. These edited notes had been agreed with the appellant's legal team. It was put to Detective Garda Long in cross-examination that the admissions made by the appellant at interview were untruthful and it was further suggested that other matters, such as the appellant's own history of abuse, may have influenced the answers the appellant gave.

9. Following the evidence of the gardaí, the prosecution applied to have those videotapes of interview played to the jury in order to allow the jury to assess the demeanour of the appellant at interview in circumstances where it was being contended that the appellant had answered questions untruthfully due to being put under pressure by the gardaí. The trial judge noted at that juncture that the memorandum of interview had been edited and the respondent noted that the videos may also have to be edited. It was conceded by the appellant that the presentation of the evidence in this way was not prejudicial. The trial judge agreed, but noted that matters discussed in the interview that ought not to be admissible would have to be edited.

10. There was then a discussion as to the practicalities of presenting the videos of interview with certain portions edited. While efforts were made to inquire as to whether the videotapes could be edited to avoid any interruptions, ultimately it was decided that it would not be possible and the trial judge ruled that the tapes were to be played in the following fashion: the Garda would stop the tape where necessary, skip over the objectionable portions and then start the tape up again. The videotape was then played to the jury in this manner. This ruling ensued despite several objections by the appellant to the effect that the procedure proposed was manifestly prejudicial and carried with it risks for the prosecution in terms of what might be adduced.

11. The following was recorded in the original unedited memo of interview:

> *"A: I stopped babysitting after that case ended and I wasn't around kids. I haven't been around kids since. I don't live in Naas now."*

This portion had been removed from the agreed memorandum read on day two of the trial because it specifically referred to another case in which the appellant had sexually assaulted a child. Counsel for the appellant submitted that the following part of the above section was played to the jury in the course of playing the video of interview:

> *"I wasn't around the kids. I haven't been…"*

It was submitted that the effect of this was that the original editing of the memorandum of interview, which was read to the jury earlier that day, had been nullified. Furthermore, that additional material relating to the complaint had been given in the course of playing the video, which had been necessarily edited out of the memorandum of interview. It was thus submitted that it must have been clear to the jury that certain parts of the video were intentionally being skipped over which brought the relevance of the portions being shown into question.

12. The defence made an application at the close of the prosecution case to discharge the jury given the manner in which the video of interview had been presented and the evidence which had been adduced.

13. The respondent opposed this application on the basis that the portions played were not prejudicial and that the reference made to the appellant's avoidance of children was not prejudicial as a similar matter arose later in the interview. Regarding what had specifically been heard by the jury, the trial judge, in refusing the application for discharge, noted:

> *"Looking at the memo, it seems to me that the substantial matter that had to be excluded was the reference to a case ending, because this was the matter that would certainly suggest to anyone reading it that the accused wasn't a person of – wasn't necessarily a person of previously good character… But that had not been breached, either in terms of the memo, or in terms of what was played in court."* (Emphasis added).

14. The appellant gave evidence on the third day of trial and under cross-examination he denied the allegations and claimed that he made admissions because he felt intimidated by the gardaí. Following the charge, one of the jury's requests was that they could be given access to copies of the transcript of the garda interview. The foreman outlined that this was due to the fact that in the agreed memorandum of interview given to the jury, the following reference appeared:

> *"Q – You said earlier you stopped babysitting because you didn't want to have access to kids?"*

and there had been no such prior reference to this in the agreed memorandum of interview. Indeed, the prior reference had been edited out of the memorandum of interview given to the jury but was heard by accident when the video was played. In response to this, the trial judge indicated to the jury that they had all of the evidence in the case.

15. The defence reiterated its application to discharge the jury in light of that query which was again refused by the trial judge.

This Appeal

16. As outlined, the appellant appeals his said conviction on the grounds that the trial judge erred in allowing a particular presentation of the video of interview of the appellant, in refusing to discharge the jury at the close of the prosecution case and in refusing to discharge the jury at the close of the case.

17. The appellant relied on the case of *The People at the Suit of the Director of Public Prosecutions v McGartland* (Unreported, Court of Criminal Appeal, 20th January, 2003) and submitted that while the admission of evidence which is more prejudicial than probative will not automatically result in the discharge of a jury, whether prejudicial evidence should properly lead to the discharge will depend on whether the evidence relates to a "live issue."

18. The appellant submitted that the truth of the admissions he had made in interview was clearly in dispute in the course of the trial and, following the evidence of an agreed memorandum of interview, the respondent then adduced evidence that substantially departed from that agreed memorandum. The evidence adduced, which was not agreed to be adduced, made reference to the fact that the appellant had not been around children since these incidents. Thus, the appellant submitted that this could have left the jury in no doubt that there were further matters relating to the appellant's interaction with children that had been deliberately excluded from them which could only have led to significant speculation. Furthermore the appellant submitted that the presentation of this evidence, with live editing, inevitably created considerable prejudice in the minds of the jurors and was not capable of curable direction by the trial judge.

19. Counsel for the respondent placed reliance upon the case of *Dawson and Dawson v Irish Brokers Association* [1998] IESC 39, where O'Flaherty J. commented:-

> *"Once again, it is necessary to reiterate, as this court is doing with increased frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the very last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought."*

Indeed counsel for the respondent submitted that there was no prejudice caused to the appellant in this case and that part of the videotapes were played in order to allow the jury to assess the demeanour of the appellant at interview in circumstances where it was being contended that the appellant had answered questions untruthfully due to being put under pressure by the gardaí. The respondent submitted that no reference to a previous case was played in front of the jury and that it did not adduce evidence which departed from the agreed evidence to any significant extent.

Conclusion

20. The Court notes that although seven words, which were part of an answer that the parties in this case had agreed should be edited out, were mistakenly played for the jury the appellant does not appear to have suffered the prejudice contended for by him. The concern expressed was that by virtue of hearing those words the jury might have been induced to speculate as to why it was that he "wasn't around the kids" as they had heard him say on the tape, and that they might further speculate that it was because the appellant was not a person of good character. However, the jury could not have been induced to speculate in that way by the words played in error in circumstances where, separately, they had been expressly told, on an agreed basis, that the appellant had told the gardaí that he stopped babysitting because he didn't want to have access to kids. In one of the memoranda of interview read by agreement, and which was subsequently given to the jury without objection, a Garda is recorded as asking the following question:

> *"You said earlier you stopped babysitting because you didn't want to have access to kids?"*

21. The Court has taken the view that, in light of this extract, the foreman's question was understandable. However, the critical point is that this information was presented to the jury on an agreed basis. That being the case, the appellant cannot tenably contend that

the recording played in error could have prejudiced him in the minds of the jury. The material put before the jury by agreement could much more readily have given rise to the apprehended prejudice. However, that was something done by agreement and the appellant cannot be heard to complain about it now.

22. In light of this, this Court is of the view that it cannot be said that the appellant was further prejudiced by the playing of the words complained of and that, therefore, the trial judge, in his refusals to discharge the jury, was correct in all the circumstances.

23. The Court is thus satisfied that in all the circumstances the trial judge was fully justified in exercising his judicial discretion as he did. Accordingly, the appeal is dismissed.