



THE COURT OF APPEAL

[210/18]

The President

Kennedy J.

Donnelly J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARTIN SHERLOCK

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2019 by Birmingham P.

1. In May 2018, following a contested trial in the Central Criminal Court, the appellant was convicted of the offence of rape, and subsequently, on 2nd July 2018, he was sentenced to a term of five years imprisonment. He has now appealed against both conviction and sentence; this judgment deals with the conviction aspect only.

2. At this stage, only one issue remains live in the appeal. It is said that the conviction was rendered unsatisfactory by reason of the Judge's refusal to give a "good character" direction to the jury on the lines of the English case of *R v. Vye* [1993] 1 WLR 471.

3. The background to the case is that the complainant, a non-national, was active on a dating site known as "Badoo". On that site, she encountered the appellant and they began to communicate via WhatsApp. They made arrangements to meet at the home of an aunt of the complainant. For various reasons, there was, at one stage, some uncertainty about whether the proposed meeting was going ahead and this resulted in the complainant making contact with another individual on Badoo and meeting up with him. In fact, the meeting between complainant and appellant went ahead. The complainant, according to her evidence, was insistent that if they were to have sexual intercourse, that the appellant would have to use a condom. The complainant and the appellant engaged in consensual sexual intimacy, but the prosecution case was that despite her insistence that she would not agree to sexual intercourse without a condom, that the appellant penetrated her without using a condom. Thus, the prosecution case was that there was vaginal penetration without consent, constituting the offence of rape. At a stage when the appellant was leaving the premises, he returned and stole the complainant's mobile phone. Consequently, a charge of theft appeared on the indictment and he entered a plea of guilty to this.

The Application for a DPP v Vye Direction

4. When counsel began to address the issue of a "good character" direction, he was quickly interrupted by the Trial Judge, it appears that similar applications had been made in the past and the Judge indicated his firm view that there was no requirement for such a direction in Irish law. The Judge is criticised by the appellant for this approach. Firstly, it is said that the stage has been reached where a good character direction should be given. Secondly, the Judge is criticised for intervening too early, and in effect, shutting down the application before it was fully opened.

5. The Judge's charge in this case was spread over two sessions. At the finish of the first session, the Judge invited requisitions. Defence counsel responded:

"Counsel: I am sure your Lordship has heard of the Vye direction where a person is of good character.

Judge: I have. I'm against you Mr. O'Carroll.

Counsel: You're against me?

Judge: I am. That's an introduction from English law which is referred to in that excellent publication, *The Judge's Charge*. It has not yet, as far as I know, been acceded to by any Irish judge, am I wrong?

Counsel: Well, apparently -

Judge: No, forgive me, I'm sorry for interrupting you, please proceed, I do apologise.

Counsel: No, just in answer to your question, Mr. Reynolds told me that he did a case before Judge White in the Circuit Court and he acceded to the application, but I'm not aware of any other authority.

Judge: Yes. No, that's alright, I interrupted you, perhaps you'd just, I mean, forgive me, as I understand it, it is an

injunction to the jury when deciding on whether or not the accused – deciding on his credibility to have regard to his previous good character.

Counsel: It is, Judge, yes, Judge, or their entitlement to do so.

Judge: I'm so sorry, I'm sorry for interrupting.

Counsel: That's okay Judge.

Judge: Am I alright, you can read it out to me, Mr. O'Carroll, just so that we can be quite clear about it.

Counsel: Yes, there appears to be two limbs to it.

Judge: Yes.

Counsel: In the first place, the defendant has given evidence of his good character.

Judge: Yes.

Counsel: And, as with any man of good character, it supports his credibility.

Judge: Yes.

Counsel: This means it is a factor which you should take into account when deciding whether you believe his evidence. And the second limb is in the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime. Now – these are matters to which you could have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this, you are entitled to take into account everything you have heard about the defendant, including such matters as his age, etc, having regard to what you know about this defendant. You may think that he's entitled to ask you to give (considerable) weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

And in that context, in R v. Vye, the Court also stated that the trial judge should instruct the jury that evidence of good character cannot amount to a defence.

Judge: Yes.

Counsel: And I would just say, in this particular case, there is evidence of good character, no previous convictions.

Judge: Correct.

Counsel: And I'd just ask your Lordship to adopt it.

Judge: No, forgive me for being so quick to intervene. I've had this requisition before, I don't criticise you for making it, obviously. I take the view that that English authority is not binding on me, obviously.

Counsel: Obviously.

Judge: And that does not form part of the law of Ireland, that it would be, were I to do it de novo, so to speak, it would introduce or inject into Irish law, and particularly in terms of charging juries, a further layer, shall we say, of complexity when these matters, in my view, can be quite properly left to the common sense and good judgment of jurors.

Counsel: Okay.

Judge: So, those are my reasons."

The Court's understanding is that the trial Judge was correct in his view.

6. Before turning to consider the issues raised, it is worth considering just what evidence there was in the case in relation to character. This was a case where the accused had elected to give evidence in his own defence. The first question that had been put to him in direct examination was to ask him whether he would give the jury a little bit of information about his background. The appellant responded:

"I'm from Navan, County Meath, I've lived there my whole life. I went to school in Gormanstown College for six years, which is a boarding school. I spent one year studying Computer Science. From there, I went into an IT role at a basic level, and for the past ten years, I've been working my way up the ladder. I'm currently a senior business analyst for an investment company on Leeson Street."

In the usual way, he was cross-examined and after the cross-examination by way of what was technically re-examination, counsel asked:

"Counsel: With my friend's permission, there was just one matter I didn't sort of cover.

Judge: Certainly.

Counsel: Mr. Sherlock, in the context of your life, have you ever been in trouble with the law before?

Answer: No.

Counsel: Do you have any sort of previous convictions of any description?

Answer: No."

7. This was not a case where any particularly great emphasis was placed by the defence on the good character of the accused, either as an aid to the jury in assessing his credibility, or as to whether he was the sort of person with a propensity to commit an offence of the nature charged. As we have seen, the information that he had no previous convictions was introduced only at the re-examination stage. The argument that there should be a "good character direction" does not arise from the facts of the case, but rather, the argument arises out of a suggestion that in all cases where the accused is of good character, however that is to be defined, the Judge is obliged to give a good character direction. Indeed, there are aspects of this case which sit uneasily with the notion of good character. Insofar as it is suggested that a jury should be more willing to accept the credibility of someone of previous good character, in this case, there is the countervailing fact that the accused admitted telling lies to the complainant to explain his non-availability at a particular time. This took the form of a fabrication in relation to a non-existent brother studying for the Leaving Cert who was in need of support. More relevantly, having engaged in sexual intimacy, he then proceeded to steal the phone of his partner, hardly the act of a person of good character.

8. The appellant has not pointed to any authorities to suggest that the giving of a good character warning is or has become mandatory in Ireland. In those circumstances, the appellant has looked to England and Wales, and to some extent, further afield. The question is not whether there is anything that would prevent a judge giving a direction or warning, though that would be unusual, but rather, whether the giving of such a warning is mandatory. It is beyond doubt that it has always been open to an accused to put his character in issue, to ask the jury to take the view that a person of his background character does not have the propensity to offend in the manner alleged, and to argue that as a person of good character, should be approached as a person of enhanced credibility.

9. In Ireland, the view has been that while there is nothing whatsoever to stop the defence putting character in issue, there is no all-purpose mandatory requirement for the Judge to give a direction in relation to it. If the issue is presented as a mainstay of the defence case, then it may be that the Trial Judge will address the issue when he or she comes to put the defence case or prosecution case before the jury. However, if the issue is less central, then it is likely to feature less prominently in the Judge's charge. In this case, the Judge commenced a section of his charge in which he reviewed the evidence of Mr. Sherlock by referring to the appellant's origins and background, but without additional comment. One could well think of examples where the background and prior good character of an accused would be central to a defence case and would likewise likely feature prominently in the charge. Take the example of someone of impeccable prior character, a pillar of the community, charged with shoplifting theft, and the defence was that they had forgotten to pay for a particular item, an item of no great value. In that case, one could imagine that the defence would beat the drum about how unlikely it was that someone of such good character would deliberately engage in shoplifting and how the denials of shoplifting at interview stage and/or in Court should carry great weight. In such a situation, the Judge would have to put those arguments that formed part of the defence's case before the jury. One would expect to see the Judge doing just that, but that would happen without elevating what was in issue to the status of a "warning", in the sense of a "Casey warning" or a "delay warning".

10. It appears that, for many years in England and Wales, the position of the English courts was that a trial judge had no obligation to give a direction in relation to good character, or indeed, an obligation to even remind the jury that such evidence had been given. However, it appears that from 1989 onwards, there was a change, and what had once been a matter for discretion now became a matter of general practice, that a warning should be given, and that in turn evolved to a situation where the giving of a good character direction was a mandatory requirement.

11. However well-intentioned the development may have been, it cannot be said to have worked entirely smoothly. Difficult questions have arisen as to who is and who is not a person of good character, an individual may not have had any convictions recorded, but there may be information to suggest that regarding him as a person of good character would involve a departure from reality. In other cases, there may be some convictions recorded, but they may not be of major significance, may go back a long time or be stale or spent. Further difficulties have also arisen for co-accused where one is of good character but the other is not. Does giving a good character direction in respect of one serve to unfairly disadvantage the other? In the case of *R v. Hunter* [2015] 1 WLR 5367, the Court of Appeal of England and Wales, sitting as a specially constituted five-judge court, dealt with five appeals against convictions. In the course of a lengthy judgment delivered by Hallett LJ, the Court reviewed a great number of authorities. The sense one has is that the rule of practice as it developed has given rise to an extraordinary number of appeals and it is not easy to reconcile how all those cases have been disposed of. The history outlined in *Hunter* is not a clear or happy one and it does not encourage much confidence in the practice. The observations of Lord Taylor of Gosforth CJ at paras. 66 and 67 are of interest:

"66. The *Vye* and *Azis* principles began life as good practice. Good practice became a rule of practice in *R v. Vye* because the Court needed a pragmatic solution to a problem of inconsistency and uncertainty. The underlying principle was not, as some have assumed, that a defendant who had no previous convictions could never receive a fair trial unless he benefited from a good character direction. Yet, the principles in *R v. Vye* and *R. v Azis* have now been extended to the point where defendants with bad criminal records (as in these appeals), or who have no right to claim a good character, are claiming an entitlement to a good character direction. Many judges feel that, as a result, they are being required to give absurd or meaningless directions, or ones which are far too generous to a defendant. Fairness does not require a judge to give a good character direction to a man whose claim to a good character is spurious (per Lord Steyn in *R v. Azis* [1996] AC 41, 52, and Taylor LJ in *R v. Buzalek* [1991] CLR 115.

67. Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend."

12. Different approaches to this issue have been taken in different parts of the common law world, as emerges from the discussion on the issue in the 'Judge's Charge in Criminal Trials' by Coonan & Foley. In Australia, in *Melbourne v. R* [1999] HCA, a majority of the High Court of Australia refused to regard the giving of a good character direction to be mandatory in nature. In Canada, though, the courts have taken the view that once some evidence of an accused's good character has been adduced, that there should be a good character direction. The approach in New Zealand is different again, in that the courts have taken the view that where there is evidence of good character, it is advisable that a trial judge direct the jury on the relationship between that evidence and the accused's credibility or propensity to commit the crime. However, in New Zealand, the bar as to what constitutes good character evidence is set higher.

13. We have referred to some of the difficulties that have emerged in England and Wales. We think it likely that such difficulties would emerge on the horizon here if a requirement for a mandatory direction was adopted. Other difficulties, too, can be envisaged. It is not unusual for persons without previous convictions to be brought before the courts to face charges of sexual abuse, particularly of minors, sometimes with multiple complainants, and sometimes in a situation where the offending is alleged to have occurred over many years. How would a mandatory warning be dealt with in such a situation? In such cases, applications for severance of the indictment are not uncommon. How would a mandatory warning work in such circumstances? Would a warning have to be given in the first case

to come to trial, even though there were cases involving multiple complainants pending in the system? We find ourselves asking the question canvassed at para. 67 of *R. v. Hunter*: does the fact that someone has no previous convictions make it any the more likely that they are telling the truth? Does the average juror need a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend? We do not believe that there is empirical evidence available to support the proposition that a person without previous convictions is more likely to be telling the truth, nor do we believe that the average juror requires a direction from the trial Judge that a defendant who has never committed an offence of the kind charged may be regarded as less likely to have offended in the fashion alleged.

14. Overall, we are not at all persuaded that it is appropriate to set Irish law on a new course. We have no doubt that this is what we are being asked to do against a background where there has been no general practice of giving such directions, and certainly that there has been no mandatory requirement to give them. We draw attention in that regard to remarks by Murray CJ. in the case of *DPP v. Joseph O'Reilly* [2009] IECCA 118. At an early stage of the judgment, he observed:

"[o]ne other aspect of the grounds of appeal was also not pursued, namely, that he learned trial judge erred in failing to give special directions to the jury as to the weight they should attach to the evidence of the appellant's good character as adduced by the defence. This also is understandable. The learned trial judge, having drawn to the attention of the jury that evidence had been adduced by the defence to this effect, it is difficult to see how his charge to the jury could be considered unfair or incomplete in that respect, notwithstanding some English authorities relied upon as to a practice followed in England and Wales."

We acknowledge that the remarks were clearly obiter in a situation where the ground of appeal was not pursued, but we think they were declaratory of Irish legal opinion.

15. Overall, we do not believe that this was a case where any particular direction was called for and we do not believe that this is the occasion to suggest that Vye directions should become a new norm.

16. Accordingly, we dismiss the appeal.