



THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

223/15

Respondent

V

R.S.

Appellant

JUDGMENT of the Court delivered on the 17th day of October 2017 by

Mr. Justice Hedigan

Introduction

1. This is an appeal against conviction. On the 2nd July, 2015, the appellant was convicted by majority verdict of the 25 counts on the indictment. There were 8 rape counts and 17 counts of sexual assault. There were two victims. One incident of sexual assault was perpetrated against the first victim when she was 12 years old, this was count 25. The remaining counts relate to the assault and rape of the second victim over a period of time from when she was aged 10 to aged 14. The offences took place in the 1990s. The first victim made a complaint to the Gardai in 2010. The second victim made a complaint in 2012. At the time of the offences the appellant was in a relationship with the mother of the victims.

2. The appellant was sentenced to 9 years imprisonment on the 28th July, 2015..

Appellant's submissions

3. The sole ground of appeal is that the jury verdict is perverse, unsound and unsafe. It is submitted that the verdict in relation to the first victim is unreliable. The date of the complaint is unclear but was between June, 1992 and 1993. Evidence was given that a complaint was made, about a year later, to the victim's mother, who was in a relationship with the appellant, and the victim was given an opportunity to confront the appellant but the complaint was withdrawn with the victim stating that she made it up because she wanted her dad back. It is also submitted that she gave evidence that she told nobody but later testified to telling a boyfriend. She gave evidence that she did not disclose the assault to her sister, the second victim, until 2010, however, the appellant's sister testified that she had heard about the first victim's allegation from the second victim much earlier. Evidence was given that the victims were bridesmaids at the wedding of their mother and the appellant in 2006. Further that the first victim was instrumental in reconciling them following a break up in 2004. Evidence was also given that the first victim let the appellant babysit her son and that the appellant had been the her sponsor for her confirmation in 1992.

4. In relation to the second victim it is submitted that the verdict is unreliable because the evidence as to dates was unclear. The second victim stated the abuse took place between June, 1993 until in or about 1997. Evidence was given that the appellant did not move into the house until February, 1994. The second victim gave evidence of her complaint to her sister but this was only grounded on information her sister had provided in relation to an allegation involving her son and the appellant. There was evidence that the appellant sent the second victim text messages and she accepted that she never met with him to discuss the content of the messages or any allegations. There was evidence that the second victim allowed the appellant to babysit her son. There was evidence given that the victims conducted a campaign to target and tarnish the appellant's name. It was put to the second victim that she had apologised to the appellant. The appellant's submissions refer to the second victim's evidence in relation to the appellant's assertion that she made inappropriate advances. There was evidence of a letter sent from the appellant to the victims' mother. There was evidence given that the second victim was overheard apologising to the appellant but that person did not hear the context of the comment.

5. It is submitted that the verdict in relation to count 25 is unreliable due to the evidence given by the victims' mother to the effect that the first victim made a complaint in or about 1993 and then withdrew that complaint. Their mother then married the appellant in 2006. Her evidence that the appellant swore he didn't do it. Their mother gave evidence was that the first victim apologised to the appellant for alleging he acted inappropriately towards her son.

6. It is submitted that the verdict on count 25 is unreliable due to the evidence of the appellant's sister that she heard of the complaint and the reason for its withdrawal from the second victim in 2003. The first victim said that she told no one with the exception of her mother.

7. It is submitted that the verdicts on counts 1 to 25 were unreliable as the appellant during Garda interview and during his evidence to the Court denied the allegations. The appellant's submissions refer to his evidence in relation to the withdrawn allegation that he did something untoward to the first victim's son.

8. The Court is referred to the remarks of Lord Justice Widgery in *R v. Cooper* (1969) 53 Cr. App. R. 82 and *R v. Lake* (1976) 64 Cr. App. R. 172 where it was held that once all procedures were followed the Court was still entitled to ask itself a subjective question in relation to the verdict to determine if it was happy to let the verdict stand or if there remained "some lurking doubt in our minds which makes us wonder whether an injustice had been done".

9. The Court is referred to *The People (DPP) v. Egan* [1990] (Unreported, Supreme Court, 30th May, 1990) where McCarthy J. held that to allow a verdict to be overturned on the basis of subjective considerations such as "lurking doubt" and "gut feeling" would "be a denial of the validity of Trial by Jury". In the same case however O'Flaherty J. held that where a jury decision was based on "tenuous evidence" the Court of Criminal Appeal is entitled to intervene.

10. It is submitted that the evidence left to the jury in this case was tenuous and this Court is therefore entitled to intervene. The verdict being founded on such unsatisfactory evidence means the trial was unsatisfactory and the verdict is unsafe and

unsatisfactory.

Respondent's submissions

11. It is submitted that the sole ground set out on the notice of appeal is that the decision of the jury was perverse. There has been no basis put forward for this contention and none exists. The verdict is consistent with the majority of the jury having accepted the evidence of the complainants.

12. It is submitted that issues regarding the accuracy, credibility and truthfulness of witness are quintessentially matters to be considered and resolved by the jury. As was held in *O'Callaghan v. Attorney General* [1993] 2 I.R. 17 at 25 the purpose of the jury is to get a cross section of society who under the judge's guidance will use their experience and common sense to decide if the accused is guilty or innocent.

13. The Court is referred to O'Malley, *The Criminal Process*, (Dublin, 2009), paras 23.12 and 23.13 and his comments on *Egan* to the effect that it found that the appeal court could not substitute its own subjective view for that of the jury verdict. The author notes that setting a verdict aside on the grounds that it is perverse is meant to be an exceptional case. It was noted in *The People (DPP) v. C(P)* [2002] 2 I.R. 285 that the appeal court does not have the benefit of seeing and hearing the witnesses. Further the Court of Criminal Appeal is especially hesitant to interfere when the main ground relates to a witness's credibility.

14. In *The People (DPP) v. Tomkins* [2012] IECCA 82 at paras. 21 and 22 the Court referred to C(P) and noted that the Court will be very slow to interfere once it is satisfied that the "judge has placed all relevant matters before the jury, and has fully and properly instructed them as to the burden and standard of proof". The Court may interfere if the direction has not been adequate but this is a separate issue to finding fault with the jury's verdict. To quash there must be very serious doubts about credibility of central evidence or the verdict was against the weight of the evidence. The court will look at all the evidence in assessing this.

15. In *The People (DPP) v. Arundel* [2015] IECA 16 this Court held that in a 12 day case with substantial cross examination of the complainant that it would be unrealistic to expect no inconsistencies. There was substantial consistency and a degree of residual inconsistencies was to be expected. These were matters for the jury to resolve. To set aside a verdict for being perverse a significantly high bar must be met. The Court endorsed O'Malley's view that this ground is intended to be an exceptional measure.

16. In *The People (DPP) v. Nadwodny* [2015] IECA 307 this Court held that the hurdle created where no direction has been sought nor relevant requisitions raised could be gotten over only where otherwise there would be a fundamental injustice to the convicted person. A finding that the verdict of the jury was perverse is only made where there are exceptional circumstances and there is a very strong basis for it.

17. The appellant quoted at length from the transcripts on matters of credibility and reliability. These are quintessentially part of the jury's fact finding function. It was for the jury to determine what weight to attach to matters such as the babysitting, reconciliation of the appellant relationship and involvement in the wedding. It was for the jury to decide on the relevance and weight to attach to the evidence of the appellant's sister and that of the overheard apology.

18. The first victim maintained the allegation under detailed cross examination and was consistent in her evidence. There was no objection to the respondent's application to amend the indictment on count 25 in relation to dates. No direction application was made at the close of the respondent's case.

19. The second victim also maintained her allegations on detailed cross examination and was a consistent witness. The respondent refers the Court to the appellant's text and letter and his explanations offered and his denial of the allegations.

20. It is submitted that the verdict is consistent with the evidence and should not be set aside.

Decision

21. Mr O'Hanlon, senior counsel for the appellant, opened this appeal by relying upon the judgment of Widgery L.J. in *R. v. Cooper* [1969] 53 Criminal Appeal Reports 82. It must be stated at the outset by this Court that the rationale of this judgment has been comprehensively rejected by the Supreme Court in its judgment delivered by McCarthy J. in *The People (DPP) v. Egan* [1990] WJSC-SC 360 in the most trenchant terms. This is a judgment binding upon this Court by reason of the fundamental common law doctrine of *stare decisis*. At p. 12 of the report furnished to the Court, McCarthy J., in considering submissions based upon *R. v. Cooper*, stated as follows:

"I share the views expressed by Griffin J. in *Mulligan* [1980] 2 Frewen 6 and by Hedderman J. in the instant case. The jurisprudence of the Court of Criminal Appeal since 1924, as, from time to time, endorsed by this Court, is clear. Save where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no appeal has no power to interfere with it. The concepts of lurking doubt, feel of the case, gut feeling, or back of my mind, are foreign to the judicial role as I understand it. Juries are regularly enjoined to disregard their personal feelings or their subjective assessments and to concentrate on the evidence as it is sworn in the witness box. In many instances what may be difficult and obscure to a trial judge is crystal clear to a jury: the converse is also very possible. To permit verdicts on criminal trials to be upset upon such subjective consideration would seem to me to be a denial of the validity of trial by jury."

22. Thus in Ireland, issues relating to the credibility of witnesses are quintessentially for the jury to consider and resolve. The rationale behind this helpfully outlined, again by the Supreme Court, in *O'Callaghan v. The Attorney General* [1993] 2 IR 17 at p. 25 as follows:

"The purpose of trial by jury is to provide that a person shall get a fair trial, in due course of law and be tried by a reasonable cross-section of people acting under the guidance of the judge, bound by his directions on law, but free to make their findings as to the facts. The essential feature of a jury trial is to interpose between the accused and the prosecution people who will bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused."

23. Mr O'Hanlon further relied upon certain passages from the judgment of O'Flatherty in *Egan* (cited above) where he stated:

"Similarly if "tenuous" evidence were left to the jury and the jury acted on it I have no doubt that the Court of Criminal Appeal would be entitled to intervene. A verdict founded on such unsatisfactory evidence would mean that the trial itself was unsatisfactory and that the verdict founded upon it was unsafe and unsatisfactory."

Having considered this passage and reviewing the authorities, Prof. Thomas O'Malley, in his book *The Criminal Process* stated as follows at para. 23.13:

"The possibility of setting aside a verdict on the ground of perversity is not therefore entirely ruled out, but it is clearly intended to be an exceptional measure. The reasoning of the Supreme Court in *Egan* and of the Court of Criminal Appeal in later cases, such as *The People (DPP) v. C.(P.)* [2002] 2 IR 285, is that the appeal is heard on transcript. The appeal court, unlike the jury, has not had the opportunity of hearing the evidence at first hand or of observing the demeanour of witnesses. The Court of Criminal Appeal is particularly reluctant to interfere with a verdict when the credibility of a witness is the sole or principal ground of challenge. This was reiterated in *The People (DPP) v. C.(P.)* where the Court, per Murray J., said the assessment of a witness's credibility and the weight to be attached to a witness's evidence is "manifestly within the province of the jury". In that case, the Court was satisfied that the judge had put all issues concerning the credibility of a witness and related matters fairly to the jury and that he had instructed them properly as to the burden and standard of proof. This ground of appeal failed, although the applicant succeeded on another ground relating to corroboration. An appeal court might well interfere if the judge's direction to the jury concerning witness credibility was clearly inadequate, but this would be an entirely different matter from finding fault with the verdict of the jury itself."

This Court considers this to be an accurate statement of the law.

24. More recently in *DPP v. Cecil Tomkins* [2012] IECCA 82 at para. 20 the Court of Criminal Appeal stated:

"Clearly therefore, the possibility of a verdict being set aside on the grounds of perversity exists, but it is a very exceptional jurisdiction. Also in *The People (D.P.P.) v. C. (P.)* [2002] 2 I.R. 285, Murray J. emphasised the reluctance of the Court of Criminal Appeal to interfere with a verdict in a situation where the credibility of a witness is the sole or principal ground of challenge..."

Finally, in *DPP v. Arundel* [2015] IECA 16 Edwards J. observed at para. 28 of the judgment of the Court:

"... The jurisdiction undoubtedly exists to set aside a verdict on the ground of perversity, but the bar is set at a significantly high level in respect of that."

25. In this case two complainants gave clear evidence in Court as to the sexual assault on one and sexual assault and rape of the other. The first complainant was challenged on her evidence that she had repudiated her complaint when she was in or about 13 years of age. This was the main ground on which her credibility was challenged. She gave the explanation that she did this so as to avoid hurting her mother or her sister. She was challenged on this but she maintained her evidence despite cross examination by experienced counsel for the appellant. There was nothing tenuous about her evidence. She explained herself and the jury clearly believed her and disbelieved the contrary evidence on her complaint given by the appellant. This judgment of the jury on credibility is manifestly within their province and nothing presented in either the written or oral submissions provides any basis whatever upon which this Court, applying the law as cited above, could interfere.

26. The challenge to the second complainant's evidence was in essence a contradiction by the appellant of her evidence. He maintained that the sexual activity he admitted had occurred had been initiated by her when she was between 10 and 14 years of age. Like her sister she was cross examined by experience counsel on behalf of the appellant but maintained her evidence. There was also the evidence of the text message she received on 9th April, 2010 from the appellant and a letter from him to the complainant's mother both apologising for what had happened with the two complainants. These were capable of corroborating the complainant's evidence and were before the jury. Again, there was nothing tenuous about this evidence. The second complainant was clear in maintaining her evidence and the jury had ample opportunity to judge her credibility and that of the appellant. They made that decision which was manifestly theirs to make. This Court cannot and will not interfere with it. The appeal is dismissed.