



**THE COURT OF APPEAL**

**No. 258/15**

**Birmingham J.  
Mahon J.  
Edwards J.**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Jason Sherin**

**Appellant**

**JUDGMENT of the Court delivered on the 31st day of July 2017 by Mr. Justice Birmingham**

1. On 5th November, 2015, following what was effectively a one day trial, the appellant was convicted at Cork Circuit Court of one count of sexual assault and one count of assault causing harm. A number of grounds of appeal were formulated and written submissions were prepared. The Court feels it necessary to say that it has not found the submissions, which were prepared by solicitor and counsel who were not involved at trial, to be helpful in the context of the case as they were not grounded in the facts of this particular case. However, at the hearing of the appeal, senior counsel who had not been involved in the preparations of the submission informed the Court that from his perspective there was one net issue in the case relating to the admission of evidence by reference to the doctrine of recent complaint in sexual assault cases.

2. By way of background, it should be explained that the complainant has an indirect family link with the family of the appellant and the other co-accused and they were therefore known to her. While this was not spelt out in any detail at trial, it appears that family law issues including questions about access to the grandson of the complainant arose. There were tensions involving the family of the complainant and members of the Sherin family.

3. The events with which the trial court was concerned occurred on 6th June, 2013. On that occasion, the complainant retired to bed early to watch television, leaving her son, who is the injured party on the assault causing harm charge, watching television downstairs. She heard a banging noise, got out of bed, looked out the window and could see people but did not at first realise who they were. She began to make her way downstairs but encountered people on the stairway. In evidence, she said that she identified Gordon Sherin, Thomas Sherin, Jean Sherin and Jason Sherin as those who had made their way into the house. Her evidence was that the group who had come to the house were shouting at her and that she saw the appellant, Jason, going into the sitting room where her son was. She sought to go back upstairs to access her phone. She gave evidence that individuals were pushing her up the stairs and they were hitting her. When she reached the bedroom, Gordon and Thomas were punching her. Jason Sherin, the appellant, also came to the bedroom. According to the complainant, Jason had grabbed her between the legs and told her that he was going to "f\*\*\* her up the a\*\*\*". She was wearing tracksuit bottoms and he had grabbed her on the outside of her clothes, on her "private parts". She said that, after that, Jason Sherin punched her and she was repeatedly punched.

4. Thomas Sherin and Gordon Sherin pleaded guilty to counts arising from the incident before this matter came for trial. The defence case was that while Gordon and Thomas were involved in an assault, that Jason Sherin, the appellant, was not there and indeed Thomas Sherin was called as a defence witness to give evidence that Jason Sherin was not present on the occasion of the incident.

5. The complainant was the first prosecution witness. When she concluded her direct examination, she was cross examined and it is of some relevance in the context that has arisen about the admissibility of the complaint evidence that the cross examination focused heavily on a statement of complaint taken from her by Gardaí on the morning after the incident.

6. The second prosecution witness was the injured party on the s. 3 assault who is a son of the complainant. No particular issue arises in relation to his evidence in the context of the issues on this appeal. However, it is to be noted that his evidence was that, while he was watching a film downstairs, Jason and Gordon Sherin, who were known to him as they were his nephew's uncles, entered the room. He gave evidence that Jason punched him in the face, on the left side of the face, dazing him. He gave further evidence that Jason Sherin "knead him in the testicles".

7. When the injured party concluded his evidence, prosecution counsel stated that the next witness was Garda Cliona O'Brien. Counsel added:-

"In fact, Judge, she is simply giving evidence of the receipt of the telephone call, the 999 call. I don't know if my ..."

Defence counsel then interjected to say:-

"If she could be tendered, Judge, because I have one or two questions for her."

In very brief direct evidence, prosecution counsel adduced that the witness was on duty in a Garda patrol car when she received a telephone call at 10.45 on 6th June, 2013 to attend at a particular premises. She went to the scene and entered the house. Counsel, having said that she would be leading the evidence, then said:-

"I think then that certain reports were made to you and my colleague may wish to ask you certain questions in that regard?"

The cross examination was also very brief, the only relevant question being as follows:-

"...and the call that was put out was an assault?"

This question drew the response:-

"That's correct."

Defence counsel then said:-

"Thank you very much, Garda O'Brien."

At this stage the judge asked:-

"Was there any indication of the number of persons?"

To which prosecution counsel responded:-

"Yes Judge ... this was a report made by the complainant at the time."

8. Defence counsel then addressed the judge, saying:

"The Garda can give evidence of what she knows Judge, that is all I am asking her. Anything further, Judge, would be hearsay."

At that point, the judge asked the jury to go to their room. In their absence, he asked:-

"What was the report?"

The prosecution counsel responded:-

"Yes, Judge, the report was that L.O'S. [the complainant] and her son both alleged that at least four persons, three male and one female had entered their home forcibly. They identified the persons as Jean Sherin, a female, Jason Sherin, Gordon Sherin and Thomas Sherin."

In response to a question from the judge, it was clarified that this was what had been said by the complainant to Garda Cliona O'Brien on the night in question. Defence counsel submitted that this was hearsay. He said that this was not something that the Garda saw but that it went to the witness's consistency, and he submitted that this was only permissible in certain cases, but that this would not be one. Prosecution counsel indicated that one of the situations in which it was permissible is in the case of a sexual assault. At this stage, defence counsel said:-

"Yes, Judge, if a sexual assault is complained of. That was not complained of at the time, an assault was complained of at the time."

Prosecution counsel corrected her colleague, saying:-

"No, Judge, that's not correct. The culprits during the incident are said to have threatened to rape L.O'S. My colleague is looking at the wrong witness."

Defence counsel appeared to acknowledge this because he said:-

"Oh, I beg your pardon, Judge, sorry."

9. The judge then ruled as follows:-

Judge "I am going to allow evidence be adduced as to the nature of the complaint and the allegation as to how many were in it."

Prosecution Counsel "Yes Judge."

Judge "Don't go any further than that as it were. Because the lady is being attacked on her credibility as to how many people were in the house at that time."

Prosecution Counsel "Yes Judge."

Judge "And what she said on the night is in my view relevant to the jury."

10. Defence counsel indicated that he would like an opportunity to check the law but the judge commented that he was not going to break the trial any further.

11. When the jury returned to court, prosecution counsel asked Garda O'Brien:-

Q. "I think that when you arrived at the scene I think you spoke with the occupants, who were L.O'S. and F.D., and can you tell the Court was there an indication given to you as to how many persons had been present in the house at the time?"

A. "Yes. I was informed that three males and one female had entered their home."

Q. "And in terms of Ms. O'S., just Ms. O'S., was any allegation made to you in relation to Ms. O'S.?"

A. "Yes. She alleged to me that she had been physically assaulted and that they had threatened to rape her."

12. This Court begins its consideration of the issue by commenting that it would have been preferable if the judge had not intervened after defence counsel had concluded his cross examination of Garda O'Brien. This was an adversarial trial, like all criminal trials. The intervention was not designed to bring clarity to an area where there was confusion or uncertainty but to address a topic that the prosecution was content to leave alone.

13. Counsel for the appellant submits that the evidence given by Garda O'Brien in the presence of the jury was inadmissible, that it could not be admitted by reference to the doctrine of recent complaint in sexual cases, rebuttal of an allegation of recent fabrication or by reference to any other rule of evidence. Counsel submits that in truth this was not an allegation of sexual assault and insofar as there was any such allegation it was not consistent with her evidence at trial. This Court does not agree that the evidence given in the presence of the jury was inconsistent with the testimony of the complainant. The prosecution was constrained by the terms of the judge's ruling to adduce the evidence in a particular way. Because of the judge's ruling, the Garda was not in a position to give the details of what was said to her on the night of the incident by Ms. O'S. However, it is unrealistic to suggest that what she says was said is in any way inconsistent with the evidence of the complainant.

14. The significance of what transpired at trial has to be seen against the background of the cross examination of the complainant. She was asked and confirmed that she made her statement to Gardaí on the following morning, the incident having occurred in the late evening. It was put to her that in the course of that statement she had said:-

"I came out of the room and started to come down the stairs. Half way down the stairs or so I could see Jean Sherin, she was standing in the hall. I could also see Jason Sherin and these people are known to me."

It was put to her that at another point in the statement she had said:-

"I turned around to run upstairs to get my phone and around that time I heard Jean shouting, 'Jason don't'."

It was suggested to her that from her statement it emerges that what she remembered was Gordon particularly, then Jason coming into the room and then that Jason grabbed her and made a threat to her. She was asked to confirm that in her statement that she had said that she took the threat very seriously, believed that he would do that and that she was scared out of her mind. It was suggested to her that in the statement she had said nothing about the appellant striking her at any stage other than the sexual assault, to which she responded:-

"I could take a punch but to be told what he told me was terrifying. A punch off him, I could have took or take, I took, but the sex, to be told that, it did stick in my mind."

15. Before Garda O'Brien was called to give evidence, which took place at the behest of the defence, the jury had, by that stage through the cross examinations conducted on behalf of the accused, heard that, in statements made on the morning after the incident by Ms. O'S., she had named Gordon, Thomas, Jean and Jason Sherin. The complainant's statement had assigned roles to them, certainly to the three males. The jury had also heard that her son had also made a statement which had referred to Jason Sherin and assigned a specific role to him as the one who punched and dazed him. What followed thereafter was, by reference to the run of the case, of no real significance whatever. In these circumstances, the Court cannot take the view that what transpired during the evidence of Garda O'Brien, which was the only point pursued at the appeal hearing, rendered the trial unsatisfactory or the verdicts unsafe. Accordingly, the Court must dismiss the appeal against conviction.