THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

109/14

The People at the Suit of the Director of Public Prosecutions

Respondent

v

D.M.

Appellant

Judgment of the Court delivered on the 16th day of July 2015 by Mr. Justice Sheehan

1. This is an appeal against conviction.

2. On the 6th February, 2014, the appellant was convicted on three counts of sexual assault following a jury trial at Limerick Circuit Court and was subsequently sentenced to three years imprisonment with the final twelve months suspended for a period of five years from the 10th March, 2014, on each count, all sentences to run concurrently. A condition of the suspended sentence was that the appellant was bound to the peace for that period of time and also directed to comply with all directions of the probation service during the five year period. In addition, the appellant was placed on the sex offenders register for a period of ten years.

3. The two grounds of appeal are:

> (1) The learned trial judge erred in refusing the defence application to discharge the jury and grant a separate trial when hearsay evidence potentially admissible against the co-accused Ms. K, but inadmissible against the appellant was admitted in the case. The jury was not directed that this evidence could not be used in deciding the case against the appellant.
>
> (2) The learned trial judge erred in refusing counsel for the accused's application to discharge the jury when in response to a question from the jury, counsel for the prosecution in the presence of the jury suggested that an answer to the jury question, the jury should be directed that certain types of evidence were inadmissible and that their query related to a type of second hand species of inadmissible evidence. This necessarily adverted to the fact that there was other evidence in the case that that had been withheld from the jury and would lead inevitably to speculation as to the nature of this evidence. As a result of prosecuting counsel's decision to express this view in the presence of the jury the deliberation process was irreparably tainted and the learned trial judge should have acceded to the defence counsel's application to discharge the jury.

4. In order to consider these grounds of appeal and the submissions made in support of them and the submissions of counsel for the Director of Public Prosecutions it is necessary to set out the background to these offences.

5. In May 2008, the appellant, his partner Ms.K and her daughter all moved into an address in Limerick and lived together there as a family unit. Prior to that, they had been living together as a family unit in an apartment for about two years.

6. The complainant told the court about going there when she was thirteen and reaching the age of fourteen on the 26th May, 2008. She told the court that the appellant has put his hand inside her knickers on two occasions and she also told the court about the appellant lying on top of her and feeling her in the breast area over the quilt. She said this happened regularly. She also alleged that the appellant had exposed himself to her and made indecent comments.

7. The appellant denied all the allegations made against him when interviewed by the gardaí.

8. The appellant was charged with 20 counts of sexual assault against KE in May 2008 and December 2009, which represented one count per calendar month. The appellants partner K was charged with one count of endangering her daughter.

9. Both the appellant and Ms. K were tried together and it is relevant to note here that no application was made by the appellant for a separate trial prior to the start of the trial.

10. The trial took place over six days and the jury acquitted Ms. K on the charge of endangerment and also acquitted the appellant on 17 of the 20 counts of sexual assault against him, convicting him on counts 1, 5 and 11 on the indictment as follows: count 1, sexual assault in May 2008, count 5, sexual assault in September, 2008, Count 11, sexual assault in May 2009. All the offences were alleged to have been committed at the family home. The matter that gave rise to the first ground of appeal occurred when the complainant in giving her evidence referred to a meeting she had with her mother and the appellant's brother in a public house late at night.

> "Q. MR O'SULLIVAN: All right. And tell me in relation to this pub, who was out in the pub?
>
> A. Well, it was -- I'll start from the start. I was at home. It was about 12 o'clock. D was after coming in. I could hear him downstairs, but I couldn't hear my Mam awith him. And then my Mam rang me and she said that would I come up to the pub to get her. I left. I went up to the pub. And then when I walked in --

Q. Who walked in?

A. When I walked into the pub it was around closing time, so there was only about five, six people there. My Mam turned around and said, "Isn't it true?" And I said, "What?" And she goes, "Doesn't D touch you?" And that's when I just ran into the bathroom, because it was the first time that she ever actually mentioned, you know, brought it up or anything. So that's when I knew that she knew and she wasn't doing nothing about it. And when I went into the bathroom a woman that was in the pub came in and she asked me was I all right, and I didn't even know her. She was a complete stranger --

MR SAMMON: This is entirely hearsay. It is not admissible evidence.

Q. MR O'SULLIVAN: Well, anything that the lady said to you -- don't say anything what he lady said to you?

A. Sorry.

MR SAMMON: Allegedly said …

Q. MR O'SULLIVAN: Allegedly said. And you came out -- you were in the bathroom?

A. Yes, sorry.

Q. You came out, what happened when you came out?

A. When I came out of the bathroom my Mam and PM -- well, we all left and there's an alleyway beside the pub. And my Mam was after telling P and P was the one to say ring the guards.

Q. Now, just -- just a moment there now --?

MR SAMMON: Again hearsay is not admissible.

Q. MR O'SULLIVAN: Just -- you just have to say things that your mother said to you. All right?

A. Oh, she was just saying that isn't -- when I first walked in she said, "Isn't it true?"

Q. Yes. All right. Now, when she said that, where was PM?

A. Sitting right beside her.

Q. And when --?

Q. JUDGE: He was sitting what?

A. Beside her.

Q. MR O'SULLIVAN: And what did she say exactly in his presence?

A. She said -- when I first walked in she said, "Isn't it true?" And I said, "What?" And she goes, "Doesn't D touch you?"

Q. How many times did she say that?

A. I can't remember.

Q. And what was -- was DM present when this was said?

A. No.

Q. PM was present?

A. Yes.

Q. What was his reaction to it?

A. He wanted to ring the guards and --

MR SAMMON: No, what PM said is not admissible evidence. It's entirely hearsay and it should not be adduced by Mr O'Sullivan --

MR O'SULLIVAN: A reaction in the presence of the -- S is admissible.

MR SAMMON: Well, that maybe in relation -- then I have an application for a -- to you, Judge, in that case. You have to hear me as the judge of law."

11. As the respondent points out in his written submissions, this ground has two components. The first being that the trial judge ought to have discharged the jury or granted a separate trial as a result of the evidence of the exchange between SK and the appellant's brother. The second aspect of this ground of appeal is the submission that the jury should have been directed that the evidence complained of was not to be considered as against the appellant.

12. In the course of his oral submissions, counsel for the appellant contended that his argument on both grounds of appeal was strengthened when one examined the verdict in light to the evidence. Counsel submitted that it was hard to understand the verdicts and especially hard to understand the finding of guilt in respect of the first count.

13. Counsel on behalf of the appellant submitted that at the very least the guilty verdicts were inconsistent the findings on the other

counts where the jury had acquitted the appellant and that this inevitably led to a conclusion that the jury had improperly engaged in speculation in arriving at the three guilty verdicts.

14. Counsel for the respondent on the other hand submitted that in the first place the evidence, while not admissible against the appellant was admissible against EK. The only portion of implied evidence which the defence were not on notice of, was the remark made by the appellant's brother that the gardaí should be notified. Counsel for the respondent submitted that the trial judge was right not to discharge the jury and relied in particular on the judgment of the Court of Criminal Appeal in *The People (at the suit of the Director of Public Prosecutions) respondent v. Kenneth Cunningham applicant/appellant* delivered by Finnegan J. on the 24th May, 2007.

15. With regard to the failure of the trial judge to deal directly with the evidence and how it should not be taken into consideration when considering the case against the appellant, counsel for the respondent pointed out that the trial judge was not requisitioned on this point. Counsel also submitted at the oral hearing that this matter had been addressed by counsel for defence in his closing speech to the jury when he said: "that there has been a reference to a Mr. PM. Not called. No evidence. Does not support what the complainant EK said. We know he made a witness statement, but he is not a witness in this case. You can draw your own conclusions from that".

16. The final ground of appeal arose out of the manner in which the trial judge responded to questions from the jury foreman and the contribution of prosecution counsel to that response. The relevant passage is as follows:

> "JUDGE: Yes, Mr Kiely?
>
> FOREMAN: Yes, your honour. Basically four questions. Will I stand up?
>
> JUDGE: Yes.
>
> FOREMAN: Just when we were given an overview of the case on day 1, we were of the view that there would be a representative from the HSE give evidence and I kind of just want to query what happened this?
>
> JUDGE: Well, that's the first questions, yes.
>
> FOREMAN: The other one is just are we entitled to ask about E's stay in hospital, the circumstances at the time? Number 3, are we entitled to ask about the detailed report written up by ND after E chatted with her on December the 14th?
>
> JUDGE: That's the school -- is she the school principal or the counsellor?
>
> FOREMAN: The counsellor.
>
> JUDGE: Yes.
>
> FOREMAN: December 14th. Is there a written summary of this report? And lastly can we have clarification on the definition of unanimous.
>
> JUDGE: Right. Okay, well the last question is the easiest: unanimous mean all 12 of you have to agree on your verdict. There can be no dissenting voice or no dissenting vote in the deliberations. So, unanimous means all 12 of you have to agree.
>
> Now, with regards to the reference to the representative from the HSE, just bear with me a minute --
>
> MR O'SULLIVAN: I think, my lord, that this issue be canvassed.
>
> JUDGE: Do you want to do that?
>
> MR O'SULLIVAN: It might be better.
>
> JUDGE: All right, we'll come back -- yes, I'll come back to that because I can answer the other question, the second and third questions quite easily I think. Sorry, I beg your pardon, if you just bear with me a minute, one minute, I want to refer to my notes here. With regards to the second and third question, that's to say about the -- inquiring about EK's stay in hospital and about the report from Ms D from the school, we can't refer to them and I can't give you any of that and the reason for that is, as I said, you are constrained by the evidence. You can only consider what was in the evidence and the evidence is what the witnesses said and what's included in the exhibits, including the memoranda of interview; they're part of the evidence as well, and your deliberations have to be confined to within the evidence and you can't speculate about anything that's not in the evidence or why it isn't part of the evidence or what it might have been had such evidence been given, so that evidence wasn't before you, either about particulars of her stay in hospital or about the report from the school counsellor, so they're not just part of the evidence and you can't allude to them. You can't speculate about what they might have been, number 1; and you can't speculate as to why they haven't been given in evidence either.
>
> Now, with regards to the first question, I stand to be corrected by counsel about this, but I understand that when Mr O'Sullivan was either initially addressing the jury panel I think it was - and he'll correct me if I've got this wrong - I don't think he said that a representative from the health executive would give evidence but that there might be reference to the person from the Health and Safety Executive, just to alert you that if anybody had got a problem or knew anything about that that they shouldn't serve on the jury. Is that --
>
> MR O'SULLIVAN: That's correct. I think it primarily was that. With leave of my colleagues, there's people who there might be reference to the child and psychiatric services - there might be a reference during the case. It was not that any witness was going to be called.
>
> JUDGE: Yes, so that means that if any member of the jury panel had any connection with the child or psychiatric sections of the Health Service Executive in Limerick that they shouldn't serve on the jury. That was the only -- because there might have been a reference to it --

MR O'SULLIVAN: Yes.

JUDGE: -- but it was never the -- I think --

MR O'SULLIVAN: It was done out of the utmost caution.

JUDGE: Yes, from an abundance of caution but there was no intention or notice given that anybody from the Health Service Executive was going to give evidence.

MR O'SULLIVAN: Yes, that is correct.

JUDGE: Does all that --

MR O'SULLIVAN: Just in relation to just the other matters I think I'd say, with leave of my colleagues, that conversations with the counsellors and so forth come under the hearsay, the definition of hearsay. That might be useful to explain that to the jury, my lord, that the counsellor, that he had agreement as to when a complaint was made to the counsellor to, if you like, to put a stop in terms of time to show how the matter arose but then, in terms of jurors, hearsay is --

JUDGE: All right. Well now, as I said at the very beginning, the trial has to be conducted in accordance with the law of evidence and the laws of evidence are applied in a criminal trial and one of the most important rules of evidence, or it's often cited anyway, is the rule against hearsay evidence. Neither side is allowed adduce evidence which is not directly in the knowledge of the witness. The witness can only give evidence of what's directly in the witness's own knowledge. The witness cannot repeat what he or she was told by somebody else so indirect knowledge is not admissible as evidence. There are two reasons for this; well, there are maybe a number but there are two principal reasons for this: the first is that anybody giving evidence of facts, that evidence has to be tested for its reliability and veracity under cross-examination. If a person is giving second-hand evidence or indirect evidence, that - the evidence - cannot be properly challenged under cross-examination. That's the first reason. The second reason for the prohibition on second-hand evidence is that it's likely to get garbled and you wouldn't want "Dúirt bean liom go ndúirt bean léi"; it can get completely garbled and become unreliable if somebody's repeating not -- what somebody had said, rather than giving their own direct evidence. And the reason why this rule is strictly established is there have been good reasons that second-hand evidence is just too unreliable and not fair. So, any of these matters which were alluded to by Mr O'Sullivan was -- are second-hand evidence and therefore are not admissible for the very good reason but there was never -- Mr O'Sullivan tells us that there was never any intention of calling any representative from the Health Servicer Executive but merely the jury panel was being cautioned that if they knew, had any connection themselves with the child or psychiatric sections of the Health Service Executive, they shouldn't serve on the jury.

Does that answer the four questions? Maybe not the way you wanted, but that's the answer. You have to confine yourself within the four walls of the evidence, that's the real answer to the question."

17. Following this exchange counsel for the appellant applied to the trial judge to discharge the jury because the explanation of the hearsay rule in light of the intervention by prosecution counsel would only lead the jury to speculate as to why they had not heard from the guidance counsellor. In the course of his oral submissions as already noted, counsel for the appellant suggests that the jury verdicts were at least inconsistent and lends support to the view that the jury did in fact speculate. Counsel for the respondent strongly submitted to the court that it would be inappropriate for this Court to investigate the verdict, in the sense of entering into a consideration as to what factors did or did not influence the jury and submitted that the jury was entitled to have the hearsay rule explained to it particularly in view of the fact that in the course of the trial, evidence that the complainant had reported matters to her school guidance counsellor was admitted without challenge by the defence. Counsel for the respondent also relied on the trial judge's concluding remarks when he stated:-

"You have to confine yourself within the walls of the evidence. That is the real answer to the question."

Conclusion

18. While counsel for the appellant developed an argument in the course of the oral hearing tending to show that the verdicts were inconsistent, thereby suggesting that the jury engaged in speculation, the questions asked by the jury indicated a high level of involvement by jurors. This Court accepts the submission of counsel for the Director of Public Prosecutions that it would be improper for it, at the very least in circumstances of this case to examine how the jury reached its verdict. No overriding obligation of fairness requires this Court to do so.

19. The court is satisfied that the learned trial judge was correct in his refusal to discharge the jury following the introduction of remarks attributed to the appellant's brother by the complainant in the course of her evidence in chief that "he wanted to ring the guards".

20. The appellant had not been on notice of this evidence and it was certainly prejudicial and inadmissible as against him. However, situations frequently arise in jury trials where this type of situation occurs and it is generally dealt with in the course of the trial judge's charge. In this case the trial judge made no direct reference to this evidence. Counsel for the appellant in his closing speech dealt with it as already outlined and in the course of his charge the trial judge stated: "the defence case is also what Mr. Collins and Mr. Sexton have said to you in their closing address . . .". It is highly unlikely and indeed there is no suggestion made by counsel for the appellant that this was an oversight, that it was an oversight on the part of counsel for the appellant not to requisition the trial judge on this matter. In considering the second ground of appeal, this court is satisfied that the jury having asked a relevant question was entitled to hear an explanation as to why they were not allowed to hear certain evidence, particularly in view of the fact that this related to evidence whose admissibility and relevance had been acknowledged in the course of the trial namely, the fact that the guidance counsellor in the school had received a complaint from the complainant. Perhaps it would have been wiser for the trial judge to have heard the parties in the absence of the jury before embarking on his explanation, but no injustice arose as a result of this, particularly bearing in mind the trial judge's concluding remarks namely: "you have to confine yourself within the four walls of the evidence".

21. Counsel for the respondent relies on the judgment of the Court of Criminal Appeal in The people at the suit of the *Director of Public Prosecutions v. Kenneth Cunningham*, Court of Criminal Appeal, Record No. 90/106 delivered by Finnegan J. In the course of that judgment, the court cited with approval the dicta of O'Flaherty J. in a civil case *Dawson and Another v. Irish Brokers Association*, (Unreported, Supreme Court, 6th November, 1998) in which he stated:-

> "Once again, it is necessary to reiterate, as this Court is doing with increasing 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. They are quite capable of accepting a trial judge's ruling that something is irrelevant, or should not have been given before them, as well as in the face of adverse pre-trial publicity."

22. This Court is satisfied that the trial judge considered carefully both applications to discharge the jury and in refusing to grant either application correctly exercised his discretion. Accordingly the appeal is dismissed.