THE COURT OF APPEAL

[50/20]
[56/20]

The President
Edwards J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

KK

APPELLANT

AND

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

DF

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 8th day of April 2022 by Birmingham P.

1. On 12th November 2019, following a trial which had commenced in the Central Criminal Court on 30th October 2019, both appellants were convicted of certain offences. In the case of DF, he was convicted of an offence of rape (oral rape) contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. The appellant, KK, was convicted of one count of rape contrary to s. 48 of the Offences Against The Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981, as amended. Subsequently, both accused were sentenced to terms of eight years' imprisonment, with the final twelve months of each sentence suspended. Each accused has now appealed their conviction. While the appeals have been heard together, it is in fact the situation that there is little overlap between the issues that arise on each appeal.

Background

2. The background to the trial is to be found in events that occurred in the early hours of 16th April 2017, in the apartment of KK, in a provincial town in the west of Ireland. Earlier on in the evening, on 15th April, a number of young people had been attending a birthday party in a licensed premises in the town. It would seem that the appellant, KK, invited a number of people who had been present at the birthday party, including the complainant, Ms. G, to come back to his house.

There was an amount of social interaction between the complainant and the accused, now appellant, KK, the nature and extent of which was explored during the trial.

3. At one point during the course of the evening, the complainant was in the kitchen of the apartment, and her evidence was that her next memory was of being in the appellant's bedroom. Her memory was of lying on her back with her head to the headboard of the bed, her legs arched, and the appellant, KK, having intercourse with her. She gave evidence that the appellant hit her a number of times and applied pressure to her throat. She indicated that she scratched the appellant a number of times on the back. When questioned about this in the course of the Garda investigation, KK took the position that all sexual activity was consensual, and in particular, that he had smacked her face, her cheeks and also her bottom, and held her by the throat all at her request. So far as KK was concerned at trial, the issue was whether what had occurred was consensual or not; the defence was that what had occurred was entirely consensual.

4. At trial, the complainant gave evidence that she blacked out again before the intercourse with the appellant KK concluded. The complainant's next memory following this involved being in bed with the co-accused, DF. She recalled lying on her stomach with her hands under her chest. She said that the appellant DF turned her over and put his penis into her mouth. At trial, she was uncertain in her recall as to whether they had sexual intercourse or not. So far as DF was concerned at trial, the defence was that what had occurred was entirely consensual.

Grounds of Appeal

5. KK has raised a number of grounds of appeal, these being:

(i) The judge misdirected the jury and was in error in implying that the complainant's consent was vitiated, or not truly consent in the eyes of the law, due to her self-induced intoxication. In the event, this ground was not pressed.

(ii) In light of the introduction of the term "comatose" as descriptive of the complainant's condition by counsel for the prosecution, for which there is no evidence, the judge misdirected the jury and erred in reading repeatedly the said description of her summation of the evidence.

(iii) The judge erred in law and failed to protect the accused's rights in insufficiently correcting the interpretation placed upon the complainant's account, that the complainant had "blacked out" and/or was comatose, notwithstanding that her evidence merely asserted that she could not account for, or remember, certain portions of the night in question.

(iv) The judge failed in her charge to highlight the differences between the case to be met by KK and the co-accused, and in particular:

(a) the complainant's visible physical intimacy with the appellant in the hours preceding sexual intercourse;

(b) that the complainant had been alone among numerous guests at the house party in depositing her belongings in KK's bedroom prior to entering the party;

(c) that the complainant had donned a T-shirt of the appellant prior to sexual intercourse;

(d) that witnesses present had assumed and predicted by what they observed that the appellant and the complainant would "get together" subsequently,

none of which applied to the appellant's co-accused, despite which each was convicted by the same numerical majority.

6. In addition to the grounds referred to, a motion was brought before the Court seeking to add and argue an additional ground as follows:

(v) The trial judge erred in law in directing the jury in relation to the significance of the fresh complaint evidence by advising them expressly or by implication that it "strengthened" the complainant's testimony, but then stating that it did "not constitute corroboration." However, the trial judge then further erred in law by failing to explain what corroboration was.

7. In the case of the appellant, DF, the issue at trial was also in relation to consent (or the lack thereof). The ground that he raises is that the judge erred in law and in fact, or in a mixed question of law and fact, in failing to accede to an application for a direction on the grounds that the State had failed in its duty to gather and preserve evidence. This is particularised on the basis that the State failed in its duty to gather and preserve the clothing that was worn by DF and to then have the clothing tested for DNA. Linked with this, it is contended that the State failed in its duty to preserve and disclose all relevant phone records.

The Grounds of Appeal of KK

8. As indicated, the first ground of appeal advanced on behalf of KK is that the judge misdirected the jury and was in error in implying that the complainant's consent was vitiated or not truly consent in the eyes of the law due to her self-induced intoxication. Notwithstanding that the issue was not pressed, for the sake of completeness, we can say that we have reviewed the judge's charge, and we can find no basis whatever for this complaint; that there was no requisition on this issue is scarcely surprising. The only reference by the judge to the question of intoxication and consent was, when dealing with the law applicable to the case, she read, without comment, from the Criminal Law (Sexual Offences) Act 2017, which states a person does not consent to a sexual act if "(c) he or she is incapable of consenting because of the effect of alcohol or some other drug".

The "Comatose" Issue

9. We turn then to what might be described as the "comatose" issue. The context for this is that, in the course of her direct evidence, the complainant had been asked by prosecution counsel, after the complainant had described the activity involving KK, how it stopped or came to a conclusion, to which she responded, "I don't know. I blacked out." The cross-examination also contained reference to blacking out, the subject having been introduced in those terms by defence counsel. In re-examination, prosecution counsel had asked ". . . [a]nd this whole thing was because you were comatose and you were not in a position to . . .". At that stage, there were interjections from both defence counsel, to which prosecution counsel initially responded by saying "[w]ell, she gave evidence she was blacked out." As the judge began to make an observation, counsel's further response was to say "I withdraw that, sorry", and then reformulated her question "… you were blanked out and you weren't in a position to know if someone else had or hadn't."

10. In the course of her charge, the judge reviewed the evidence in the case and did so without any reference to the comatose comment of prosecution counsel, though it had been an issue that had featured in the speech by defence counsel on behalf of DF.

11. However, while the jury were deliberating, they returned to court and asked that the evidence of the complainant would be read to them. The application was not a surprising one in circumstances where the judge had told the jury that there was a transcript available to her and that she was in a position to read any sections of the evidence that the jury wished. In responding to the jury's request, the judge read the direct evidence of the complainant, the cross-examination and re-examination of the complainant, including the fact that counsel for the prosecution had used the word "comatose", and had then withdrawn it. It is important to appreciate that "comatose" was not the judge's language, and that the judge did not use the word "comatose" as her language at any stage.

12. It is in these circumstances that we are bound to say that we do not see this as a point of substance. The complainant had used the phrase "blacked out" on multiple occasions, and we do not see prosecution counsel's paraphrasing by inserting the word "comatose" particularly significant in the context of the case. In any event, following protests, prosecution counsel immediately withdrew the word, and thereafter used the phrase "blacked out", and perhaps on one occasion, "blanked out". As we have seen, the judge's only reference to comatose was when responding to a request to read the evidence of the complainant. We are in no doubt that this ground must be rejected.

Ground (iv)

13. Ground (iv) states: "The judge failed in her charge to highlight the differences between the case to be met by KK and the co-accused, and in particular:

(a) the complainant's visible physical intimacy with the appellant in the hours preceding sexual intercourse;

(b) that the complainant had been alone among numerous guests at the house party in depositing her belongings in KK's bedroom prior to entering the party;

(c) that the complainant had donned a T-shirt of the appellant prior to sexual intercourse;

(d) that witnesses present had assumed and predicted by what they observed that the appellant and the complainant would "get together" subsequently,

none of which applied to the appellant's co-accused, despite which each was convicted by the same numerical majority."

14. From the outset, it might be noted that this issue was not the subject of a requisition. We have to say that we found the ground as formulated very surprising indeed. During exchanges with counsel in the course of the appeal hearing, members of the Court made the point that what would seem to be sought was that the jury would have been told that the case against DF was a very strong one, in order to indicate by way of contrast that the case against KK was not as strong. We pointed out that if the judge had said anything remotely of that nature, there would have been a very real unfairness to DF, which would probably have provided him with an unanswerable ground of appeal.

15. In fairness to counsel for KK, he accepted the point made by members of the Court, and said that, on reflection, he was really making the case that there should have been separate trials.

His difficulty in advancing that argument is that there was no application for separate trials before the case commenced, or at any point during the trial. Just as significantly, the question of separate trials was not raised in the grounds of appeal, though a motion has been brought to add a further ground relating to the judge's treatment of recent complaint and corroboration. In circumstances where the question of separate trials has never surfaced at any point, we do not see this as an argument to which we can give consideration. Insofar as the ground is advanced on the basis that the jury should have been told that the case against KK was not as strong as the case against DF, we have no hesitation in rejecting this ground.

Recent Complaint Evidence

16. The motion brought in relation to this point was deferred to be dealt with alongside the substantive hearing. In the course of the appeal hearing, we did not rule formally on whether we would permit the ground to be argued, but essentially allowed counsel make his arguments on a *de bene esse* basis. The case arises in the circumstances that, in the course of her remarks to the jury, the judge, when dealing with legal issues relevant to the case, commented:

> "Now, I want to cover what's called first complaint. In a sexual assault case an exception is allowed to the ordinary rule of evidence. That ordinary rule is that a person's testimony is not strengthened by their having repeated it to another person. A person who says that they were robbed by the accused is not improved as to their reliability by having previously told one or a number of people that they were robbed by this accused. A limited exception arises in relation to sexual cases. If a complaint is made of a sexual offence at a time which is proximate to the commission of the alleged offence and it is made in a reliable away, in other words not in response to being dragged out of that person by suggestive questioning, then you are entitled to use that complaint as evidence of the consistency of the allegation. However, it does not constitute corroboration. Here the evidence of consistency is the evidence of Mr. O, Ms. M and Mr. J as to what Ms. G said to them and this evidence can be read over to you again if you so wish."

17. There was no issue in relation to what the judge had to say at trial. No objection was taken, either by the prosecution, or by either of the defence legal teams. However, after the trial, following a change of personnel on KK's legal team, the Senior Counsel who had represented him at trial dropped out and was replaced by a different Senior Counsel. The latter had, at one stage, been instructed on behalf of KK, but had not been available to conduct the trial. There was then a review of the transcript precipitating the current complaint.

18. For our part, we do not see any basis for criticising what the trial judge had to say. She correctly told the jury that recent complaint evidence was evidence of consistency. We do not see any basis for criticism of the fact that she told the jury, correctly, that the ordinary rule is that a person's testimony is not strengthened by their having repeated it to another person. The reference to a limited exception arising in relation to sexual cases seems to us quite unobjectionable, particularly when the jury was immediately told that complaint evidence could be used as providing evidence of consistency.

19. The judge is criticised for commenting that the recent complaint evidence did not constitute corroboration; she was perfectly correct that the recent complaint evidence did not constitute corroboration, but she is criticised for not going on to explain to the jury what

corroboration was. We do not believe that there was any obligation on her to do so. We do not think she was using the term "corroboration" in the strict legal sense, where it is a term of art, as in cases such as *R v. Baskerville* [1916] 2 KB 658, but rather, in the more general sense as a synonym for affirming or giving support. To the extent that we permitted the issue to be canvassed, we are in no doubt that as a ground of appeal, it has to be rejected.

20. In summary, we have not been persuaded to uphold any of the grounds of appeal advanced by KK.

The Grounds of Appeal of DF

21. We turn then to the grounds advanced on behalf of DF. DF has two real complaints: one relating to telephone records; and one relating to a failure to seize the appellant's clothes, pertaining to the possibility that if the clothes had been seized and submitted to the Forensic Science Laboratory, DNA evidence might have been obtained from the appellant's clothes. So far as the telephone records are concerned, the position is that we are at a loss to know what the suggested relevance of the phone records is. In any event, the defence had been made aware that redaction had been undertaken on the phone records. If they had any concerns, they were in a position to raise the issue with the judge and obtain a ruling. It was also the case that the actual mobile phone which had been taken from the complainant in the aftermath of the incident was available at trial, meaning that, even at that stage, there was nothing to stop the defence from making an application to view some or all of the redacted entries. We feel bound to say that this sub-ground of appeal is entirely lacking in reality.

22. In relation to the clothing of DF, the position is that he had told Gardaí that the complainant had put her hand inside his trousers, in effect, by way of foreplay. Again, we feel bound to say that we see the arguments here as somewhat contrived. There was no dispute at trial about the fact that the complainant and DF were in close physical proximity; the only issue was whether the sexual activity that occurred was consensual or non-consensual. In those circumstances, it seems to us that the arguments now made, and indeed made at trial, have failed to engage with the reality of the situation. We do not believe that the fact that Gardaí did not seize the clothing of DF has meant that he has been denied an obviously useful line of defence. Moreover, we cannot lose sight of the fact that we are talking about DF's own clothing, in that it was open to him and his advisers to have any tests that they wanted carried out in relation to them. In these circumstances, we have no hesitation in rejecting this sub-ground.

23. In summary, we have not been persuaded to uphold the grounds of appeal as argued by DF.

Decision

24. In those circumstances, we are obliged to dismiss both appeals and to affirm the convictions.