THE COURT OF APPEAL

Record No. 149/2017

Birmingham P.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

K.A.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of June 2018 by Mr. Justice Mahon

1. The appellant has appealed his conviction following an unanimous jury verdict of guilty on the 27th March 2017 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 by s. 21 of the Criminal Law (Rape) (Amendment) 1990. While this judgment is concerned solely with the conviction appeal, the appellant has also appealed his sentence of ten years imprisonment, with the final one year suspended, imposed on the 29th May 2017.

2. The appellant had been returned for trial with a co-accused, P.O'B. P.O'B pleaded guilty so that the trial, which commenced on the 23rd March 2017, proceeded in respect of the appellant alone. It was alleged that Ms. N. was raped by both men in Balleyphehane Park in Cork in the early hours of the morning of the 28th June 2013. It was alleged that the offence took place on a bandstand in the park in circumstances where the appellant forcibly held the complainant while she was vaginally raped by P.O'B. The offence occurred in circumstance where Ms. N. had been drinking in the park with a number of others. She became upset because her phone went missing and her handbag appeared to have been rifled. Within a short period of time all but the two accused men left. She was then forcibly held down while P.O'B raped her. Later, when the two men walked away from her she shouted after them that she intended to go to the gardaí, whereupon P.O'B threatened that he would *"kill her stone dead"*. The appellant, following the incident expressed concern for Ms. N. and hugged her before leaving with P.O'B. Shortly afterwards she reported the incident to a man on a bicycle who allowed her to use his phone to contact her boyfriend. On arrival at her boyfriend's house, and on her boyfriend's advice, she contacted the gardaí. Gardaí took Ms. N. to the Sexual Assault Treatment Unit in the South Infirmary Hospital.

3. The grounds of appeal on which the appellant relies are as follows:-

> (i) the learned trial judge erred in that she incorrectly admitted evidence of recent complaint when same ought to have been excluded;
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> (ii) the learned trial judge erred in that she failed to discharge the jury after prosecuting counsel had made certain comments which were highly prejudicial to the appellant in her closing speech;
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> (iii) the learned trial judge incorrectly curtailed the cross examination of various prosecution witnesses on behalf of the appellant, while limiting the extent to which reference could be made to the statements of persons who were not present at trial to testify;
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> (iv) the learned trial judge incorrectly refused an application to withdraw the case from the jury on the basis that a real risk of unfairness / prejudice has arisen by reason of the unavailability or absence of certain key witnesses at trial, and
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> (v) the learned trial judge erred in fact and in law in refusing to give a corroboration warning as part of her charge to the jury.

4. Ground (v) was not included in the original Notice of Appeal and its addition is subject to a motion for leave to add the ground of appeal. It is contended that this ground of appeal was omitted by mere inadvertence and it is pointed out that the learned trial judge had been requested to give a corroboration ruling and had refused. In these circumstances the court is prepared to permit this ground as an additional ground of appeal.

Recent complaint

5. Following the incident Ms. N. walked from the park onto the road. A cyclist, Mr. G., stopped and spoke to her. She complained to Mr. G. of what had occurred and asked him to use his phone. She telephoned her boyfriend who advised her to call the gardaí which she did. The respondent did not seek to introduce the complaint evidence made to the boyfriend. The appellant agreed to have the evidence of Mr. G. read to the jury pursuant to s. 21 of the Criminal Justice Act 1984. The content of the 999 call made to the gardaí being opened to the jury was objected to. A *voir dire* was held in relation to the admissibility of the content of the 999 call, and at its conclusion the learned trial judge ruled as follows:-

> *"The question I have to address is the complaint made by Mr Grehan on behalf of his client, two questions, first of all, the multiplicity of complaints and secondly the contention that the prosecution are cherry-picking their best complaint, so to speak. As regards the issue of multiplicity of complaints, I have no difficulty and I am perfectly satisfied that it is not prejudicial. In fact that I should phrase it this way, that is it more probative than prejudicial to allow the introduction of certainly the two complaints, that is Mr G. and the 999 call. As regards cherry-picking, I'm also satisfied that the first complaint was made to Mr G. That's perfectly admissible. And secondly, the complaint in relation to the 999 call is also*

absolutely admissible and highly probative evidence."

6. In *DPP v. GC* [2017] IECA 43, Edwards J. in delivering the court's judgment approved and endorsed the following statement from *R v. Valentine* [1996] 2 Cr App R 213, as follows:-

> *"The authorities establish that a complaint can be recent and admissible although it may not have been made at the first opportunity that presented itself. What is the first reasonable opportunity will depend on the circumstances, including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity."*
>
> And
>
> *"We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them, that some victims will find it impossible to complain to anyone other than a parent or member of their family, whereas others may feel it quite impossible to tell their parents or members of their family."*

7. The 999 call was made to the gardaí by Ms. N. in what might be described as the immediate aftermath of the attack on her. She made the 999 call at the prompting of her boyfriend on telling him of what had occurred to her. Both the complaint to the boyfriend and to the gardaí through the 999 call could almost be said to have been contmporaneous with the assault on Ms. N. It would have been, in the court's view, in the particular circumstances of this case, entirely artificial to exclude the content of the 999 call simply on the basis that it was not, literally or physically, the first complaint made. This ground of appeal is therefore dismissed.

Comments made by counsel for the prosecution: Failure to discharge the jury

8. In his oral submissions Mr. Grehan S.C. described this ground as his main ground of appeal.

9. It was maintained by Mr. Grehan that certain comments made by counsel for the prosecution in her closing speech to the jury contravened s. 1(b) of the Criminal Justice Act 1924.

10. Section 1(b) of the Act of 1924 provides as follows:-

> *"1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person: Provided as follows:-*
>
> *(a) …*
>
> *(b) the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:"*
>
> *(c) etc."*

11. The "comment" complained of arose in the course of the cross examination of Ms. N. by Mr. Grehan, as follows:-

> *"Q. Yes. I'm suggesting to you that Mr - Mr A. had been kissing you and that he left to go off to urinate?*
>
> *A. That is so untrue.*
>
> *Q. Yes?*
>
> *A. That is not - are you serious?*
>
> *Q. Yes?*
>
> *A. No, that is not -*
>
> *Q. And that you were kissing, as others describes, Mr O'B. then?*
>
> *A. That's not true, I was not kissing any of them, they started kissing me and -*
>
> *Q. And that whatever sexual intercourse occurred between you and Mr O'B., that Mr A. played no part in it at all?*
>
> *A. That is so untrue.*
>
> *Q. And the only - he was there waiting until Mr O'B. left and the two of them then left together?*
>
> *A. That's so untrue, that is not one bit true, that's -*
>
> *Q. That he wasn't physically involved with you or sexually involved?*
>
> *A. He was physically involved with me.*
>
> *Q. Or part - ?*
>
> *A. He held me down while the other man raped me."*

12. Later, in the course of her closing speech to the jury, Ms. Biggs S.C., counsel for the prosecution, made a number of comments, the effect of which, it is submitted, was to invite the jury to draw inferences adverse to the appellant by reason of his failure to give evidence in the case, in direct contravention of s. 1(b). The comments complained are included in the following extract from Ms. Biggs' closing speech to the jury:-

"Now, there is no doubt that the prosecution case stands or falls on what Ms N. says. It has been put to her during the course of cross examination that at the time of the sexual activity with Mr O'B., that Mr A. was off urinating and had nothing to do with the matter. Now, it's very important, in my respectful submission, that you understand that what is relevant about that question is not the question, it is the answer. And the answer that she gave to that is that assertion put to her that it was untrue. A barrister's questions are not evidence and cannot be evidence. So that assertion that is put to her, that question that is put to her that Mr A. was off urinating, she says it's untrue. And there is not one shred of evidence before you.

There is no evidence from the witness box, there was no admissible evidence supportive of that contention, that factual contention put by the defence that he was urinating at the time that Mr O'B. was engaged in sexual activity with her. That being the case, I do not resile for one second from the central proposition that it is our job to prove each and every ingredient..of the charge. It stands or falls on, as I said, the evidence of Ms N. And for that reason, I have to go through her evidence and make submission to you in relation to aspects of her evidence."

13. Towards the conclusion of her closing address to the jury, Ms. Biggs stated:-

"Now, in my respectful submission to you ladies and gentlemen, you marry the evidence of Ms. N., it's consistent with the CCTV, it's consistent with the evidence of A. McC. It is consistent with the scientific evidence that has been read to you during the course of the case from the Forensic Science Laboratory, the DNA found of Mr. O.B. There is, in my respectful submission, ample evidence upon which you can take the view and should you take the view that the accused, Mr A. is guilty of the offence. I ask you to consider not only as I said, her evidence, the way she gave it, consistency in her account. And while it is undoubtedly our duty and our job to prove every aspect of this case, the central contention put to her that Mr A. was off urinating at the time of the events with Mr O'B., there's not one shred of evidence in support of that contention, not one. And if you are invited to rely upon that, you're invited to speculate. From looking at the rules of law and the actual evidence in this case, and bringing your own judgment to bear, we ask you ultimately to return a verdict of guilty…"

14. It is also complained that Ms. Biggs stated the following:-

"..And ultimately it has never been suggested to her by the defence in any way that she consented to sexual activity with Mr O'B. So she has given that evidence, that evidence of lack of consent, penile penetration and her saying no has gone unchallenged."

And

"You will recall that she indicated that there was a threat made by Mr O'B., "I'll kill you stone divine dead" when she said that she was going to the gardaí. It wasn't suggested to her ever that those words were not said."

15. It is contended on behalf of the appellant that the net effect of these words or comments made by Ms. Biggs was to highlight the fact that the appellant had not given evidence in his own defence and that as such constituted a serious breach of the rule of law in that it undermined an accused person's right not to give evidence in his own defence, although he could do so if he so desired.

16. In her ruling on the application to discharge the jury in the light of the said comments made to them by Ms. Biggs, the learned trial judge stated as follows:-

"I have had reference to the Criminal Justice (Evidence) Act of 1924 and the provision of section 1(b) and we all know what that actually says. Ms Biggs did not go so far as to make any comment adverse in relation to the accused man's failure to give evidence. She indicated that there was no evidence as regards particular matters. There could have been - there could be no difficulty with any suggestion as Mr Grehan has properly agreed that the evidence is in the answer given by the witness. And we know what the evidence was given in cross examination by the complainant, Ms N. I am satisfied that the matter, if it needs to be addressed can be addressed by me telling the jury as I always would, that whilst the accused man has not given evidence, that they cannot attach any significance to that, or speculate about it in any way whatsoever.

I will, as I would always do, emphasise for the jury as to where the burden of proof lies and that burden lies with the prosecution and it never shifts, and it never shifts at any point in time. I can also inform the jury as I will and as I indicated that I would that the evidence is in the answer given by the witness. That the evidence is not by way of suggestion in relation to any matter put by counsel, either by way of suggestion or question asked. That the evidence is in the answer given by a witness in relation to any given question asked. So in those circumstances, I'm not satisfied that Ms Biggs has breached the rule of law as set out - the rule as set out under statute under the 1924 Act. I'm not going to discharge the jury, Mr Grehan."

17. It is noteworthy that the subject matter of the appellant leaving the scene at a crucial time in relation to the incident complained of was introduced by the appellant's own counsel. It was not simply putting a denial of the commission of the crime to the injured party. It was, in a sense, suggesting alibi evidence favouring the appellant in that it suggested that the appellant had left the scene for a specific purpose at that crucial time when Ms. N. claims that she was raped.

18. Questions put by counsel do not amount to evidence so that the suggestion by Mr. Grehan that the appellant had left the scene for the purposes of urinating is not evidence that this in fact occurred.

19. A broadly similar matter arose in *DPP v. P.(P).M.* [2010] IECCA 61. In that case, which concerned a number of sexual offences, an issue arose as to the locking mechanism on a door and there was a reference in the cross examination of a complainant that the accused, if called to give evidence, would give conflicting evidence to that of the complainant on that particular matter. In his closing speech to the jury prosecution counsel specifically referred to the fact that the jury had not had the *best evidence* in relation to the issue, and that such evidence could have been given by the accused.

20. In the course of her judgment Macken J. stated:-

"..The fact that, in the course of cross-examination counsel for the accused may make statements or cross-examine in a manner which may be open to criticism, is not either a reason for permitting counsel for the prosecution to comment on the failure to give evidence, in contravention of the clear rule laid down in the Act of 1924, as occurred in this trial,

even if inadvertently done in response to what was said in cross-examination."

21. In *PM* the appeal was successful. The court ruled as follows:-

> *"This trial was all about credibility, and the above extracts from the transcript and references to the evidence given show that this door/lock/keyhole issue was, and was treated during the course of the trial, as a very significant issue on the aspect of credibility. It would not be exaggerating to say that it was a keystone of the defence. In reality, the learned trial judge failed sufficiently to focus on the issue of the breach of s. 1(b) of the Act of 1924, as she initially stated she would when refusing the application to discharge the jury. She did not relate this fundamental Rule of Law (the right to silence) to the issue in her charge. She should have told the jury, for example, that they had the oral evidence and the physical evidence of the photographs and the piece of the door and that they should determine the question of whether L.K. was correct in her claim that the door was locked from the inside by reference, and solely by reference, to this evidence and that they must totally disregard and put entirely out to their minds any consideration of what the accused might have said had he chosen to give evidence."*

22. In effect, the decision in *PM* was to the effect that the offending comment, of which it must be said was probably a greater infringement of s. 1(b) of the Act of 1924 than what occurred in the instant case, was not necessarily fatal. It was capable of being corrected by the learned trial judge's charge to the jury.

23. Furthermore, the appellant was not the only potential source of evidence that at a crucial time in terms of the commission of the offence the appellant had left the immediate location for the purposes of relieving himself. Mr. O'B might also have given this evidence and was available to do so, had the defence so required. This factor significantly distinguishes the instant case and *PM*.

24. The decision by the learned trial judge to deal with the matter in the course of her charge to the jury to the effect that the appellant had not given evidence and that no significance could be attached to the fact that he had not done so was sufficient to deal with the matter in the particular circumstances of this case. In due course the learned trial judge strongly emphasised to the jury the fact that the appellant's decision not to give evidence was his entitlement and no significance could be attached to it. The court will therefore dismiss this ground of appeal.

The curtailment of the cross examination of witnesses

25. On a number of occasions prosecution counsel objected to certain questions being put to the complainant, Ms. N. by defence counsel in cross examination.

26. The first objection related to a reference, in that cross examination of Ms. N., to what had been stated by Mr. C. in his statement. Mr. C. was not a witness listed in the book of evidence and was not called to give evidence. In the course of his cross examination of Ms. N., Mr. Grehan said:-

> *"All right. Well, (Mr C.) and I don't understand that he is a witness, so bear in mind I'm asking you something that's in his statement, he's not here as a witness as such. He thinks he left at about 12.30 or 1 o'clock?.. And that he was outside in the park with N. O'B., that's your friend, N?.." (and then, quoting from Mr. C.'s statement) "Ms. N. was supposed to be with us, but she went away looking for her 27 phone?"*

27. Counsel for the prosecution objected at this point on the basis that Mr. C. was not a witness and that there was no indication that he would be called as a witness by the defence. The learned trial judge ruled as follows:-

> *"I don't think you can read from the statement and say that (Mr C.) says X or Y, Mr Grehan. I think it's more appropriate to put certain propositions to the witness arising from it… we'll follow the usual rules of evidence, Mr Grehan… You can put the proposition arising from the statement to the witness.. But you're not entitled to quote as such from the statement itself, if you understand me?" To this Mr. Grehan responded that he would "try to comply with the ruling."*

28. At a later stage in the cross examination of the complainant, a statement made by G.D. who was by then deceased, was referred to by Mr. Grehan. In the course of his questioning of the complainant, Mr. Grehan said:-

> *"And Mr (D), the unfortunate deceased suggesting that you weren't asleep.."*

29. This questioning was objected to by counsel for the prosecution. Mr. Grehan responded:-

> *"The witness is dead. Now, there is no other way I can do this, and in my submission, if the accused is to get a fair trial, I should be given the latitude of having to do this, having already stated plainly in terms in front of the jury that the witness (is) dead and will not be giving evidence. I am entitled to put what is in the witness's statement in those circumstances."*

30. The learned trial judge ruled as follows:-

> *"It's not a question of hearsay in any event, because I - you're not introducing the material to prove the truth of the content of the statement. The witness can answer the questions or not as the witness considers to be appropriate in the circumstances, obviously in accordance with the witness's recollection of events. Given - I'm satisfied that in the ordinary course of events, the position is that you cannot simply take extracts from an individual's statement and say a certain witness will say such and such. It is more appropriate that propositions will be put to the witness and then the evidence given by a witness in due course. But in these circumstances and only limited to this particular set of circumstances, and this ruling should not apply in relation to other witnesses. But given that this witness - or excuse me, that Mr D. is unfortunately deceased, I will allow this form of questioning."*

31. In the course of further questioning of Ms. N. by Mr. Grehan included the following:-

> *"..And furthermore, the late Mr D. said you weren't asleep at any stage?.. And that you actually were kissing both Mr A. and also Mr O'B.?... And that while you were kissing the two of them, D.C. saw your bag at the bottom of the steps and it was D.C. who went through your bag, but you were awake at that point, you were kissing…"*

32. This was a direct reference to what D.C. had said in a statement. Mr. C. was not a witness but was alive at the time of the trial

and could have been called by the defence. A further attempt by defence counsel to directly refer to the content of Mr. C.'s statement when cross examining a garda witness was ruled against by the learned trial judge.

33. The court is satisfied that the rulings made by the learned trial judge were correct and appropriate. Considerable latitude was afforded to the defence in relation to the statement made by Mr. D. who had died before the trial and was not available to give evidence. It was appropriate that questions put to a witness in cross examination based on the content of a statement made by a person who had not, nor would not be giving evidence in the course of the trial, were inadmissible where they were put in the context of evidence from that person.

34. This ground of appeal is therefore rejected.

The absence of "key" witnesses

35. At the close of the prosecution case an application was made on behalf of the appellant to have the case withdrawn from the jury on the grounds that an inherent prejudice had arisen, by reason of the absence of G.D. (deceased) and the very limited extent to which the appellant was entitled to make use of his statement as well as that of Mr. C. The appellant relied on the decision in *DPP v. PO'C* [2006] 3 I.R. 238. The application was refused. The learned trial judge ruled as follows:-

> *"Well, this application is made pursuant to the decision of POC v. the DPP. And in that particular decision it's well established that the onus is on the applicant or accused to demonstrate a real risk of an unfair trial such as cannot be avoided by the directions of the trial judge. The application is predicated upon a complaint in effect made by the defence of an inability to introduce inadmissible evidence, which comes about in circumstances where a potential witness for either the defence or the prosecution has passed away..it should be said at this point in time that Mr D. obviously doesn't appear on the book of evidence, and we know the date when he passed away…I am pointed to an extract from Mr D.'s statement where he makes reference to consensual kissing between Mr A. and Ms N. Now, in relation to the matters contained in Mr D.'s statement, notwithstanding the legal difficulties, the defence were given an opportunity to cross examine the complainant in respect of that and by reference to Mr D.s statement. In addition to that, Ms McC.was cross examined in relation to this afternoon. Mr C., I am told his statement which I have also received was disclosed as were all other statements. Mr C. was present at the same time as Mr D. in the park and at the relevant period of time. And I am told that potentially, Mr D., could have been a witness in the case. In pointing out the particular extract in Mr D.'s statement to me in relation to consensual kissing, I've pointed out to the - to Mr McCullough that that doesn't seem to sit with the extracts which were read into evidence today from Mr A.'s statement. In particular, when asked in relation to the events he said that he'd no sexual contact with the complainant "Or did any rape", I think were the words which were given and attributed to Mr A. In those circumstances it's impossible to see what prejudice could be caused as a result of the loss of Mr D. Certainly, I'm not satisfied that any prejudice has been disclosed to me arising from this particular point. And I'm not satisfied that there has been discharged the onus, that there is a real risk of an unfair trial."*

36. While Mr. D. had died and therefore could not give evidence, Mr. C. could have been called as a witness by the defence. The account given in his statement, while less detailed than the account given in the late Mr. D.'s statement, is broadly similar to that given by Mr. D. even to the extent that the accounts provided by each of them in relation to the selling of Ms. N.'s phone on the following day were consistent. It is also noteworthy that neither Mr. C. or the late Mr. D. were present in the park when the rape of Ms. N. allegedly took place. The only people who were present at that time were the appellant, his co-accused and Ms. N. Such evidence as might have been given by Mr. C. and the late Mr. D. was therefore limited.

37. This ground of appeal is dismissed.

The refusal to give a corroboration warning

38. A corroboration warning was not given to the jury. The reasoning for not doing so was explained by the learned trial judge as follows:-

> *"I have a discretion as to whether to give a corroboration warning pursuant to section 7 of the Criminal Law (Rape) (Amendment) Act 1990. And the principles set out in the English decision of R v. Makanjuola have been approved in this jurisdiction in the decision of DPP v. JEM. And one of the factors under consideration or as a factor in considering whether or not to grant a corroboration warning is set out in R v. Makanjuola, being that of the reliability of the witness whose evidence is or is not corroborated. And in the instance of this particular case, having considered the evidence and the manner of the giving of the evidence, it does not appear to me that there is any issue that the defence can properly point to to demonstrate unreliability on the part of the complainant."*

39. She also said:-

> *"In addition to that evidence of demeanour has historically been permitted to be considered as evidence capable of amounting in law to corroboration. Albeit, as has been said that evidence of demeanour can amount to weak evidence of corroboration but evidence of corroboration nonetheless."*

40. Section 7 of the Criminal Law (Rape) (Amendment) Act 1990 provides:-

> *"(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.*
>
> *(2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."*

41. There is therefore a wide discretion to a trial judge as to whether or not a corroboration warning ought to be given in any particular sexual offence case.

42. In her judgment in *DPP v. JEM* [2001] 4 I.R. 385, Denham J. (as she then was) stated:-

> *"This section is quite clear in stating that it is for the judge to decide in his discretion having regard to the evidence, whether the jury should be given a warning about the danger of convicting the person on the uncorroborated evidence of the other person."*

43. There was evidence relating to the demeanour of Ms. N. in the period shortly after she left the park where she had been raped which was capable of being corroborative of the offence. In addition, Ms. N.'s evidence as to the details of the rape were relatively clear and strong. Given that there was a basis for the learned trial judge exercising his discretion not to give a corroboration warning the court cannot identify any basis for criticising that decision. Indeed, entirely objectively, this court would consider that decision to have been correct.

44. The ground of appeal is therefore dismissed.

Conclusion
45. As none of the grounds of appeal herein have succeeded, the court will dismiss the appeal.