THE COURT OF APPEAL

[2016/47]

Birmingham J.
Mahon J.
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

B.R.

Appellant

JUDGMENT of the Court delivered on 12th day of December 2017

by Mr. Justice Birmingham

1. On 18th December, 2015 the appellant was convicted in the Central Criminal Court of 16 counts, 15 of s. 4 rape and one count of sexual assault. He was subsequently, on 8th February, 2016, sentenced to ten years imprisonment with the last year suspended in respect of each of the s. 4 rape counts and to a concurrent sentence of three years imprisonment in respect of the sexual assault. The appellant has brought this appeal against conviction and sentence. This judgment deals with the conviction aspect only.

2. By way of background, it should be explained that the complainant was born on 30th December, 1983 and is a nephew of the appellant. All of the offences in respect of which the appellant was convicted were said to have been committed at a rented house. The offences in respect of which the appellant was convicted were said to have been committed on dates between 30th December, 1997 and 29th December, 2001. It is to be noted that there were 35 counts on the indictment, but the appellant was found not guilty by direction in respect of a number of counts. The appellant's date of birth is 24th November, 1967.

3. In terms of identifying the points of conflict at trial, it should be explained that it was not in dispute that the appellant and complainant had lived in the rented house for a significant number of years and that there had been a sexual relationship between the complainant and appellant. However, while the prosecution contended that the sexual activity commenced before the complainant's fifteenth birthday, the effective date of consent, and was non-consensual throughout. The case put forward by the defence was that the sexual activity commenced only after the complainant's fifteenth birthday and that all sexual activity that took place was consensual.

4. In a situation where it was accepted that sexual activity had occurred but there was a dispute as to when the activity commenced, the dates during which the parties lived together in the rented house, and linked to that, the dates at which sexual activity commenced became issues of major significance at trial. In particular, there was much focus on whether the sexual activity all post-dated or partly pre-dated the complainant's age of consent.

5. The grounds of appeal that are live are as follows:

> (i.) The trial judge erred in law and on the facts in failing to accede to the defence application for a direction in respect of offences allegedly committed prior to 1st January, 1999, namely counts 1, 2, 7 and 23 on the indictment being three counts of s. 4 rape and one count of sexual assault, given the prosecution evidence that tended to show that both parties did not live in the location prior to 1999.
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> (ii.) The trial judge erred in law and on the facts in characterising various responses of the appellant, to questions put to him by the Gardaí, as lies which were capable of corroborating his guilt and directing the jury accordingly.
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> (iii.) The trial judge erred in law and on the facts in failing to warn the jury, of a special need for caution in their assessment of the evidence of the complainant, as being a witness who may be tainted by an improper motive, given the evidence of another prosecution witness, [M.N.], to the effect that the complainant had offered him money in return for making a statement and to the effect that the complainant had expressed an intention to extract money from the appellant in the context of the allegations giving rise to this prosecution.

6. For completeness, it is appropriate to refer to the fact that the notice of appeal had included a ground which was that the judge had erred in law and on the facts in failing to accede to the defence application for a direction in respect of all counts on the indictment, given the tenuous nature of the complainant's evidence, the contradictions between that evidence and prior statements made by the complainant and contradictions between that evidence and that of other witnesses called by the prosecution. However, the written submissions subsequently filed made clear that this ground was not being pursued and was in fact being withdrawn.

7. The main focus of attention in this appeal hearing, it is fair to say, has been in relation to the issue of identifying the period during which the complainant and the appellant lived in the rented house. There is also a notice of motion before the Court seeking to adduce additional evidence and this motion and the proposed evidence is directed to what might be described as the accommodation issue.

8. The evidence on this accommodation issue might be described as follows. The complainant told the trial court that he was "just going on 14" when his father asked the appellant to look after him and that they initially lived in a caravan and that after about three months in the caravan he and the appellant moved to the rented house. He said that he was "gone 14" when they moved to the rented house. The first incident occurred following the return from a public house, shortly after they had moved to the rented house, and the second incident occurred the following day. The complainant described that on the first occasion, the appellant had gone to the room where the complainant was sleeping and rubbed his penis against him. The second incident involved anal penetration. No condom was used and there was ejaculation. In direct evidence, the complainant said that they had gone to the public house in a car driven by the appellant, a blue Mazda Familia 232 (clarified later as a reference to 323). However, in cross examination the complainant conceded that when they moved to the rented house, the appellant was driving a motorbike, which he fell off a few

months later as a result of which the appellant was hospitalised. The complainant's evidence was that there were two occasions on which the appellant penetrated his anus with his penis at a time that the complainant was 14 years of age. Oral penetration of the complainant's mouth occurred "every second night, maybe" between the ages of 14 and 18. When the complainant was 14 years old, the appellant forced him "just a couple of times" to put his penis in the appellant's mouth.

9. In cross examination, the complainant accepted that he was nearly 15 years old when he moved to the rented house. The complainant conceded that "dates and all that mightn't be reliable". When asked about the dates of certain matters that had been referred to in his witness statement, the complainant said "well I told you them dates and that, they're only guesses. I'm not full sure". It is to be noted that the regime in the rented house described by the complainant was a very violent one, with severe violence being inflicted on him and with threats of violence, including shootings, aimed at his father and family members. The particularly grim picture of the regime painted meant that there was no scope for any ambiguity whatsoever in relation to consent. If the jury was prepared to accept beyond reasonable doubt that the regime was as described by the complainant, then there could be no real substance to any suggestion of consensual sexual activity.

10. The other evidence which touched on the issue of the duration of the rented house occupation and when that occupation commenced was that of P.S., who had rented the property to the appellant. The evidence of Mr. S. was that he had acquired the property in 1992 and that a few years after he bought the property, he was approached by a person now deceased who asked him whether he would be prepared to "set the house" to the appellant. The transcript records prosecution counsel asking him:-

> Q. "And do you remember, roughly, when that was that he took the house from you?"
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> A "It was about – I bought it in '92, it was about '99 or '99 or 2000 or that."

He was asked how long the appellant was in the house and he responded:-

"I'm not certain, but approximately two year I'd say."

11. In his closing speech to the jury, counsel for the prosecution dealt with Mr. S.'s evidence as follows:-

> "No doubt the defence will point out that there was evidence from [P.S.] and you'll recall he's the man who rented the house to [the appellant], the house in […], and he did say in evidence that that would have been about 1999 or 2000, but I think it's very important to bear in mind that he was giving an approximate date from recollection. He didn't appear to be giving that date by reference to any documents that he had in his possession, such as a lease or a contract of tenancy."

12. The witness was asked whether there was anyone with the appellant when he moved into the house. He indicated that the appellant was accompanied by a chap, who was supposed to be a nephew. Prosecution counsel asked "did you know what age he was?" and the response was "at that time he looked young, he'd be 13 or 14, I'd say, to me."

13. In light of the request to adduce additional evidence arising from contact between the solicitor for the appellant and the Department of Social Protection post trial, it is appropriate to refer to such contact as there was with the authorities in advance of the trial. Garda Frances Dunphy was the member of An Garda Síochána who was most involved in the investigation. When giving evidence, she was asked about the conduct of the investigation and she explained:-

> "One of the first things I did, I made an application to the Department of Social Welfare looking to see in relation to payments because I wanted to see what age [the complainant] was, if there was payments made to [the appellant]."

In advance of the trial, disclosure was made in the ordinary way and the documentation furnished included a letter from the Special Investigations Unit of the Department of Social Welfare dated 10th October, 2013, addressed to the Garda Síochána. That letter referred to the fact that child benefit in respect of the complainant was paid to the father of the complainant, with a stated address up to December, 1999. In relation to the appellant, it is stated that for the period 6th December, 1999 to 12th December, 2001 he had claimed and was paid an increase on his Jobseekers Allowance in respect of the complainant. The letter states that the Department was unable to determine the appellant's address at the time as "some archived documents have been purged". Thereafter, the solicitor for the appellant wrote to the Department of Social Protection on 26th November, 2015 asking for further details in relation to this issue. The letter required particulars of all records and forms relating to the client for the period 1st December, 1999 to 31st January, 2002.

14. By letter dated 1st December, 2015 further disclosure was made by the prosecution including a letter, dated 18th November, 2015, from the Special Investigation Unit of the Department of Social Protection along with a computer-generated "claim summary". Essentially, this repeated what had already been stated in the letter from the Department of 10th October, 2013 that the appellant had been paid an increase in respect of the complainant in his Jobseekers Allowance for the period 6th December, 1999 to 12th December, 2001. The appellant's solicitor has averred that prior to trial he believed that he had received all available information from the Department of Social Protection that would assist in showing the date on which the appellant and the complainant moved to the rented house.

15. Following the conviction and sentence, the solicitor for the appellant raised further queries with the Department of Social Protection. It appears he may have been prompted to do this by the evidence of Mr. P.S. He did so by letter of 11th March, 2016. Further correspondence followed. On 6th May, 2016, the Department of Social Protection indicated that the appellant was in receipt of rent supplement for the period 10th May, 1999 to 5th November, 1999 and for the period 8th November, 1999 to 23rd April, 2005. This letter stated that it was not possible to confirm the address at which the appellant resided during these periods as the written files had been "purged". The letter further stated that the Department was not in a position to provide further information.

16. The appellant takes the view that the information that has emerged from the Department of Social Protection post trial is very significant and for this reason has sought to adduce it in evidence before this Court. He contends that the significance of this further information is:

> a. that it suggests that the appellant leased the house in or about November, 1999 and to that extent corroborates the evidence of Mr. S. on that point;
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> b. that it would have strengthened, considerably, the appellant's application for a direction in respect of all counts alleged to have been committed prior to 8th November, 1999;

c. that it would have undermined the credibility of the complainant and as a result strengthened the appellant's application for a direction on all counts; and

d. that the trial would have been of a significantly different character if the jury only had to consider allegations of sexual assault at a time when the complainant was over the age of 15.

17. The prosecution however, challenge the suggestion on behalf of the appellant that the information emerging from the Department of Social Protection showed that the complainant's evidence in respect of when he began to live at the house was inaccurate. The prosecution submit that the information was entirely equivocal on the question of when the appellant started living in the property. They submit that the new material goes no further than confirming the dates upon which rent allowance claims were commenced and the dates upon which addresses were changed or edited on the system as opposed to clarifying the dates upon which the appellant commenced living at the rented house.

18. The test to be applied when determining if fresh evidence can be adduced on appeal has been considered on a number of occasions by the Superior Courts and in truth was not seriously in dispute between the parties, though they diverged on what the outcome would be if one applied those principles. The principles are sometimes referred to as the Willoughby principles, a reference to the Court of Criminal Appeal decision in the case of *The People (DPP) v. Willoughby* [2005] IECCA 4. Those principles are as follows:

a. "Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the Court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.

b. The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

c. It must be evidence which is credible and which might have a material and important influence on the result of the case.

d. The assessment of the credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

19. When the appeal was first listed, this Court felt that the new information that was sought to be put before the Court was quite inconclusive and that further enquiries might well establish to what extent reliance could be placed on it. Questions that arose included whether rent supplement was payable from the date of application, from the date of approval of the application or whether it was paid retrospectively to the date when a property was first occupied. The Court decided to put the matter back so that the parties, and in particular the appellant, would have the opportunity to make further enquiries.

20. Further enquiries have now been carried out by the solicitor for the appellant but the outcome of these has not moved the situation on to any significant extent. The further enquiries have however exposed certain frailties with the departmental records. The appellant maintains, and there is no reason whatever to doubt this, that he moved from the rented house to another location in 2003 and lived there until about April, 2005 when he moved to another location. However, the documentation that has been made available does not deal with any change of address in 2003. Perhaps more significantly, the documentation suggests that there was a change of address in November, 1999 but nobody involved in the case has ever suggested that there was in fact a change of address at that stage. So, such documentation as is available has to be treated with a degree of caution.

21. The Court begins its consideration of this issue in relation to the desire to admit evidence by observing that there is no criticism to be made of the solicitor for the appellant by reason of the fact that this information did not emerge pre-trial, indeed the contrary is the case. He was in touch with the Department of Social Protection pre-trial, as indeed was the investigating Garda but the responses they received did not deal with the issue of rent supplement. The Court attaches some significance to the fact that it was at trial that the landlord, Mr. S., spoke of "[around] '99 or 2000". His witness statement as contained in the book of evidence had referred to the fact that he had agreed to rent the house in the late 1990's.

22. The Court also places its consideration in the context of the fact that the complainant had told the jury about his movements before going to live with the complainant, first in the caravan and then in the rented house. This recorded the complainant living with his father in Co. Kilkenny until he was eight, moving to Wales and then returning to Ireland when he was almost 14 years, living with a named aunt in Co. Kilkenny for approximately two months, moving to a different location in nearby for "a couple of weeks", then moving to Co. Tyrone with his father for "about four months, returning to live with a named aunt, a couple of weeks passing, his father asking the appellant to look after him and then the complainant and the appellant living in a caravan for three months, and then moving to the rented house when he was nearly 15. Thus, even on the complainant/prosecution case, the window of opportunity for offending to occur in the rented house before the complainant turned 15 on 30th December, 1998 was a narrow one.

23. The information which has emerged post-trial from the Department is certainly not dispositive of the issue as to when the complainant and the appellant first moved to the rented house. It is quite possible that the records are incomplete and that there were payments over a period longer than is now recorded. However, in that regard it is probably the case that the records are more accurate when it comes to recording whether payments were made as distinct from peripheral issues such as changes of address. It is also possible that the appellant did not claim rent supplement when he first moved to rented accommodation, either because he did not know about his entitlement or for some other reason, again though, the jury would be likely to take the view that somebody living in fairly straitened circumstances, as it would appear the appellant was, would be likely to claim everything to which he was entitled. The Court has concluded that the information that has become available post-trial, had it been available at trial, might have had the effect of causing the jury to conclude that they could not, beyond reasonable doubt, accept the evidence of the complainant that the move to the rented house occurred before he turned 15 years old.

24. Being of that view, it is appropriate that the Court should admit the evidence and quash the convictions in respect of the counts relating to the period before 1st January, 1999, namely counts 1, 2, 7 and 23 on the indictment.

25. The Court has then had to consider whether it is reasonably possible that the information, had it been available, could have caused the jury to take a different view about the credibility of the complainant in general and to have impacted on their verdicts in relation to other counts for that reason. The Court is satisfied that the additional material does not have that potential. In that regard, the Court bears in mind what it has already said about the very grim picture of life in the rented house that was painted, involving significant violence directed at the complainant on his account, as well as threats of violence directed at him, at his father and other family members. The Court also bears in mind that the complainant was quite open with the jury about the fact that he

could not be precise about dates, he spoke about "guesses". Accordingly, the Court is satisfied that the impact of the proposed additional evidence is limited to those counts relating to the pre- 1st January, 1999 period and does not spill over or contaminate other counts.

26. So far as the remaining counts are concerned, it is therefore necessary to consider the further grounds of appeal that have been advanced. One of the subsidiary grounds of appeal is as follows:-

> "The trial judge erred in law and on the facts in characterising various responses of the appellant, to questions put to him by the Gardaí in the course of detention pursuant to Section 4 of the Criminal Justice Act 1984 as lies which were capable of corroborating his guilt and directing the jury accordingly."

This issue arises in a situation where the appellant was interviewed on a number of occasions by Gardaí. Initially the appellant appeared, certainly on one interpretation, to deny any sexual relationship with the complainant whereas during the course of the third interview he admitted that there had been sexual activity but not in the manner alleged by the complainant. The trial judge raised the question of a Lucas type direction with counsel prior to delivering her charge. Counsel for the appellant responded:-

> "To go down the road of saying he told lies in the station, you can treat that as corroboration of his guilt, I say that would be outrageous, Judge."

The prosecution's view was that lies were told, that the jury could take that as evidence of a guilty mind and could also treat that as evidence of corroboration. If one reads the interviews as a whole, then certainly it is the case that one is left with a clear sense of a significant shift in position. It is, though, the case that many of the questions were formulated in what might be described as a compound form and the compound assertion or proposition was rejected by the appellant. The appellant says that the fact that the overall compound proposition was rejected does not mean that each and every component part was being challenged. Be that as it may, once the prosecution indicated that they were proposing to raise the question of the telling of lies with the jury, it was entirely understandable that the judge would feel that she had to instruct the jury how they should approach the significance of lies.

27. Underlying this ground of appeal is an assumption that a *Lucas* direction is or certainly can be damaging for the defence. The *Lucas* direction and the so-called modified *Lucas* direction gained currency in England and Wales and have been imported into this jurisdiction. However, it should be understood that even before the *R. v. Lucas* [1981] Q.B. 720 decision it was always open to trial judges to offer advice to juries as to how they should deal with the question of lies. Judges would often have felt it appropriate to warn juries that even if they concluded that lies had been told by an accused person in relation to a particular issue that it was not permissible to jump from that conclusion to a finding that the accused must be guilty as there might be any number of explanations for the lies. In this case, the trial judge was doing no more than saying that even if they accepted the prosecution interpretation that lies had been told it did not at all follow that the accused must be guilty of the offences. Accordingly, this ground of appeal fails.

28. The final ground of appeal is as follows:-

> "The trial judge erred in law and on the facts in failing to warn the jury of a special need for caution in their assessment of the evidence of the complainant, as being a witness who may be tainted by an improper motive, given the evidence of another prosecution witness, [M.N.] to the effect that the complainant had offered him money in return for making a statement and to the effect that the complainant had expressed an intention to extract money from the appellant in the context of the allegations giving rise to the prosecution."

M.N., it should be explained, is another uncle of the complainant.

29. However, the trial judge's corroboration warning addressed this issue and did so very much along the lines of what would have been involved in an ulterior motives direction or a special need for caution direction. In explaining to the jury why she was giving a corroboration warning, the judge referred specifically to the evidence of M.N. The judge also made further reference to the evidence of M.N. in the context of responding to requisitions.

30. In the Court's view, the approach taken by the trial judge was one that was open to her and this ground of appeal must accordingly fail.

31. In summary then the Court will allow the appeal relating to the period before 1st January, 1999 quashing Counts 1, 2, 7 and 23 and will dismiss the appeal in relation to the remaining counts.