



THE COURT OF APPEAL

Record No. 220/2016

**Birmingham P.
Mahon J.
Hedigan J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND-

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APPELLANT

JUDGMENT of the Court delivered on the 21st day of June 2018 by Mr. Justice Mahon

1. The appellant was found guilty by a jury at the Central Criminal Court on the 13th June 2016 of two counts, namely:-

- count 1: Rape contrary to s. 48 of the Offences Against The Person Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990, and
- count 2: Defilement of a child under the age of seventeen years, contrary to s. 3 of the Criminal Law (Sexual Offences) Act 2006.

2. The duration of the trial was eight days, and it commenced on the 25th May 2016. This judgment relates to the appellant's appeal against his conviction.

3. The appellant has also appealed against sentence. He was sentenced on the 29th July 2016 in respect of count 1 to eight years imprisonment, to date from the 13th June 2016. The second count was taken into consideration.

4. The background facts can be briefly stated as follows. The offences were said to have taken place between the 4th and 5th October 2014 at the appellant's home. At the time the appellant was aged twenty one and the complainant was aged fifteen. It was the defence case that the appellant had initiated sexual activity with the appellant while she was wearing only her underwear. He maintained that all sexual activity that occurred was consensual. He denied penetrative sex. Subsequent to the incident it was noted that there was evidence of bleeding from the complainant's vagina and of a recently torn hymen, and that there was blood and the appellant's semen on the complainant's underwear. It was contended by the appellant that the complainant had been involved shortly before his encounter with her in sexual activity, including sexual intercourse, with another male. It was suggested that the bleeding was the result of the complainant being on the contraceptive pill. It was also suggested that the complainant had made a false allegation against the appellant in order to gain sympathy from her own father with whom she had had a somewhat fractious relationship in the period immediately preceding the incident.

5. It was the prosecution case, based on statements provided by the complainant, that the complainant had not previously been sexually active and was a virgin prior to her encounter with the appellant.

6. A number of grounds of appeal are maintained on behalf of the appellant, numbering twelve (in relation to the conviction appeal). These have been reduced to four broad grounds in the written submissions of the respondent and this judgment will address the grounds of appeal under the following headings to reflect same, namely:

- (i) Restrictions on cross examination of the complainant in relation to previous sexual activity and in relation to the contraceptive pill;
- (ii) The defence not put; misdirection re "motive" inferences;
- (iii) The misdirection of the concept of reasonable doubt, and
- (iv) The Admissibility of DNA evidence

The complainant's previous sexual history and her reason for taking the contraceptive pill

7. The appellant sought to introduce evidence and to cross examine the complainant in relation to previous sexual history, and in particular in respect of various electronic communications on the complainant's mobile phone which contained sexual content. This was with a view to establishing that the complainant had been sexually active and had probably engaged in sexual intercourse in the period immediately prior to the alleged rape. The appellant also sought to introduce evidence that would assist in establishing that the complainant was taking the pill at least partly for contraceptive purposes in contemplation of such activity.

8. Section 3 of the Criminal Law (Rape) Act 1991 (as amended) deals with the issue of the cross examination of a complainant as to

previous sexual activity. It provides as follows:-

3.(1) *If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience of a complainant with a person other than that accused.*

(2) (a) *The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person.*

(b) *The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.*

(3) *If, notwithstanding that the judge has given leave in accordance with this section for any evidence to be adduced or question to be asked in cross-examination, it appears to the judge that any question asked or proposed to be asked (whether in the course of so adducing evidence or of cross-examination) in reliance on the leave which he has given is not or may not be such as may properly be asked in accordance with that leave, he may direct that the question shall not be asked or, if asked, that it shall not be answered except in accordance with his leave given on a fresh application under this section.*

(4) *Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section."*

9. At the close of the complainant's examination in chief, Mr. Ó'Lideadha S.C., counsel for the appellant, made the following application to the learned trial judge. He said, *inter alia*:

"..the first matter is that we're asking for leave in principle in the first place for permission to cross examine, to ask questions and if necessary to adduce evidence suggesting or tending to show that the complainant had engaged in sexual intercourse with another person or persons at the time that she went to the sexual assault examination unit. In circumstances where the prosecution proposes to lead evidence to the effect that the findings were consistent with recent penetration. And the position is that the complainant's statement in the book of evidence asserts that she was a virgin at the time of the examination. And that although she had boyfriends, she was not sexually active at the time. And she repeated that assertion to the Sexual Assault Unit. So cross-examination of - we would contend is absolutely essential in those circumstances to suggest to her and to put forward evidence tending to show that she did engage in sexual intercourse..."

10. Mr. Ó'Lideadha went on to say:-

"In order to put to her various communications to suggest that these are communications which effectively involve discussing, engaging in sexual intercourse with particular persons or other sexual activity. I would also wish to suggest that she was taking the contraceptive pill at the time, at least partly to avoid becoming pregnant..there is evidence in the form of a letter from a consultant who refers to a consultation and advice and interaction with the complainant and her mother. And indeed refers to the fact that she was advised to try other methods to deal with the various difficulties that she had before taking this particular medication... And there's also material, Judge, from psychiatric services, two persons who were dealing with herself and her mother in relation to this matter. And it appears that the mother and I believe that the complainant herself were adamant that they did not wish these psychiatric services persons to communicate with the GP, because it was being suggested by the psychiatric services that taking the pill was actually causing various difficulties that she was having, including very low mood and tendencies towards self-harm and suicide. So it appears that there was a resistance, very firm resistance to communications with the GP to try to raise the issue as to whether or not she should come off the pill. And so those are matters of particular significance, Judge."

11. There followed a lengthy exchange of views between counsel on both sides and the learned trial judge, and further and more detailed submissions made by both sides in relation to the issue of the contraceptive pill and the reasons why the complainant was on that medication. Mr. Ó'Lideadha spelt out in some detail the medical evidence relating to the subject contained in a report of the HSE. Mr. Ó'Lideadha sought to persuade the learned trial judge to permit the issues relating to the contraceptive pill to be raised in the course of the trial on the basis that it would be done in a sensitive manner. He submitted:-

"..It would not be the intention of the defence to distort the context or to be unfair in relation to it. It would be the intention of the defence to accept that there were real concerns grounding the process leading to the possibility of taking the pill. All of that would be fairly and properly acknowledged. But it would also be suggested that there was another way of dealing with matters, which involved a change in diet. And it was then the subject of consideration by the psychiatric services that the issue should be reconsidered. And a decision was made to dissuade attempts to communicate with the GP on the subject. And in my respectful submission, it would be again grossly unfair - it's not really about unfairness really, it's about actually whether or not this could make a difference. And if you have a jury that's sitting there saying to themselves, well all we know is that she was told to go on the pill because of a separate medical problem, that's all we know and we can't have any speculation that there might have been any other factors at play. That the mother or that the complainant herself might have had in the back of their minds, I know this will help with the dizzy spells and all the rest of it, but also because I'm sexually active or because I'm liable to be sexually active, it is actually worth it to be on the pill for that purpose as well. If I'm not allowed to elucidate the truth as to the circumstances, then important considerations in that regard would not be open to the jury. And I'm telling the Court that I've no intention of distorting the situation. I would fully acknowledge the proper circumstances and it would be for this witness who might, I don't know, who might acknowledge that this actually was a factor. And if she doesn't acknowledge it was a factor, I should be entitled to say to the jury, look, you see the evidence, you see what she was advised and you see the choices she made and it's up to you to make up your mind as to whether or not a factor in this was the knowledge that she was liable to engage in sexual intercourse. And these are absolutely matters of absolute fundamental importance in this case. I've put all my cards on the table in terms of this aspect of the case and I'm assuring the Court that I would do my utmost to fairly and honourably deal with these matters."

12. Mr. ÓLideadha relied extensively on the decision in *DPP v. GK* [2007] 2 I.R. 92 in support of his application.

13. There then followed an exchange between Mr. ÓLideadha and the learned trial judge as to the nature of the questioning that would follow in the event that his application was successful. He explained that he wished to establish that the complainant was not a virgin at the time she visited the appellant in his home on the night of the incident. He said he wished to establish that the complainant had been communicating with a number of young men regarding engaging in sexual activity with each other, including sexual intercourse, in the days immediately prior to the alleged offences. He said he wanted to cross examine the complainant about her sexual history and her previous sexual activity. He said he also wished to question her about her reasons for taking the contraception pill so as to establish that it was taken at least partly as a contraceptive.

14. Mr. ÓLideadha submitted that the jury might reasonably and rationally conclude that the complainant had engaged in sexual intercourse with a person or persons other than the appellant and within the period shortly prior to her encounter with the appellant from the nature and vocabulary used in such communications. While the phone messaging in question was of a highly explicit sexual nature it was accepted nonetheless that none of the communications in themselves proved that any particular sexual activity had been engaged in by the complainant.

15. Having heard submissions from both sides, the learned trial judge decided to conduct a *voir dire* in which he heard evidence on the specific matters that Mr. ÓLideadha wished to put to the complainant, particularly relating to her mobile phone text messages.

16. Ultimately, on Day 3 of the trial, the learned trial judge ruled on Mr. ÓLideadha's application in the following terms:-

"..Well, now the position is this matter is before me at this juncture for leave to cross examine the complainant in respect of certain aspects of what it is broadly speaking are contended to be prior sexual experience. The material effectively can be summarised as follow, firstly certain communications which I might describe as electronic communications which in -which carry, I think it's fair to say sexual innuendo, and which indeed extend to what might be described as slang or explicit reference to sexual conduct. The material includes at least one representation, I think a direct photographic representation of a male penis, for example. It is contended that this evidence tends to show that when the complainant says that she was not sexually active, in particular, was a virgin at the time of the alleged sexual intercourse with the accused, this was not true. And it is contended that this is relevant on the basis not only that an issue of credibility arises, but also because the medical report concludes that there - that this lady had engaged in sexual intercourse or that there had been sexual intercourse, penetrative sex obviously by definition. And in circumstances where the accused denied that that occurred, it must follow that this had been something which had occurred as a result of some form of sexual conduct with somebody else. If there is a rational basis for it, that is the rational basis.

Now, it seems to me that the texts or electronic communications could not rationally say extend to, or go to, or be relevant to that proposition. It seems to me that it would be degrading to the complainant were they to be cross examined upon. It would be quite different if the -if it was clear from them that they constituted for example admissions expressed or implied of having close sexual relations, perhaps not even amounting on the electronic communications to - to intercourse. But they don't stretch to that at all, some of them seem to be in the form of jokes, others seem to be rather squalid, but it appears to me that the morals of individuals, perhaps of teenagers are perhaps outside the common experience of certainly judges. And - but it seems to me from my experience in this court that we are not looking at anything particularly unusual, whether one deprecates that or not, it's none of my business to make any comment upon it and truly I do not. So I believe that there is - that to be permitted to cross examine in respect of that material doesn't reach the threshold, so to speak, contemplated by the Act.

Now, in relation to the medical material, what is the thrust and tenor and substance of that material? One can probe and particular and dare I say it nit pick and try and build some form of substantive edifice on an observation here or there. An example would be the strong view of the complainant's mother that she did not wish there to be any communication with the doctor who was the treating doctor. But it seems to me that this is to enter into a realm of gross speculation. What is the material before me? It is purely and simply at bottom, as a matter of substance, that this child was on medical - on contraceptive medication for medical reasons, quite unrelated to the purpose of inhibiting contraception. I will refer to the material in question less there be any doubt as to why I think it could have no relevance. Before I do that I think we should pause, what is the - what implication is it sought to raise? How is it conceived that this might be relevant? It is conceived, it can only be relevant to the proposition that well she might have been sexually active, or may well have been sexually active to the extent of penetrative sex, because she was on the pill. That is the bald proposition in this case. It might be one thing to make it if one had no medical evidence as to why she was on it. But there is unambiguous medical evidence.

Now, what Mr Ó Lideadha has tried to do first of all is to parse and analyse the form of words used in the medical report from the paediatrician. He has first of all sought to say that the medical report as it were, qualified the necessity for immediate prescription of - of contraceptive medication. That it gave rise to the implication that further consideration should be given to not doing so. It's perfectly plain that it was not rushed into. It's perfectly plain that it took some six weeks to do so. And it raised effectively an issue for consideration, that is all. People are entitled to consider whether or not they go on particular medication, children in particular no doubt with the assistance of their mothers and a decision was made to do that. Now, at a later stage, the nurses raised issue with, as a result of their consultations, with the family, including the complainant. They took the view that there should be a re-visitation of this in the light of what they understood to be the symptoms. The mother and the - certainly, if not both of them were against this. They're perfectly entitled to make that decision. The implication being, oh well they were a bit reluctant to make that decision, it may well be that she was taking advantage of the fact that she was on it for other nefarious purposes. I hesitate to use the phrase, I hope it is accepted that I don't use this in a derogatory sense of counsel or the accused. But Mr Condon does character it correctly when he says, what we're dealing here with is, we'll call it a nod and the wink where it is suggested that as it were, fortuitously, this girl was on this medication and therefore of course, that increased the implication or gave rise to an implication that she might have been engaged in sexual activity. There's no evidence whatsoever, good, bad or indifferent of any kind or description to support that proposition.

...Yes, well, I said I'd give a summary of the matter and I believe this is an adequate summary, we're not going into the realm of speculation, there isn't an evidential basis for this. It's perfectly plain why the medication was being taken and anyway, I mean people can take contraceptive medication for medical reasons without any implication that it has a bearing on their sexual activity. And this is the very mischief which the Act is devoted to excluding. So, very good."

17. The defence was however permitted to suggest to the complainant that she had previously had sexual intercourse. The defence was also permitted to refer to the fact that the complainant was on the contraceptive pill and that that fact might explain why her underwear was blood-stained.

18. The issue concerning the contraceptive pill again raised its head at the close of the prosecution evidence. Leave was sought by the defence to refer in its closing speech to the jury that there had at an earlier stage in the trial been a ruling from the learned trial judge that evidence relating to communications on the complainant's mobile phone regarding sexual activity in the form of words and pictures would not be raised before the jury. In support of this application it was pointed out that the jury were aware from the evidence that the defence had had access to the contents of the complainant's phone. Not unsurprisingly having regard to his earlier ruling the learned trial judge ruled against this application.

19. In the course of his closing speech to the jury, the prosecution counsel referred to the complainant taking the pill for pre menstrual symptoms and did so in terms that would have left the jury in no doubt that she was taking the pill for medical reasons only. Mr. Ó'Lideadha made the following submission to the learned trial judge:-

"Now, what I want to say is that the evidence is that it was not prescribed for contraceptive purposes, but Mr Condon went further than that in his closing speech and made an assertion that it wasn't being - that it was being used for medical purposes and clearly imply that it was not being used for contraceptive purposes. That is a separate matter. There's no evidence on that one way or the other. We clearly accept that as far as the medical personnel were concerned they were prescribing it for non contraceptive purposes. As to why it was being used, that is a separate matter and we don't have evidence on that."

20. The learned trial judge ruled against Mr. Ó'Lideadha and refused his application to discharge the jury.

Discussion and conclusion

21. Issues raised on behalf of the appellant in the course of the trial related to, essentially, three different subjects, namely the application to question the complainant in relation to her previous sexual activity in the context of the messaging on her mobile phone, the application for leave to cross examine in relation to the reasons why the complainant was on the contraceptive pill and, finally, the application to pursue the theory that the complainant had complained of being raped in order to win the affection of her father. These were difficult and complex issues for the learned trial judge in seeking to strike a balance between protecting the appellant's right to a fair trial and excluding evidence that was irrelevant and prejudicial. That observation is borne out by the extensive submissions made in relation to them and the length of time devoted to their consideration, as well as the detailed rulings in relation thereto. It is undoubtedly the case that the learned trial judge afforded these matters very thorough consideration and analysis.

22. The facts of the instant case are not dissimilar to those in the case of *DPP v. Keogh* [2017] IECA 232. One of the issues in that appeal concerned a refusal by the trial judge for leave to cross examine the complainant pursuant to s. 3 of the Criminal Law (Rape) Act 1991, and more specifically in relation to a series of images of a sexually explicit nature which had been saved on a media card on the complainant's mobile phone. In this court's judgment delivered by Birmingham J., as he then was, the following is stated:-

"...The statute provides that the judge should give leave if and only if he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked but significantly it then goes on to say as follows:-

"That is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied."

The Court does not see how the images would ever come close to meeting the statutory threshold. Indeed, even if the statutory considerations are completely put to one side the issue would not cross the basic threshold of relevance. Simply because a person makes a complaint that they have been a victim of crime does not mean that they abandon their right to privacy or that they lose that right. Someone wishing to question an individual about private or intimate matters must establish that the proposed line of enquiry has a relevance..."

23. In the instant appeal the court does not find fault with the learned trial judge's rulings in relation to the issue of the complainant's previous sexual history and the evidence relating to her mobile phone, nor indeed the issue concerning the possible desire on the part of the complainant to win back her father's affection by complaining she had been raped.

24. The court does however have a concern in relation to the learned trial judge's ruling effectively preventing any questions being raised as to the reasons why the complainant was on the contraceptive pill or remained on it despite some adverse medical reaction to the medication. There was, at least, a possibility that the jury might be persuaded that a secondary, or indeed a primary, motivation for the taking of the pill or remaining on it, was to fulfil sexual intercourse and that such sexual activity that occurred in the course of her confrontation with the appellant was not the first occasion on which she had engaged in sexual intercourse. It was an important credibility issue. That issue, in the court's view, ought to have remained open to greater clarification aided by cross examination. It is a matter which ought properly to have been left to the jury for its consideration. Accordingly, the court will allow this particular ground of appeal.

25. Having so found in the appellant's favour in relation to the foregoing and which was in reality the primary ground of appeal, it is unnecessary for the court to make determinations in relation to the remaining grounds save to observe that they appear to the court, in general terms, to lack merit.

26. In these circumstances, the court will allow the appeal and set aside the conviction. In the event that the respondent seeks a re-trial, that issue will be considered in due course.