THE COURT OF APPEAL

[138/2017]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PETER HALLIGAN

APPELLANT

JUDGMENT of the Court delivered on the 21st day of February 2019 by Mr. Justice McCarthy

1. This is an appeal against the conviction of the appellant on the 31st of January, 2017 in the Central Criminal Court of one count of rape and another of rape contrary to s.4. of the Criminal (Rape) (Amendment) Act. He was sentenced on the 13th of March, 2017 to eight years' imprisonment on the first count and 5 on the second to run concurrently, with the final two years suspended.

2. On the 24th of July, 2014 the complainant was walking home at approximately 11 p.m. from a get-together in a friend's house in Larchville, Waterford. She was sixteen years old at the time. She had been accompanied by two friends but became separated from them as she was rushing to get home. She had stayed out later than the time permitted by her mother and feared that she would be angry with her. At a walk-way between Tramore Road and Cherrymount Estate, she was approached by the appellant from behind who grabbed and dragged her further along the walk-way. The appellant threatened to throw her into a nearby river, which put the complainant in fear. She was subjected to oral and vaginal rape. She told him that she was fourteen years old in hope that that would persuade him to stop but it did not. After the attack he told her not to tell anyone what had happened. She walked home in a distressed state and informed her mother of the rape, who immediately rang for the Gardaí. After his arrest, the appellant initially denied that anything occurred between him and the complainant and asserted that he had been chased by a man with a knife (characterised as a phantom by the prosecution) when on the road proper but later admitted that sexual activity did occur but that it was consensual. He denied that it extended to oral sex, as alleged by the complainant. He stated that the complainant approached him and initiated sex.

3. The case was a strong one. On arrest, the accused told the gardaí that he had nothing to do with the crime and that he had been chased by a man as aforesaid on the roadway, but a number of witnesses gave evidence that they had seen no such thing. Subsequently, when interviewed whilst detained for the investigation of the offence he stated that he had lied because he had a girlfriend who he did not wish to find out about what he said was a consensual sexual encounter with the complainant. However, during the interview he also said that there had been no oral sex, whereas his semen was found on a swab taken from her mouth when she was subsequently examined at a sexual assault treatment unit and swabs taken from there. Furthermore, she was found to have injuries consistent with some violent event, and accordingly consistent with what had occurred. In addition, her earrings were found on the ground. She was in a shocked state when, a short time after the crimes she reported it to her mother and of course the latter, apart from incapacity to corroborate, was a complaint consistent with her allegations made in the immediate aftermath.

4. The appellant appeals on the ground that the trial judge (Butler J.) erred:

(i) In failing to properly or adequately direct the jury on reasonable doubt;

(ii) in failing to properly or adequately direct the jury on the issue of

evidence/absence of evidence from the appellant;

(iii) in failing to contextualise the requirement that no adverse inference may be

drawn from the absence of evidence from the appellant at the trial by

reference to the presumption of innocence;

(iv) in refusing requisitions raised by counsel on behalf of the appellant in

respect of those points.

5. Grounds two and three, pertain to the manner in which the judge dealt with the fact that the accused chose not to give evidence and should be dealt with together. Ground four is effectively a complaint that the judge did not rectify his alleged errors after requisition; of course the real question is whether or not such errors exist, and hence there is no necessity to deal with that ground

separately. Of course the grounds all pertain to the charge, and before we go further we think that we should emphasise that the judges' charge must be taken as a whole: authority is scarcely necessary for this proposition.

Ground One

(i) Failing to properly or adequately direct the jury on reasonable doubt.

6. We think it right in the first instance to refer to portions of the charge. It will be seen on perusal of it that the judge referred at the commencement and indeed on a number of occasions thereafter to the presumption of innocence and the onus of proof, with special reference to the fact that the onus does not shift to the accused. Specifically, with respect to the concept of reasonable doubt he had this to say: -

> "*Now, you've heard counsel mention the concept of reasonable doubt and judges and lawyers spend a lot of time trying to explain to juries what is and what is not reasonable when actually what is or what is not reasonable is entirely a matter for the jury. But, for example, it must be genuine, it mustn't be airy fairy or whimsical. At the same time you are not looking for moral or mathematical certainty but, as I say, in the end, it's up to you to decide what is or is not a reasonable doubt.*"

and then, referring to the civil standard of proof, as being on: -

> "*… the balance of probabilities. In other words, if there's a tint of fifty-one percent on one side that's enough for you and that is a standard in cases where there's a road traffic accident or an injury at work and so forth, those don't involve people's liberty. They involve money. I only mentioned that standard of proof to show you – to illustrate how strong the onus is in a criminal matter.*"

7. He then went on to deal with the fact that the accused is entitled to the benefit of any doubt when faced with two alternatives or two views and that: -

> "*When two views on any part of the case are possible or on any part of the evidence he must adopt that which is favourable to the accused unless the State has established the other beyond a doubt….*"

8. In a requisition it was submitted that the judge should have gone further when addressing what was or was not a reasonable doubt by providing the jury with: -

> "*… An illustration as to what a reasonable doubt might be in the sense, of course, that as is often the case you would point out to a jury that the decision that they are about to make is on a par with an important decision that they would make in their own affairs and it would be a decision, a reasonable doubt would be one that might give them pause for thought before proceeding to make a decision on matters such as the hackneyed, I suppose, examples of changing a job, emigrating, which school to send a child to but in my respectful submission it is incumbent upon the trial judge to go further and actually illustrate to the jury what the reasonable doubt.*"

9. The judge accepted that requisition and said: -

> "*The first is I was dealing with the concept of reasonable doubt and I ended up saying, which is true, that what is or what is not reasonable is a matter entirely for you and not for anyone else, but what was suggested and I should have given some illustration of how you could go about that or what might or might not be reasonable. For example, in a home situation what colour do I paint my front door is not a very serious matter, well it might be to some, but to the generality of the population it's not a very serious matter and it's not a matter which you worry about…. But if you were sending a child… to school what school they are going to, obviously is a substantial matter and a doubt about that would be an example of a reasonable doubt and I really do think that's enough. It's an important matter, not a trivial – I did say not whimsical…. I hope I've made that a little clearer if it needs to be made clearer.*"

10. The appellant relies on a number of authorities in seeking to suggest that the charge was deficient under this head. *DPP v. MK* [2005] 3 I.R. 423 did not directly deal with any of the issues raised here though, in the context of the issue of whether or not or to what extent a trial judge should distinguish between or compare the criminal and civil standards of proof the Court of Criminal Appeal made reference to and approved the judge's charge in the course of which, in reference to the standard of proof and what might or might not constitute a reasonable doubt when he said: -

> *"To understand the concept of reasonable doubt have regard to your own affairs. Think of decisions, important to individuals… and as you come to that hour of make up your mind time, you are not satisfied to go ahead and make it then, you wanted to consult if it was a legal matter a solicitor if it was a financial matter your accountant or bank manager or as many people do they want to sleep on their problem…."*

As we understand it, it is contended that the judge should have given examples of decisions of importance but had not. Firstly, there is no authority of any kind supportive of the proposition that a judge must do that. Secondly, it seems to us that this was done

11. *DPP v. Kiely*, unreported, Court of Criminal Appeal, 21st March, 2001 is not authority for this proposition; it merely endorses the well-established rule that reasonable doubt is the sort of doubt which might affect members of the jury in the context of important affairs in their own lives.

12. Reference is made also to *The People Attorney General v. Byrne* [1974] I.R. 1. We cannot see that in the present case there was any departure from what should be said by a judge in the course of his charge, still less that the criticism that what one might term everyday examples of transactions or decisions must be given when seeking to explain the concept of reasonable doubt. Indeed, the type of charge approbated by Kenny J. in *Byrne* is what was given here (and we quote in that regard the passage referred to in the appellant's submissions): -

> "*The correct charge to a jury is that they must be satisfied beyond a reasonable doubt of the guilt of the accused and it is helpful if that degree of proof is contrasted with that in a civil case. It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond a reasonable doubt.*"

We accordingly reject this ground of appeal.

Grounds Two and Three

(i) failing to properly or adequately direct the jury on the issue of evidence/absence of evidence from the appellant.

(**ii) failing to contextualise the requirement that no adverse inference may be drawn from the absence of evidence from the appellant at the trial by reference to the presumption of innocence.**

13. The judge addressed the exercise by the accused of his right not to give evidence in the following way: -

> *"… Frequently accused persons do not give evidence. They have absolutely no – no compulsion to do so, frequently they do not give evidence and I can tell you from seventeen years' experience in this court that frequently the failure of the accused to give evidence is due entirely to the legal team advising don't give evidence. Onus is on the prosecution and so forth. So, the second thing I want to say is you take and read absolutely nothing against the accused arising out of his not giving evidence."*

This form of words was the subject of a requisition when defence counsel said–

> "*I am concerned that the impression might be given to the jury that there was perhaps a tactical reason for him not giving evidence… ."*

and also, that: -

> "*… the court should have gone further and said if flows as a corollary from the presumption of innocence and the onus of proof that he doesn't have to give evidence and you say, of course, I accept that no adverse inferences should be drawn from it."*

The judge rightly rejected this requisition. We think that on any view the judge cannot be criticised for dealing with the issue in this way: the suggestion that for some unworthy tactical reason the accused had not given evidence was not capable of being inferred by the form of words which was used. If anything, what was said was in ease of the accused. The use of the sentence "*onus on the prosecution and so forth*" was clearly intended to remind the jury of what he had said a very short time (perhaps no more than minutes) before and he was perfectly entitled, and indeed it was a sensible course, to make such a brief reference but he need not, of course, have done so. In the most trenchant terms he told the jury "*so, the second thing I want to say is used to take and read absolutely nothing against the accused arising out of his not giving evidence*". No jury could have been in any doubt as to the correct approach given how much he had said about the responsibility which lay on the prosecution, the standard of proof, the fact that the benefit of the doubt must be given to the accused and that the onus never shifts to the accused, (something particularly relevant in the context of the fact that the accused did not give evidence) that the accused had no obligation to give evidence nor could any adverse inference been drawn from what the judge said.

Mr Cody seeks to build the proposition that the jury might in some way have been confused or that the trenchant and unambiguous statement quoted was in some sense watered down. He speculates that some adverse effect might have been drawn by the jury to the effect that the appellant had something to hide and hence had been advised not to give evidence. There is no basis for such speculation. We think that there is no reason but to feel completely confident that the jury did not breach the instructions given to them by the judge and ignore the fact that the accused did not give evidence. This approach erroneously seeks to isolate or take out of context particular elements of the charge.

14. We might add that in *DPP v Curran* [2011] 3 I.R 785, O'Donnell J. cautioned against taking an isolated view of a direction on a particular point in a charge: -

> "*While it is perhaps possible that if a charge in these terms had been given to the jury, it would have been deemed beyond objection or at least beyond these specific objections, that is very far from saying that the absence of such specific directions renders inadequate the charge that was actually delivered. Here the Applicant seeks to present a wish list of propositions which the Applicant desire to see in the charge to the jury, and the absence of which it is now contended renders the trial unsafe. There is, with respect, a fallacy in the Applicant's reasoning in this regard. The process of argument seems to follow a number of stages. The first, a statement of law is identified, itself unobjectionable. The judge is then requisitioned upon it. If the judge does not then adopt the specific language suggested by counsel it is said that the charge is inadequate. But the trial judge's charge is not designed to be a receptacle for propositions desired by either party. The function of the charge is to put the jury in a position to address the issues of fact arising in the particular case, in the correct legal framework, and thus to be able to deliver their verdict. This Court is satisfied that the charge in this case was more than adequate to perform this task, and conspicuously fair to the accused."*

15. In a case where the evidence was as strong, indeed overwhelming, as it is and where the charge read as a whole was fair and balanced, the arguments advanced have not caused us to have any doubts about the satisfactory nature of the trial or safety of the verdict. We therefore dismiss this appeal on all grounds.