THE COURT OF APPEAL

[139/19]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

ANDRIUS LIPINSKAS

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 21st day of February 2020 by Birmingham P

1. On 5th June 2019, the appellant was convicted of counts of s. 4 rape, three such counts, aggravated sexual assault and burglary. He was subsequently sentenced to a lengthy term of imprisonment and he has now appealed against that conviction.

2. The background to the case is to be found in events that occurred on 2nd August 2010. On that occasion, the injured party, Ms. LR, had been socialising with friends and had returned to her home in Finglas in Dublin. As she entered the hallway of her home, she was pushed into that hall by the appellant, a stranger to her. The intruder threatened to kill the complainant and raped and sexually assaulted her on a number of occasions at various locations within the house. At one stage, the complainant managed to run down the stairs, she had been dragged upstairs by the intruder, and ran out the front door to a neighbour's property who called the Gardaí. The complainant provided a description and an amount of information to Gardaí about her attacker. Of considerable significance in the context of the investigation that followed, and indeed of significance now, in the context of this appeal, is that a partly-smoked cigarette was retrieved from the bottom of the stairs in the house. From this, it was possible to obtain a DNA profile. At the time, this was seen as potentially highly significant in circumstances where the complainant had been examined at Sexual Assault Treatment Unit in the Rotunda Hospital after the incident and traces of semen located on internal swabs. It was also seen as potentially significant in a situation where the intruder into the house was a stranger.

3. As a result of information that came to hand, Garda interest focused on a particular vehicle, a silver Volkswagen Passat, that was registered to foreign nationals resident in County Cavan. The appellant was one of four residents there. All four were non-nationals.

The other three, who were brothers, were quickly eliminated from enquiries through DNA. Enquiries in relation to the appellant established that he had left Ireland for Lithuania, that he had travelled across England on 6th August 2010.

4. The next phase of the investigation saw efforts by way of the Mutual Assistance Scheme to obtain a DNA sample from the appellant in Lithuania. On 12th September 2012, a member of An Garda Síochána travelled to Kliapeda in Lithuania with a view to obtaining a DNA sample. Such a sample had been provided on 20th February 2012 by the appellant at Kliapeda County Police Headquarters. The DNA profile that was generated matched that of the profile that had been generated from the partly-smoked cigarette retrieved from the crime scene.

5. At trial, there was an issue leading to a voir dire in relation to the admissibility of the evidence obtained through the DNA sample that was provided at Kliapeda County Police Headquarters in February 2012.

6. In due course, the appellant was surrendered to this State pursuant to European Arrest Warrant provisions. He was arrested at Dublin Airport on 28th August 2017 and he was brought to Fingals Garda station where he was introduced to the Member in Charge and he was there charged in the presence of a Lithuanian interpreter.

7. Two grounds of appeal have been identified. These are:

   (i) That the trial judge erred in ruling admissible the DNA sample taken in the Police Headquarters on 20th February 2012.

   (ii) That the judge erred in ruling admissible the response by the appellant after he was cautioned at Finglas Garda station on 28th August 2012.

8. The issue as to the DNA sample focused on the procedure that was followed at the Police Headquarters. On behalf of the appellant, it was submitted that the procedures to be followed there had to accord with the law in this jurisdiction. The written submissions point out that at no stage while at the police station, was the appellant arrested, or were the relevant parts of the Criminal Justice (Forensic Evidence) Act 1990 explained to him. It was said that the explanation provided at Police Headquarters differed from the wording set out in the document seeing mutual assistance that had been drawn up by the investigation team by reference to a template. It is said that it was not specifically explained to him that the results of the DNA sample may be given in evidence in proceedings against the appellant. A reference to the fact that it was required for comparative purposes was, it was said, inadequate. It is argued that the appellant did not provide, and was not in a position to provide, fully informed consent.

9. At trial and on this appeal, the Director points to the fact that the investigator, Mr. Jurijus Domnenko, a member of the Lithuanian police force, gave evidence that the appellant's rights had been explained to him prior to the sample being taken, that it was explained to him that a request had come from Ireland and that the sample was taken because he was

close to the location of the alleged offence scene. He was told that he could have access to a lawyer and that the appellant had then signed a statement, saying that he understood his rights and that he did not require a solicitor. The investigator's evidence was that the appellant had agreed to give a DNA sample voluntarily. His evidence was that he had told the appellant that the sample could be used against him. The appellant had signed a statement confirming that he had been told of his rights to legal advice and confirming that the sample was being provided voluntarily.

10. In summary, the Director submits that there was abundant oral evidence and documentary evidence that the taking of this sample was completed voluntarily. There was evidence that the appellant was told that the request emanated from Ireland, why the sample was being sought, he was told he could access to a lawyer and told that the DNA sample could be used in evidence. The taking of the buccal swab was identical to the methods that would be used in Ireland.

11. While there has been reference in the papers at various stages to the Criminal Justice (Forensic Evidence) Act 1990, it is now conceded by Senior Counsel on behalf of the appellant that that statute is of no application, but it is said that is not relevant because it said that the statute mirrors requirements at common law, and that therefore, what happened in Lithuania in the police station was inadequate. We cannot agree with that contention. In our view, the procedure that was followed mirrored and was equivalent to the procedure that would be followed in Ireland. We are entirely satisfied that there was no unfairness in relation to the taking of the sample, no oppression and that the judge was well within his rights to admit the DNA evidence.

12. In relation to the second ground of appeal, that is to say the issue arising from the charging in Finglas Garda station, this arises from the fact that the Member in Charge there and other members, gave evidence that when the appellant was charged with one offence, he said in reply "she fell off the second floor while being drunk. I came over to asked (sic) if she was injured". It was accepted that the replies to caution following charge were not read back to the appellant. The reply was, however, recorded in the custody record and it was recorded in the notebook of a Detective Garda who was present. Later that day, the Detective Garda in question attended in the District Court where she gave evidence before the Court of arrest, charge and caution. She did so in the presence of the appellant and the Lithuanian interpreter.

13. The judge's approach was to accept that there had been a breach of the Judges' Rules. However, he decided to exercise his discretion to admit the evidence, commenting:

"I am satisfied that there was no mistake in translation. I do not believe, in the unhappy series of coincidences that were put forward here in evidence yesterday. It would have been better, I suppose, as a counsel of prudence, if not perfection, that in the circumstances the matters were read over, but it seems to me, in the circumstances, having regard to my view of the facts and the evidence that was given yesterday, it seems to me that if I had any doubt about the matter of what was said, that would be one thing. I think I am entitled to take into account that I do not accept for one moment

that two guards independently, one, Carla Creegan [the Detective Garda who was investigating] and two, the officer entering the matters formally into the custody record, made any mistake about what the translator spoke in English, and given the difference between what Mr. Lipinskas is of the opinion that he said, and what was apparently rendered in English by the translator, I do not believe there was any room for a mistake of that magnitude, and I say that also in the context of his assertion that somebody else, in a different country, made a mistake about precisely the same issue. I am not in the market for that at all. I do not accept it as a reasonable possibility or otherwise, so I am exercising my discretion of admitting the statements after caution."

14. The reference in the judge's ruling to mistake and coincidence, relates to fact that the appellant had claimed that when cautioned, that he had in fact said was that he did not know any Irish girl, and that a girl he was with was a Latvian girl, but that this had not been translated. The reference to coincidence is explained by the fact that the appellant complained that during the taking of a statement from him in Lithuania, a statement that was not ultimately admitted into evidence by the trial judge, the Lithuanian authorities had also failed to record that he had told them that he had been at a party with a Latvian girl. This reference to a party and a Latvian girl was not reflected in the recorded statement in Lithuania.

15. The judge proceeded on the basis that there was a breach of the Judges' Rules. For our part, we are not fully convinced in that regard. We asked the experienced counsel who appeared on both sides of the Court whether it was their understanding that the practice was, when someone is charged, that any reply made is read over and both counsel seemed of the view that was not the general practice. If that is their understanding, that understanding accords with the impression of each of the members of this Court. However, on the basis that the judge proceeded on the basis that there had been a breach of the Judges' Rules, and even assuming, if not convinced, that that was the case, assuming that it was so, we are still quite satisfied that the judge exercised his discretion correctly to admit the evidence. It seems to us almost inconceivable that the discretion could have been exercised differently. This was a situation where the appellant was charged, where he had the assistance of an interpreter, where what was said was recorded simultaneously, and where, within a very short period of time thereafter, he was appearing in Court where, in his presence and in the presence of an interpreter, evidence was given as to has been said.

16. For completeness sake, we would observe that even if we had been persuaded that the admission was, for some reason, in error, in our view, that certainly would not have called into question the fairness of the trial or the safety of the verdict.

17. In summary, nothing that we have heard, in our view, causes us to have any doubt about the fairness of the trial or the safety of the verdict.

18. We reject both grounds of appeal and dismiss the appeal.