THE COURT OF APPEAL

[144/13]

The President

Peart J.

Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

J.S.

APPELLANT

JUDGMENT of the COURT (Ex tempore) delivered by The President on the 23rd day of February 2015

1. On 18th and 19th April 2013, the appellant was convicted of four counts of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001, and of two counts of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990. On 10th June 2013, the appellant was sentenced to eight years imprisonment in respect of the s. 4 rape counts and to five years imprisonment in respect of the sexual assaults, all sentences to run concurrently from 19th April 2013, with the final 12 months of the sentences suspended on conditions. The appellant appeals against his conviction but not the sentences.

2. The offences were charged in the indictment to have been committed on occasions between 1st June 2002 and 30th November 2002. The complainant, who was then a 14-year old girl, had travelled from her home in England to visit her natural father, the appellant, who lived in County Kilkenny, and she travelled over on three separate occasions. The offences are alleged to have occurred during the second and third visits. There was dispute at the trial about the timing and duration of the visits but it is clear that each one extended over a number of weeks. On the first visit, the complainant stayed with the appellant's daughter, but on the other two occasions she resided in the family home. There was no evidence of any impropriety during the first visit, but the complainant testified as to sexual abuse that was perpetrated on her by the appellant during the periods of the second and third visits. Her evidence was that she suffered sexual assaults in a variety of forms, including sexual touching by the appellant and being required to feel him and masturbate him. In addition, there were the s. 4 rape charges which encompassed oral sex. These incidents happened, according to her evidence, in different locations including the family home of the appellant and when she was travelling with him by car, and also on occasions when he brought her to motorcycle rally events.

3. The complainant's mother gave evidence at the trial that each visit extended over a period of about five weeks. The first visit was in April/May 2002, on which occasion the girl was brought to Ireland by one of the appellant's sons. The second visit was in June/July when she was brought over to Ireland by the appellant himself, travelling on a motorcycle. The third visit was said to have begun on 7th September and to have ended in October 2002. On that occasion, it was the appellant's niece who brought the complainant from England to Ireland.

4. The evidence given at the trial was that the matter came to light on 13th December 2002, when the complainant spoke to her aunt in England, that is, her mother's sister. The aunt notified the mother to whom the girl spoke and repeated the complaints that her father had been touching her, by which she meant intimate touching of a sexual nature, and that this had happened during the period of her second and third visits to Ireland. The mother contacted the appellant by text message and phone call. At first, he denied that anything untoward had happened. However, the mother said that the appellant had then rung back and admitted that he had been guilty of inappropriate sexual behaviour with his daughter. The girl's mother also testified that the appellant had proceeded in subsequent text messages and in a conversation that happened in Rosslare, County Wexford in July 2003, to admit that he had committed sexual abuse with his daughter.

5. The appellant sent letters to his daughter, which were sent some time after December 2002 and before June 2003, when the mother spoke to a Police Officer in England about this abuse. She gave the Police the two letters which were read to the jury at the trial and provided as exhibits in the case. The mother also showed the Police Officer her mobile phone which had text messages from the appellant. The Police Officer copied down details of the messages including the date and time and the message in each case which began on 13th December 2002, that is, the date on which the girl complained to her mother about having been abused and on which the mother said that she had contacted the appellant. The text on 13th December at 11.36 read "do you want me to hand myself up to the Police?" The last text of which evidence was given was on 28th April 2003 at 08.12pm when the message was "there is not a day goes by when I regret what I done. I am so sorry, love you loads".

6. The evidence consisted, accordingly, of the testimony of the complainant in respect of the abuse that she described as having happened during her second and third visits in 2002; her mother, who described receiving the complaint from her daughter on 13th December 2002, and her subsequent conversations with the appellant including phone conversations and the text messages. She also described the meeting that she said took place in Rosslare in July 2003, when she confronted the appellant personally and she testified that he again admitted the abuse of his daughter. The occurrence of this meeting was denied by the appellant in the course of his evidence to the trial. The letters from the appellant, as above described, were in evidence, as were the text messages noted down by the Detective Constable. There was a variety of other evidence including that of Gardaí who interviewed the appellant, but

the prosecution case was essentially that of the complainant and her mother plus the evidence of the appellant's two letters to his daughter and the evidence of the Detective Constable about what she had noted from the phone text messages.

7. The appellant gave evidence at the trial in which he denied any sexual abuse or any sexual impropriety with his daughter. He testified as to how he was in hospital having psychiatric treatment during certain of the periods covered by the indictment, to the effect that it would have been impossible for him to have committed abuse every day, as alleged by the complainant in her evidence. He denied making admissions to the girl's mother on the phone as she had described. He denied that any such meeting, as she described, taking place in Rosslare. That simply had not happened, as he testified. He accounted for the text messages and his letters by saying that it had happened during the girl's time in Ireland, that that she was very demanding, temperamental and difficult to deal with, that she often went into tantrums and screamed and would not behave herself. On those occasions, he had shouted at her and sometimes had had to drag her from the yard of the house into the house because it was impossible to get her to see reason or to behave. He was very unhappy about having behaved in this manner and that is why he wrote the letters and sent the texts. He did not agree that he had sent all the texts but he did appear to accept that since they had come from his phone then he must have sent them. In his interviews with the Gardaí, he had admitted sending at least some of the text messages.

8. The defence did not consist simply of rebuttal of the evidence. Counsel made the case at the outset of the hearing that the prosecution should not proceed because of alleged defects of procedure and fairness in accordance with settled jurisprudence.

The Appeal

9. The grounds are as follows:

> (i) The trial judge should have withdrawn the case from the jury because of delay in prosecuting the trial and failure of the investigating authorities to obtain and preserve relevant evidence concerning the girl's mobile phone and other telephones.
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> (ii) The learned trial judge was in error in refusing a defence application for a direction at the conclusion of the prosecution case.
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> (iii) The trial judge erred in ruling admissible the complaint made by the girl to her mother on 13th December 2002.
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> (iv)-(vii) A series of grounds complain that the trial judge failed to give a proper and full summary of the evidence to the jury, including the cross-examination of the prosecution witnesses other than the complainant, and by failing to summarise the evidence of the defence witnesses.
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> (viii) The appellant complains that the trial judge should have brought to the attention of the jury inconsistencies between the complaint made by the complainant to her mother and the details of the abuse that she gave in evidence.
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> (ix) Finally, the trial judge should have given an adequate corroboration warning, and specifically, should have acceded to a defence requisition that he address the jury on the absence of medical evidence to corroborate the complainant's testimony.

10. The background to the complaints centring on the judge's charge is that the judge explained how his normal practice is of dictating a note of the evidence at the end of each day and sending it electronically for transcription but the system broke down. In the circumstances, the trial judge recounted for the jury the evidence of the complainant, including her direct evidence and cross-examination in full form, and he detailed the examination-in-chief of the appellant. He referred, in respect of other evidence, to the speeches of Counsel who, he said, had covered all the points and he referred the jury to them. He also noted that some of the jury had been taking what he called meticulous notes during the trial and the judge invited the jury, if they had any problems or request for recall of any particular part of the evidence, to come back to Court and ask and he would give it to them from the transcript, but that did not happen. One of the complaints now made by the appellant is that this was an unsatisfactory procedure and that the trial was unsatisfactory as a result and the conviction unsafe.

Submissions

11. The first complaint that the appellant addresses is the failure of the prosecution, as is alleged, to obtain and preserve relevant records in relation to the dates on which the complainant was in Ireland and the dates and locations when the offences were alleged to have been committed. Absent evidence is said to include records of ferry tickets purchased for the complainant and backup financial documents, how they were paid for and school records of the complainant's school and from the education authorities in England. The appellant also complains of alleged failures in respect of telephone records but this is a separate matter. In respect of the dates on which the complainant travelled to Ireland, it is hard to see how the prosecution authorities can legitimately be criticised under this head. It is not in dispute that the complainant came to Ireland on three occasions in 2002 and stayed on each visit for a number of weeks. It is true that the appellant was in hospital for two periods during the latter part of that year and for one of those periods it would seem that he was in hospital for approximately six days. But it is also quite clear that he was not in hospital for the whole of either of his daughter's visits, on any view of the timing. Having regard to the terms in which the indictment sets out the charges, it is difficult to see how any case of real prejudice can be asserted under this head. It is even more difficult to see how the prosecution could be blamed for failing to anticipate that this issue was going to arise and that it would need to seek to garner records from the ferry company that carried her. In respect of one of the crucial visits, namely, the second, the person who actually brought the girl to Ireland was the appellant himself, travelling on his motorcycle. In respect of the third visit, it was his niece who brought her and in respect of her first visit, his son brought her over to Ireland.

12. It is clear, whatever issue may have arisen about specific dates, that the essence of the complaint was that the girl was being subjected to regular abuse by the appellant and the indictment was couched in terms that would encompass the case that she was making and allow the jury to reach a verdict on any one or more allegations of the different kinds of abuse that she was alleging, as between s. 4 rape and vaginal rape and sexual assault more generally. Those crimes were not time-specific and the accused was denying them in blanket fashion, that nothing of the kind had happened, and so the jury had a clear choice to make. The point, however, is that it was not a choice that depended on any very specifically or narrowly defined time period other than in a broad sweep of time in respect of two periods that extended over a number of weeks up to five. In the circumstances, this ground of appeal cannot succeed. The case is like many similar cases in which repeated sexual abuse over a period of time is alleged. The essential question for the jury was whether they accepted the evidence of the complainant in respect of one or more of the sexual assault and s. 4 allegations and the other rape allegations in each period.

13. Different points arise in respect of the telephone records. The Detective Constable took down details of the text messages that

appeared on the mother's mobile phone when the mother spoke to her about the matter in June 2003. The Officer testified that she did not take possession of the phone at that time because she did not have a complaint. It is true, as Counsel pointed out in cross-examination and as is set out in the appellant's submissions, that the mother was indeed complaining about her daughter having been abused by the girl's father. But the Police Officer was using complaint in a restricted sense, as the learned trial judge understood and as he took pains to establish by asking questions of the Detective Constable. If the mother was making a formal complaint on behalf of her daughter against the appellant, the Officer would have set in train a set of steps designed for such a situation. That would include conducting a victim interview on video with the complainant in a formal setting, but that is not what was happening in June 2003. The Officer was reviewing the situation and explaining to the girl's mother what would be involved. But it was understood at that time that the girl was not in a position to take on the burden of making such a complaint. That is the evidence that was given at the trial. The Officer did not feel in a position to take the mobile phone into her possession; instead, she took down details of the text messages that were appearing on it. She also took with her the two letters that the mother gave her which had been sent by the appellant to his daughter. In due course, the Officer compiled a report that ultimately went through Interpol to the Gardaí in accordance with established protocol. That still did not constitute a formal complaint, which did not happen until much later when it gave rise to the prosecution in this case. When it did occur, the Gardaí were able to access the file with the relevant letters and copy text messages and in due course, interviewed the appellant, arrested and charged him which ultimately led to the trial in the Central Criminal Court.

14. As it happened, the telephone records at the time were retained for a limited period of three years. This meant that when they were subsequently sought, it was too late because they had been destroyed and the telephone company had not been given any notice that they should have been preserved. In any case, it would have required an application under relevant legislation and stringent requirements would have to be complied with but nothing of that arises.

15. The trial judge held that it was impossible to find fault with the approach of the Police Officer in England and acquitted her of any neglect of duty or any obligation. This Court agrees with that conclusion. Any other view would be wholly unreasonable and would impose an impossible standard. It would also have implications for the lives and property of persons who are not the subject of any formal complaint.

16. It was not suggested to the Detective that she had miswritten any of the text messages. It was also the suggested that they should be considered inadmissible in written submissions because they were only one part of a conversation. But a text message can stand on its own just as a letter can. It is possible to explain or qualify a text message just as one can do with a letter by putting it in context. There may be occasions when a text message or a letter makes no sense whatsoever without seeing the missive to which it is a reply or the general circumstances but that cannot be an absolute rule. It all depends on the missive and the circumstances. It is surely obvious that this is a matter for a jury to consider in light of the evidence as a whole and any cross-examination and submissions.

17. The learned trial judge ruled that if the case had rested on the evidence of the complainant alone, he would have stopped it going to the jury on the ground that it would have been unsafe. But the case did not rest on that evidence, as he said, "there is also evidence from her mother and there is evidence from the accused man himself, particularly in the letters, and they are a matter for the jury to interpret and decide what they are saying". He had previously decided that the claim of failure to preserve evidence was unreal. It is clear that there was evidence to go to the jury in the case.

18. The next point is that the learned trial judge was in error in treating it as admissible the complaint made by the complainant to her mother on 13th December 2002. Counsel, Mr. McCarthy S.C., argues that the complaint was inadmissible on the ground that it was inconsistent with the evidence, the inconsistency residing in the fact that the girl made her complaint in respect of touching in an intimate sexual manner, whereas her evidence extended to much more invasive, improper sexual activity. The Court had the benefit of the excerpts from Professor O'Malley's work on sexual offences, one quote of which is contained in the appellant's submission and that makes it clear that if the complaint is entirely inconsistent with the actual evidence at trial, then it will be or may be excluded on the ground of admissibility, and that of course makes logical, rational sense because it would not be a complaint relating to the sexual activity at all; it would be a complaint about something quite different, that is clearly the rationale of that. But, as was pointed out by Edwards J. during the argument, the succeeding passage of the text by Professor O'Malley expands the admissibility issue quite considerably. So the Court is satisfied that the learned trial judge was correct in deciding that the complaint was in this case admissible and in rejecting the proposition that there was inconsistency to a degree that would render it inadmissible.

19. It is worth remarking also that having ruled on that, the trial judge then went on, before the evidence was given, to describe at that very point to the jury the purpose for which the evidence was admitted, namely, to establish consistency and not to furnish independent evidence or even corroboration of the complaint. It was merely for the purpose of consistency and the judge made that very clear to the jury at that point just before the evidence was given.

20. For the respondent, Ms. Biggs S.C. also makes the point in written and oral submissions that the complaint evidence was admissible on two other bases. Number one, it was evidence admissible to rebut the suggestion that had been made in cross-examination that the complainant had made up these allegations because she knew that the appellant had got money from the Residential Institutions Redress Board. That is a legitimate legal rubric under which that evidence is admissible. Moreover, Counsel argued that the evidence of the girl's mother of her making the complaint to the appellant on 13th December 2002, made no sense without a context being established for it in the evidence and that this was yet a further validation of the trial judge's decision to admit the evidence. Counsel's point was that it might well have given rise to speculation on the part of the jury as to what had happened to cause this telephone accusation to be made in the first place and this was explaining the context and so the evidence was admissible on that point. This Court is satisfied that the evidence was properly admitted and finds it unnecessary to deal in detail with each of the headings but is satisfied to say this, first of all, that it was admissible as a complaint, that the alleged inconsistency was not of a nature that would exclude the evidence, even if one accepted the degree of inconsistency that is suggested, and secondly, that it was admissible under the heading of rebuttal or intending to rebut the allegation of recent invention or fabrication.

21. It is clear now that by statutory provision the previously accepted imperative of giving a corroboration warning and indeed in doing so in particular terms has been abolished. The courts have made clear, and particularly the Court of Criminal Appeal, that it is not a proper or acceptable practice for a Court to decide that it better be on the safe side and give a corroboration warning in all cases. It is only proper to give a corroboration warning where there is a reason to give a corroboration warning. Ms. Biggs correctly points out that it is usual for Counsel to raise this question before the speeches and obviously before the judge's charge so that everybody knows where they stand, including Counsel when making their closing addresses. The judge makes a determination at that point but there was no such application in this case. The Court is satisfied, therefore, that the trial judge is not to be faulted for having failed to give a corroboration warning. Not only that, if the trial judge had decided to give a corroboration warning it would have been necessary to refer to the various pieces of evidence that might have furnished not only corroboration, but independent confirmation of the testimony of the complainant, and in this case, such material was undoubtedly to be found (a) in the evidence of

the girl's mother and (b) in the evidence of the text messages and the letters emanating from the appellant himself. That is not to say that only one view is possible of those materials. Of course, it was perfectly legitimate for the defence to point out and make suggestions as to other means that could be ascribed to these materials, but that is not the point that this Court has to consider; this Court has to consider whether it was reasonable or open to the jury to consider them, when properly instructed, as being either confirmatory evidence standing independently or as corroborative material if they chose to so regard that material and the Court is satisfied that the answer to that is in the affirmative.

22. The questions for this Court are whether the trial was satisfactory and whether the conviction was safe. In respect of each of these questions, the Court is satisfied that the answer is in the affirmative. There was ample evidence on this the jury was entitled to be satisfied beyond reasonable doubt that the appellant was guilty of the counts on which he was convicted. In respect of the complaints made about the evidence in the case, the admissibility of the complaint and the argument concerning Port phone records and ferry records and the other points, the Court is satisfied that there is no substance in these propositions advanced and the Court has endeavoured to deal with those in some reasonable detail. There is one point, however, made by Mr. McCarthy S.C. for the appellant in respect of which the Court considers that there is some validity but not such as to justify overturning the conviction, considering that the conviction was unsafe or that the trial was unsatisfactory.

23. For reasons stated elsewhere in the judgment, the trial judge explained that he was not in a position to deal with the evidence in a way that he would have liked or intended and so he adopted a somewhat different course. The Court is satisfied that there was no question in the circumstances of any unfairness to the appellant in what he did, and indeed the prosecution might have had good grounds for complaining that its case was not fairly or fully presented. The trial judge sought to circumvent the difficulties that presented themselves by inviting the jury to consider the factual summaries and contentions as contained in Counsels' speeches. He also adopted the policy of reading to the jury the evidence as described above. This was intended, as far as possible in the circumstances, to be fair, particularly, as was necessary in the case, to the appellant.

24. The Court is satisfied, as already stated, that the trial was satisfactory when considered overall, particularly in regard to the rights of the accused and also that the conviction is safe. However, the Court finds it impossible to endorse the practice adopted by the learned trial judge. Although he found himself in difficulty because of a failure of technology, it would not have been impossible to devise a different and better solution than the one he adopted. What he did was less than ideal and could have led to an unsatisfactory trial and to everybody involved in the case being put to unnecessary anxiety in the form of a retrial. This Court, in the circumstances, would wish to make it clear that such apparently practical expedient could very well, in other circumstances, give rise to a successful appeal.

25. In all the circumstances, the Court is satisfied that the conviction was safe and the trial was satisfactory and that the appeal must accordingly be dismissed.