THE COURT OF APPEAL

[2012 CA 297]

The President

Birmingham J.

Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

C O'R

APPELLANT

JUDGMENT of the Court delivered by The President on the 27th day of March 2015

Introduction

1. The appellant was convicted of rape contrary to s. 48 of the Offences Against The Person Act 1861, and s. 2 of the Criminal Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990, at the Central Criminal Court. He was found to have raped his mother who was aged 66 years of age at the time of the offence.

2. The trial took place over four days and the accused was convicted by a majority verdict of ten to two. The case was a retrial following a previous hearing when the jury was unable to agree. The appellant was convicted on 4th July 2012 and sentenced to 12 years' imprisonment and now appeals that conviction.

The Trial

3. On the night of the 2nd March 2008, the complainant went to bed about 9pm and was reading a book, when her son called to the house some time around 11pm; she had been at a social function from lunchtime until about 8pm. The appellant asked for a drink and the complainant, who had come downstairs in her nightdress and dressing gown, produced a bottle of vodka. He had some of it and she said that she had a small vodka with a lot of 7Up. He suggested that they put on some music and he put a CD into the player. After a time, he began to dance with his mother. He characterised them as dancing closely but she did not agree and said that it was like ballroom dancing, except that she was not able to move and was doing no more than swaying. She had had knee surgery in the recent past and was due to have a hip replacement and so her movements were severely restricted. She had in the past been a keen ballroom dancer years before but was not able to do that now because of her condition.

4. The complainant's evidence was that somehow she and the appellant ended up on the floor and his penis was in her vagina. She could not recall how she came to be in this situation. She said that she must have blacked out, but when she realised what was happening she told him to leave her alone, meaning that she wanted him to stop. Although she kept saying that she wanted him to leave her alone, he continued until he had ejaculated.

5. The appellant's account confirmed that they had full intercourse but insisted that it was by consent. He described how they were dancing but said that it became erotic with kissing and touching. He agreed that she said "leave me alone" but on his account that happened when they had finished intercourse and he was offering to help her get up from the floor. She preferred to stay where she was and remained there when he left the house.

6. The complainant was cross-examined at length by defence Counsel who endeavoured to show that she did not really remember her state of mind, that she did in fact consent, notwithstanding the impropriety of the situation, and that she was completely confused in thinking that her son forced himself on her. Counsel did not suggest, and it was not part of the defence case, that the complainant was lying, suggesting instead that she did consent, but understandably had felt confused and perhaps guilty afterwards and could not really remember what had happened. Furthermore, the defence contended that she was taking a combination of drugs and she had had a good deal of alcohol that day which would account for her confusion and her failure to recall the sequence of events.

7. The complainant said that she had remained on the floor unable to get up for most of the night after the appellant had left. She did manage eventually to get to her feet and make her way up to bed at around 8am. She got up around midday and made contact with a person who normally visited her later in the week. On this Monday, the visitor was with a neighbour and the complainant called her over. This person gave her some assistance and contacted the social worker who notified the Gardai when she heard the complainant's account of the events of the previous night. The Gardai arrived and the process of investigation began.

8. The Gardai brought the complainant to the Rotunda Hospital Sexual Assault Unit where she was examined and swabs and samples were taken. The appellant was arrested in due course and questioned, and he admitted that he had had intercourse with the complainant but maintained that it was by consent.

Grounds of Appeal

9. Nine grounds of appeal are contained in the appellant's written submissions and they may be grouped under three headings, namely:-

(i) There was insufficient evidence to go to the jury and the trial judge should have directed the jury to acquit;

(ii) The accused was prejudiced in his defence by the failure of the complainant to make her medical records and psychiatric history available to the defence;

(iii) The learned trial judge should have acceded to the requisitions made by defence counsel following his charge to the jury.

Appellant's Submissions

Ground 1: Insufficiency of Evidence: Refusal to Grant a Direction

10. At the close of the prosecution case, the appellant applied for a direction of not guilty, *inter alia*, on the basis of the complainant's evidence which was to the effect that at the crucial time she did not know what had happened, what she had done, what she was thinking, feeling and wanting and that her evidence, at its height, was that she "would not have consented" to sexual intercourse, not that she did not consent.

11. It was submitted that evidence given by the complainant that the sexual intercourse continued after she said "leave me alone" could not be relied on by the jury beyond a reasonable doubt in circumstances where she had accepted that it was possible that the sex did not stop at that point. It was submitted that the complainant went further and clearly accepted that the sex stopped when she said "leave me alone".

12. The appellant submitted in the trial Court that the complainant's evidence taken as a whole was such that a jury properly charged could not have found him guilty beyond a reasonable doubt on the basis of the evidence of the complainant. He cited *The People (Director of Public Prosecutions) v. Leacy* (Unreported, Court of Criminal Appeal, 3rd July 2002). In the instant case, it was submitted that the complainant's evidence was weak, vague and tenuous, such that there was a real danger of injustice if the case went to the jury.

Ground 2: Refusal to Disclose Medical/Psychiatric Information

13. The appellant submits that the learned trial judge failed to take sufficient steps to ensure that the appellant was not subjected to an unfair trial having by the failure to disclose medical and psychiatric notes pertaining to the complainant.

14. It was submitted that disclosure of the materials sought could have assisted the defence in showing why or how, in this extremely unusual case, the complainant may have wanted to have sex with her son, or may have appeared to have wanted to do so. The appellant relied on the line of authority in missing evidence cases which emphasises the primary role of the trial judge to ensure a fair trial and the power to direct an acquittal to protect that right. The cases of DH v. Groarke [2002] 3 I.R. 522, The People (Director of Public Prosecutions v. P.O'C [2006] 3 I.R. 238, and J.F. v. DPP [2005] 2 I.R. 174 and O'Callaghan v. Mahon [2006] 2 I.R. 32 were all cited in support. The appellant submits that the trial judge ought to have withdrawn the case from the jury on this ground also.

Ground 3: Charge to the Jury/Requisitions

15. The appellant submits that the learned trial judge erred in refusing to re-charge the jury in accordance with the requisitions made in respect of:-

(i) the complainant's use of the expressions "I think" or "I believe" as indicating uncertainty on her part;

(ii) the trial judge's summaries of the prosecution and defence cases;

(iii) the issue of consent;

(iv) the value of the medical evidence to the defence was understated;

(v) the judge permitted and repeated hearsay evidence from the complainant's doctor advising her against furnishing her medical records;

(vi) although the judge correctly stated the law with regard to consent he did not expressly repudiate an alleged misstatement of the law by prosecuting Counsel.

Respondent's Submissions

Ground 1: Insufficiency of Evidence: Refusal to Grant a Direction

16. Counsel argued that there was ample evidence given by the complainant that she did not consent to the sexual intercourse with her son. The complainant did not accept that the sex stopped when she said "leave me alone", in fact, the evidence was to the contrary. Any inconsistencies in the evidence of the complainant did not go to the fundamental issue as to whether or not she consented. If an issue of credibility arose, it was a matter for the jury to decide what weight to place on her evidence. By its verdict, the jury accepted the account given in evidence by the complainant.

17. Counsel for the respondent relied on the Leacy case and submitted that the assessment of the complainant's reliability was a matter within the province of the jury. The respondent distinguished the cases of *The People (Director of Public Prosecutions) v. Reid* [2004] 1 I.R. 392 and *The People (Director of Public Prosecutions) v. O'Callaghan* [2013] IECCA 46 from the present case and submitted that they are of no relevance.

Ground 2: Refusal to Disclose Medical/Psychiatric Information

18. The respondent argued that disclosure of the medical records could not have assisted the defence in showing why or how the complainant may have wanted or may have appeared to have wanted to have sex with her son. There was no evidence to suggest that the material would have any bearing on the issue of the complainant's consent. The trial judge determined that there was nothing to warrant the disclosure sought by the defence. Furthermore, the material sought was at no time in the possession of the prosecution.

19. The respondent also argued that the rules governing discovery in civil matters are not applicable in criminal proceedings. *DH v. Groarke* [2002] 3 I.R. 522 approved the proposition in The People (Director of Public Prosecutions v. Sweeney) [2001] 4 I.R. 102 that in the hundred years that followed the Supreme Court of Judicature Act (Ireland) 1877, there was never discovery of documents ordered in criminal proceedings. The more recent case of *Breslin v. McKenna* [2009] 1 I.R. 298, it was submitted, emphasises that the application and enforcement of the prosecution's obligation to disclose all relevant material "was not governed by the rules of court relating to discovery which had quite distinctive features".

Ground 3: Charge to the Jury/Requisitions

20. The respondent maintained that the trial judge was correct in refusing to re-charge the jury as sought by the appellant in respect of the complainant's use of "I think". Conflicts or inconsistencies of evidence, if any, are matters for the jury to consider and determine. The learned trial judge pointed out that it was a matter within the province of the jury to assess the entirety of the complainant's reliability and the strength or weakness of the prosecution evidence.

21. The respondent submitted that the trial judge dealt fully with consent in his charge. He did not understate the value of the expert medical evidence. The respondent did not accept that the jury ought to have been re-charged in respect of the complainant's evidence that her doctor advised her not to furnish medical records.

Discussion

Ground 1: Insufficiency of Evidence: Refusal to Grant a Direction

22. The application for a direction was based upon the well-known principles in *R v. Galbraith* [1981] 1 W.L.R. 1039, which have been adopted and applied in this jurisdiction in many cases*. In The People (Director of Public Prosecutions) v. Leacy* (Unreported, Court of Criminal Appeal, 3rd July 2002), Geoghegan J. delivering the judgment of the Court, endorsed Galbraith and the interpretation placed on it in Blackstone's Criminal Practice,1st Ed. 1991. Lord Lane C.J stated:-

> "How then should the judge approach a submission of "no case"?
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> 1. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> 2.(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.....
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

Geoghegan J said in *Leacy:*

"In Blackstone's Criminal Practice (1991) there is considerable discussion of this case and related cases in section D 12 and the learned authors 'with some hesitancy' set out in section D 12.31 the following propositions as representing the effect of the English decisions but primarily Galbraith.

1. '(a) If there is no evidence to prove an essential element of the offence a submission must obviously succeed.

2. (b) If there is some evidence which - taken at face value - establishes each essential element, then the case should normally be left to the jury. The judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases, …)

3. (c) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey) where the inconsistencies (whether in the witness's evidence viewed by itself or between him and other prosecution witnesses) are so great that any reasonable tribunal would be forced to the conclusion that the witnesses is untruthful. In such a case (and in the absence of other evidence capable of founding a case) the judge shall withdraw the case from the jury.'

This citation would seem to represent also what would generally be understood to be the law in this jurisdiction in relation to applications for a direction.

23. In *R v. Shippey* [1988] Crim. L.R. 767, Turner J gave a direction on a charge of rape based upon his assessment of crucial parts of the prosecution case as being "frankly incredible" and as having "really significant inherent inconsistencies" and as being "strikingly and wholly inconsistent with the allegation of rape". The test used by Turner J. was to ask if the witness's evidence was self-contradictory and out of all reason and common sense. For a direction to be given the case had to go beyond a matter of credibility of individual witnesses or evidential inconsistency. Taking the prosecution at its height did not mean "picking out the plums and leaving the duff behind".

24. A similar approach was adopted in The People (Director of Public Prosecutions) v. M (Unreported, Court of Criminal Appeal, 15th February 2001) in which the issue was whether a direction should have been granted on a sexual assault charge. The Court ruled that while some inconsistencies existed, they went to the issues of credibility and reliability which, as matters of fact, were the duty of a jury to determine. Giving the judgment of the Court Denham J. stated, at page 15:-

> "If there was no evidence that an element of the crime alleged had been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the situation here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is its duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to the issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge therefore was correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and law the learned trial judge did not err in refusing to withdraw the count in respect of sexual assault from the jury at the conclusion of the prosecution case."

It is clear that there are some circumstances in which a trial judge is entitled and even obliged to withdraw the case from the jury on the basis that no reasonable jury, properly instructed, could safely conclude that the accused was guilty beyond reasonable doubt.

Counsel for the appellant submitted to the trial judge, and to this Court, that so confused and contradictory was the evidence given by the complainant that it was not safe to permit the case to be considered by the jury. He highlighted a number of passages in the transcript of the complainant's evidence as indicating the tenuous nature of the case. Counsel said that there were inconsistencies in respect of how much alcohol the complainant consumed, whether a sing-song took place on the night in question and the fact that the complainant had not mentioned dancing with the appellant to the investigating Gardai. He had also put to the complainant that she did not know what happened between the time she was sitting on the seat and the time when sexual intercourse was happening.

25. Counsel's application to the trial judge was that, taking the evidence at its height, no jury properly charged could return a guilty verdict that would not be perverse. The evidence of the complainant at its height was that:

> "She would not consent to having sexual intercourse with her son but explicitly and repeatedly concedes that at the crucial time she did not know – she does not know what she wanted, she does not know what her behaviour was, she does not know what she was thinking and she does not know what she was feeling, and when one combines that with the evidence of the alcohol and the medication which she consumed, that she herself explicitly said she had never taken alcohol with the particular drug that she had taken, the sleeping medication".
>
> The trial judge rejected the application, ruling that "even if there is no evidence as to how matters commenced, consent can be withdrawn, if consent had been given, and on her testimony does she not say that she was telling him to leave her alone which effectively was telling him to stop and he did not stop once that had been said to him".

26. There was evidence, therefore, taking the prosecution case at its height, to establish the essential elements of the offence. The judge held that conflicts of evidence and issues of credibility are quintessentially matters for the jury and the mere existence of such conflicts or issues would not, in the circumstances of the case, justify him in taking the case away from the jury.

27. This Court considers that there was clearly sufficient evidence to go to the jury under the first of the tests in Galbraith. The complainant testified that she had told the appellant to stop, when he was having sex with her, that he did not stop, but rather, continued and that it was not with her consent. It was a matter for the jury to resolve the conflict of evidence in relation to consent. They could only do so in favour of the prosecution, i.e. prefer the complainant's account, if they were satisfied beyond a reasonable doubt as to its correctness. Otherwise, there had to be an acquittal.

28. In regard to the jurisdiction to withdraw a case because the evidence is tenuous or self-contradictory or manifestly incredible, it is a relevant point that the trial judge saw and heard the complainant giving her evidence in Court. An appellate Court should be reluctant to overrule the decision of the trial judge when it is based, as it had to be in this case, on an evaluation of the overall presentation of the testimony. Defence Counsel's contention was that the complainant had previously expressed herself differently and in a way that accepted or implied uncertainty. He explored this theme at length in cross-examination. If the trial judge had decided to withdraw the case from the jury, it could only have been on the basis that a properly instructed jury would have had no choice but to acquit. That decision would have required an appraisal of the weight to be attached to the present evidence in light of previous allegedly different and inconsistent positions but that was precisely the function of the jury.

29. There was undoubtedly some basis for Counsel's contention that the complainant had exhibited a degree of confusion and inconsistency, but the trial judge decided that the issue as to whether her evidence was reliable, or not, was a matter for the jury to determine. She did not know how the sexual intercourse had begun, or indeed how she had come to be on the floor with the appellant. She thought she might have blacked out for a time and come to when he was having intercourse.

30. Some of the complainant's answers in cross-examination did lack clarity but that may not have been entirely her responsibility. In some instances during cross-examination, it appears from the transcript that the witness may have given an answer to a different question than the one asked, or to a previous question, or may have responded more generally to what she thought was being sought from her. That can happen during cross-examination. Counsel may decide to leave the matter without seeking absolute clarity because that may be better for his client. It may also happen that a witness being cross-examined in regard to previous statements or evidence or both, which was the situation in this case, becomes somewhat confused as to whether the question relates to the evidence being given in this case or in the previous case or what was written in a statement.

31. The complainant was clear and insistent in her evidence in chief, and while under cross-examination, that she had said to the appellant to leave her alone at a time when he had his penis in her vagina but that he did not leave her alone.

32. There was room for the jury to decide that the complainant was confused or uncertain or unreliable and that the appellant should be acquitted. However, to acknowledge that those were possibilities is a very different thing from deciding that by leaving the case to the jury the judge was exposing the appellant to the risk of a miscarriage of justice.

33. The Court's decision is that there was sufficient evidence to go to the jury and that the issues about reliability of recollection were also properly left for their decision.

Ground 2: Disclosure of Medical Records

34. In *DH v. Groarke* [2002] 3 I.R. 522 the Supreme Court held at p. 529:

> "The complainant in a criminal case is bound to supply the prosecution with any information relevant to the case, whether favourable to the prosecution or the accused and the judge is obliged to ensure that fair procedures are observed at the trial. If the prosecution cannot obtain evidence the disclosure of which is necessary for the purposes of the defence, the accused may be entitled to a direction on the relevant counts."

35. *The People (Director of Public Prosecutions) v. P. O'C* [2006] 3 I.R. 238, confirms that the trial court retains a jurisdiction to prevent the trial from proceeding if matters arise that render it unfair and this includes a general and inherent power to protect its process from abuse, including the power to safeguard an accused person from oppression or prejudice.

36. During cross-examination, Counsel asked the complainant about her refusal to give access to her medical and psychiatric records and she replied:

> "Well, I asked – I made an appointment to see my doctor and I asked him what would he advise me to do, should I do it and he said what happened that night had nothing got to do with my medical – what medication I was on. It had absolutely nothing got to do it and he advised me not to give it. So, on his advice that's how I didn't give it."

The trial judge held that there was no basis for concluding that anything in the complainant's psychiatric history was relevant. She had acknowledged that many years ago she had had psychiatric treatment with an admission to hospital but had not had any hospital treatment since then. The judge held that such remote psychiatric history could not have any impact on the issues in the trial. Any attempt to connect a psychiatric condition with the events was pure speculation as the trial judge held.

37. The Court is satisfied that the trial judge was correct in this ruling. There is no obligation to provide material that has nothing to do with the case. There was no reason to suppose in this case that this historic treatment was in any way relevant. The appellant's Counsel did not at the trial make any specific case for relevance but made a general request. The trial judge described it as a fishing expedition. The mental health of a complainant could be relevant in some circumstances but there was nothing in this case to justify that conclusion.

38. The appellant also applied for a direction on the ground that the complainant was taking a range of medications which might have had side effects and again the judge held that this was a fishing expedition. The Court finds that the trial judge was justified in this finding.

39. Apart from suggesting that it was wrong to refuse his request for the information, Counsel also complained that the judge was wrong to allow the evidence of the complainant as to why she had refused consent but this complaint is also without merit. It would have been wrong and unfair to allow the complainant to be exposed to the suggestion that she had unreasonably or capriciously withheld the information. The prosecution was not adducing evidence that the statement made by the doctor was true. The witness was entitled to refer to advice that had been given to her and to give it as an explanation. The rule against hearsay forbids the introduction of a third party statement with a view to establishing the truth of that statement. That was not the situation here; it was merely offered as an explanation.

40. This is not a case where material information has been withheld by the prosecution and therefore this ground of appeal also fails.

Ground 3: The Trial Judge's Charge

41. The appellant claims the learned trial judge should have acceded to the requisitions made by defence Counsel following his charge to the jury; it is not suggested that the judge erred in what he told the jury but rather that he should have gone further than he did in dealing with the subjective element of the crime, in pointing out that prosecuting Counsel had misstated the law in his closing address and in failing to point out deficiencies in the evidence of the complainant and areas of confusion and uncertainty in her evidence.

42. The first point is in relation to the complainant's use of the expression "I think" in her statement to the Gardaí. Counsel's contention was that the judge should have told the jury that the witness had, at one point in the cross-examination, said that in using the words she was expressing doubt. He made another requisition seeking "a clear statement to the jury that the complainant has clearly conveyed that she was unsure on crucial matters". It would appear that this complaint is factually incorrect because the judge actually said to the jury:

> "In her statement to the guards, she said 'I think he continued' and she accepted in evidence that when she used 'I think' then that means she was not sure".

The witness made clear in her evidence, however, that she was standing by her complaint that she had not consented to sex and that there were no circumstances in which she would have consented to it. Counsel was entitled to enquire as he did and to suggest that she was expressing uncertainty when she was speaking to the Gardai. Whether that was an indication of uncertainty about her evidence generally was classically a matter for the jury.

The judge was entitled to respond as he did by saying that he was not required to make an additional speech for the defence. The facts were, as the trial judge pointed out, a matter for the jury.

43. Neither is there anything in the submission of the failure, as alleged, by the trial judge to put the defence case. The Court is satisfied that the judge more than adequately presented the defence case and did not misstate the issues.

44. The judge dealt adequately with the medical expert's evidence that was given at the previous trial which was read into the record. This Court is satisfied that the judge did not misstate the evidence or devalue it.

45. There is also a complaint that the judge should have referred to the evidence of the complainant that she was not taking an antidepressant, which was contrasted with the evidence of the toxicologist which it was said confirmed her use of an antidepressant, but it was not the function of the trial judge to present every jot of evidence to the jury.

46. Finally, there is the complaint the appellant makes about prosecuting Counsel's closing speech to the jury in which he said that if the accused reasonably thought his mother was consenting that was an excuse in law and that it came down to reasonableness.

47. Counsel for the prosecution had suggested that the appellant did not have a reasonable belief that his mother was consenting. Counsel for the accused took issue with the reference to reasonable belief and submitted to the jury that it was wrong. He said that the question was whether or not there is actually a belief on the part of the accused, and in assessing that question, the jury looks at all the circumstances, in particular to see if there are any reasonable grounds for him to actually believe it. He said, ultimately, the test was whether or not the accused honestly believed his mother was consenting.

48. There was no complaint about the judge's charge to the jury and the judge did say that the jury must take the law from him. The trial judge set out the provisions of s. 2(2) of the Criminal Law (Rape) Act 1981, as follows:

> "The Act goes on to further provide, Ladies and Gentlemen, that if at a trial for a rape offence, the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard in conjunction with other relevant matters in considering whether or not he so believed. In this case, the case is made that the accused man believed that the woman was consenting. So you must look and see whether or not there is present or absent reasonable grounds for such a belief and they are matters that you have to have regard to, considering the overall picture, the entire picture. Was there a reason why the man might believe that she was consenting or was there an absence of any grounds for such a belief."

This was a correct statement of the law. The statement by counsel for the prosecution would of course have been overtaken and supplanted in importance by the express instructions of the judge and by his communication that it was for him to tell the jury what the law was. This ground of appeal must therefore be rejected.

Conclusion

49. In all the circumstances, the Court is satisfied that there is no basis in law for overturning this conviction. The conviction was safe and the trial satisfactory and the Court accordingly dismisses the appeal.