



THE COURT OF APPEAL

[169/16]

The President

Edwards J.

Whelan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JH

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 25th day of June 2019 by Birmingham P.

1. On 5th February 2015, the appellant was convicted in the Central Criminal Court on seven counts. Three of those were counts of rape, one of attempted rape and three of sexual assault. There had been an eighth count on indictment, but that was dealt with by way of a directed verdict of not guilty. That count is not the subject of any controversy and was not at any stage.

2. The statement of grounds is structured so that there are two grounds of appeal and the reason for that will emerge in due course, but in essence, the substance of the appeal is that the verdicts of the jury were perverse and contrary to reasonable view of the evidence. At the outset, the Court would observe that the task facing the appellant's representatives, who are not those who appeared for him at trial, is a daunting one. The Court makes that observation in a situation where, at trial, the appellant was represented by very experienced and able counsel and no application was made at the close of the prosecution case to withdraw the case from the jury, nor was there any application made at the close of all the evidence in the case. It was the situation that the defence called evidence.

3. The background to the trial is that the appellant was charged with repeated rapes and sexual assaults of his niece whose date of birth was very late in 1977, the alleged offending occurring between 1984 and 1988.

4. The high water mark at this point of the appeal relates to the involvement at trial of a cousin of the complainant, Ms. K, who was aged some six months or thereabouts older than the complainant. The complainant, in her evidence, alleged that Ms. K was present in respect of two incidents, and indeed, that she was abused in each of these two incidents. One of those had occurred in the sitting room of the appellant's house and the other was alleged to have occurred in a big steel galvanised shed at the back of the grandparents' house.

5. According to the complainant, she and Ms. K were sent to the shed because they had been making noise. The appellant is alleged to have been present there and to have raped both girls. The incident was dated as occurring in 1984 or 1985, and it was dated by reference to the death of the complainant's grandfather. It was put to the complainant that it would be denied that her cousin had been abused, and in due course, the defence called the cousin, Ms. K, as a witness and she denied ever witnessing anything untoward involving the complainant and also denied that she herself was abused. Ms. K was subject to cross-examination by prosecution counsel and the cross-examination focused on the fact that she had been asked to give evidence only on the day before she came to Court as a witness and also as to how she had responded when approached by Gardaí at an earlier stage of the case. The Notice of Appeal is structured so as to isolate the counts involving Ms. K from the remaining counts on the indictment.

6. This was a situation where there was a conflict of evidence between the two cousins, the two cousins who were close contemporaries. Nobody at trial felt that that conflict could only be resolved, or indeed should be resolved, by withdrawal of the case from the jury. Rather, the matter in conflict was left to the jury, and in the Court's view, properly left to the jury. The matters in issue were resolved by the jurors. Their return of a guilty verdict meant that they accepted the complainant's account and that they did so beyond reasonable doubt.

7. There is one other aspect of the trial to which reference should be made. A significant witness at trial was Ms. RM, the appellant's former wife. She was the subject of vigorous cross-examination by defence Senior Counsel and it was put to her that even though on two occasions she went to Gardaí in order to provide statements in relation to what had happened to the complainant, Ms. S, that the vast bulk of the statements provided by her related to alleged wrongdoing against her. Pressed by defence counsel, at one stage, she observed:

"Do you think that when I was in there giving that statement that I cared about what date it was, what day it was, or whatever, do you know what it took for me to go in there and do that and keep that locked up inside me for so many years and him do what he had done to my children?"

There was no application to discharge the jury. Rather, the matter was dealt with by counsel asking the investigating Garda whether any statements existed alleging wrongdoing against the appellant's own children, the response to which query was that there were no such statements. The Judge at trial clearly formed a view in relation to this witness and he told counsel how he intended to deal with her evidence, which was, essentially, that it was his intention to tell the jury that the witness in question was one who clearly came

to Court with an agenda. Told by the trial Judge how he proposed to deal with the matter, Senior Counsel for the defence expressed himself happy with what was proposed.

8. In those circumstances, realistically, counsel on behalf of the appellant today does not put forward this as a standalone ground, but rather, it is indicated that this forms part of the overall jigsaw that is the case.

9. In this case, the trial Judge felt that it was a matter which should be left to the consideration of a properly charged jury. Nobody disagreed with him, nobody sought to persuade him to do otherwise, but today, it is said that the verdict is perverse and what that amounts to is that this Court is invited to take a different view to the evidence to that which was taken by the jury that actually heard the evidence, which of course, this Court has not done, this Court being confined to the transcript with all the limitations that that involves. Such an approach would involve flying in the face of the long-standing jurisprudence of this Court and of its predecessor. That, the Court declines to do.

10. In the circumstances, the Court will dismiss the appeal.