THE COURT OF APPEAL

Record No. 25/2017

Birmingham P.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

E.D.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of June 2018 by Mr. Justice Mahon

1. This judgment relates to the appellant's appeal against his conviction by a jury at the Central Criminal Court on the 30th November 2016 of one count 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) Act 1990. The appellant has also appealed against his sentence of ten years imprisonment to date from the 3rd May 2016, imposed on the 30th January 2017. This judgment relates to conviction only.

2. The appellant is originally from South Africa and came to Ireland when he was eleven years old. He was twenty four years old at the date of his conviction. The complainant, MT, alleged that on the evening of the 23rd July 2014 the appellant broke into her apartment while she was in bed. MT was alerted to the presence of the appellant in her apartment by her daughter, DT, who had never before met the appellant. The appellant was known to the complainant, had been in the complainant's apartment on a previous occasion and had had consensual sexual intercourse previously. It is alleged that the complainant was forcefully brought downstairs to an outside area of her apartment block while being assaulted, and was subjected to sexual intercourse with the appellant against her will. The fact that sexual intercourse took place was not disputed. The appellant maintained that it was consensual.

3. The appellant was originally charged with burglary in addition to the rape offence and was tried in respect of both. The jury acquitted him in relation to the burglary charge

4. The following grounds of appeal are maintained on behalf of the appellant, in relation to his conviction:-

> (i) the learned trial judge failed to re-charge the jury during the course of his charge when requisitioned by counsel to re-direct the jury on the issue of recklessness and ruling against an application by counsel on behalf of the appellant in that regard, and
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> (ii) the learned trial judge failed to re-charge the jury during the course of his charge when requisitioned by counsel to re-direct the jury on the issue of consent and in particular the specific issue of vitiation of consent which was raised by counsel on behalf of the appellant and upon which the prosecution was founded.

5. In the course of his charge to the jury, the learned trial judge said:-

> *"In this case, the fact of sexual intercourse is not in dispute. It must also be proved that the woman did not consent to the sexual intercourse. Now, if you decide that the prosecution has not proved beyond all reasonable doubt that the complainant did not consent then the charge of rape is not made out. If sexual intercourse and lack of consent is proven then you must - then you should consider the mental element, in other words what was the accused's state of mind at the time? The mental element of the crime of rape is that the man knew that the woman was not consenting to sexual intercourse or that he was reckless as to whether she did or did not consent.*
>
> *Recklessness means the accused man was aware that there was a risk that the woman was not consenting, but nonetheless proceeded. If it is proven that he was aware that there was a real risk that the woman was not consenting, but that he proceeded to have or continue intercourse with her in spite of this, then recklessness is established.*
>
> *Recklessness only arises where the accused claims to have mistakenly believed that a woman was consenting. In this case no such claim has been made by the accused. Instead you have starkly diverging accounts of what occurred, neither of which allow any room for the possibility of mistaken belief. The prosecution case is to the effect that the complainant, at all times, made plain the fact that she was not consenting to sexual intercourse with the accused. The accused's version of events is very different. The accused alleges that before they left the apartment he had a conversation with the complainant in which he said M, let's do it now and she said I can't, my daughter is here, next time. He then says he invited her downstairs and she came with him. He says that the complainant took his hand and followed her down - followed him downstairs. He says that she wanted to have sex close to the door but he told her no and suggested going further away from the door. He says that when they went around the corner she started bending over straight away and said "give it to me quick". He says he asked her to move further in case the complainant's daughter would see them. He alleges that she then bent over and they had consensual sexual intercourse which she enjoyed.*
>
> *Now, that is the version of events and, as I say to you, if you accept his version of events you must of course acquit. If you accept his version of events could reasonably be true you must acquit. Even if you reject that version of events you*

must still be satisfied that the prosecution has proved its case beyond all reasonable doubt. The - now, I have said to you that the accused has not claimed that there was mistaken - mistaken as to consent in this case. The facts are for you to decide. If you are of the view that the fact - evidence in this case is to be interpreted on the basis that recklessness is a live issue that is entirely a matter for you. That is merely my comment on the facts, which may or may not be of assistance to you. But it seems to me that on the starkly divergent accounts which you have heard reckless (recklessness) is not an issue in this case, but you're entitled to disagree with me because the facts are for you."

6. Following the conclusion of the charge to the jury, Ms. Biggs S.C., on behalf of the appellant, raised certain requisitions with the learned trial judge. These related, *inter alia*, to the learned trial judge's references in the course of his charge to the jury to consent and recklessness. Following a brief exchange between the learned trial judge and Ms. Biggs, the relevant requisition was explained in the following terms:-

"JUDGE: The prosecution case is that she did not consent. Her evidence is that she did not consent and made plain the fact that she was not consenting and it's a matter for the jury to decide whether they accept that or not.

MS BIGGS: Yes, Judge, I accept the Court's ruling ultimately but in relation to the issue of recklessness which, as I think for completeness sake, that the Court would make it clear that it is absolutely subjective and in terms of the accused's state of mind and while the Court does very clearly comply in every way with the COR direction, because it is said once I wonder would the Court also make it clear that he must have adverted - it must be a conscious advertence for the purposes of recklessness to be involved.

JUDGE: Well, as I read COR I'm not required to deal with recklessness unless the defence have actually made a case of mistaken belief.

MS BIGGS: Yes, Judge, but this comes into - this is the problem, the prosecution case is one of brute force, that is what the complainant has said and if that is the case then there can be no question of mistake or anything even closely resembling it. But if the jury rejects that brutal force and goes on to consider the issue of recklessness in the context of the overall evidence and fear and matters of that nature, then I think the jury will need to have some further instruction in relation to the concept of recklessness, but ultimately I do stand over my - I suppose I don't know, they're not exactly at the stage of requisitions, but you might treat it as so rather than repeating it at a later stage, Judge, that the prosecution case must be marshalled and must be made known to the jury and if it is as was said in evidence, but as I say, I've made my submission in that regard.."

7. The learned trial judge decided against further addressing the jury in relation to the issue of recklessness. He said, after a brief adjournment:-

"…I wanted to get the COR judgment and it seems to me from a reading of paragraph 51 of that judgment that it's only where the accused claims to have mistakenly believed that a woman consented that directions, elaborate directions as to recklessness are required."

8. Ms. Biggs did not take issue with the learned trial judge's expressed understanding of the decision in *COR*.

9. The concept of recklessness in the context of the offence of rape was considered by Charleton J. in his judgment in the Supreme Court case of *DPP v. CO'R* [2016] IESC 64. In para 45 of his judgment, Charleton J. stated:-

"…In cases of rape, recklessness means that the possibility that a woman was not consenting actually occurred in the mind of the accused. Where an accused decides to proceed with or continue with intercourse in spite of adverting to that risk; that is recklessness. Alternatively, it may be claimed by the accused at trial that the man genuinely believed that the victim was consenting, even where the basis for such a belief is totally unreasonable. The resolution to any such claim must depend, in the first instance, on the jury deciding what facts they accept beyond reasonable doubt. The absence of consent to sexual intercourse is an objective fact. The accused's view, as to the existence, or non-existence, of this fact is subjective. An honest, though unreasonable, mistake that the woman was consenting is a defence to rape. Any such alleged belief in consent must be genuinely held… Belief in a set of facts is generally only validly grounded on circumstances which themselves have a foundation in reality and it is for the jury in a given case to determine whether a claim of honest though unreasonable belief in consent was held by the accused."

10. He also stated:-

"Recklessness is the taking of a serious and unjustified risk. The crime of rape is about the right of a woman to be protected against a gross violation of her mental and physical integrity. Those rights are protected by the Constitution as part of the collection of rights which the State guarantees to respect, and, specifically by making rape an offence, to defend and vindicate as far as practicable…If an accused is aware of the possibility that a woman may not be consenting, any conscious disregard of this advertence to that possibility means that for him to proceed is for him to act recklessly; and thus criminally."

11. The evidence given in this case by the complainant was that while asleep in her apartment, her apartment was forcibly entered by the appellant. The complainant and the appellant had previously met on a small number of occasions, and had had at least on one occasion engaged in consensual sex. The complainant maintained that she was forced by the appellant to descend the stairs in her apartment, go outside before being raped by the appellant. She maintained that he assaulted her in the process leaving her with bruising and scratches. The defence case, as put to the complainant in her cross examination by Ms. Biggs was that she had engaged in consensual sex outside the apartment, having left the apartment with the complainant voluntarily. Ms. Biggs put the following to the complainant:-

"Q. Can I suggest to you, Ms T, that you were not pushed down the stairs as you allege. In fact, Mr D was in front of you and may have grabbed your hand?"

12. To this, the complainant responded:-

"A. No, that's not true, I was pushed."

13. Ms. Biggs also put the following to the complainant:-

> *"Q. You see, I have to suggest to you, Ms T, that you did indeed want Mr D out of the apartment but in circumstances where you did not want your daughter D to know for one second that he had been there previously?*

And

> *"Q. …And I have to suggest to you that you were not pushed down those stairs, that you went down those stairs on a voluntary basis with Mr D when, in fact, he was in front of you and had your hand?"*

14. To this, the complainant responded:-

> *"A. No, that's not true, he hadn't my hand. There were marks on my body from him attacking me."*

15. The complainant claimed that the following suggestion put to her by Ms. Biggs on behalf of the appellant was a lie:-

> *"Q. … I have to suggest to you that he did not hold your arms, force your arms or force to you do anything. I have to suggest to you that what happened outside was a consensual act of sexual intercourse?"*

16. Earlier, in her direct evidence, the complainant described what occurred as follows:-

> *"Q. You said, how did you get down the stairs?*
>
> *A. He pushed me down.*
>
> *Q. So was he behind you at that stage?*
>
> *A. He was. Yes.*
>
> *Q. And as he was pushing you down what were you doing at that point?*
>
> *A. I just went with it because I didn't know, I couldn't do anything.*
>
> *Q. Were you saying anything at this stage?*
>
> *A. Yes. I was angry, I think as well you know "Leave me alone" you know.*
>
> *Q. Was the door of your apartment still open at that stage?*
>
> *A. It was broken open.*

And

> *Q. When you say he was pushing you down the stairs, did he, what part of you was he pushing or what was he doing?*
>
> *A. Pushing me down, you know, by the shoulders and..*

And

> *Q. .. Now when you got to the bottom of the stairs, what happened next?*
>
> *A. He pushed me out the door, told me to turn to the right down the steps, around the corner where the shed was.*
>
> *Q. And at that stage how were you brought around there, could you just describe how you got there?*
>
> *A. I was pushed around."*

17. The complainant also described in her direct evidence how she was left marked on her hands, back and lower back.

18. The conflict as between the complainant's account as to what occurred, and the account of the appellant as indicated by Ms. Biggs was clear cut and unambiguous. It was never part of the appellant's defence that he had mistakenly believed that the complainant had consented to sexual intercourse. The learned trial judge was correct to suggest that on the run of this case no question of mistaken belief could have arisen.

19. The learned trial judge went to refer to the *"starkly diverging accounts of what occurred when neither of which allow any room for the possibility of mistaken belief"*.

20. In the course of making her requisition to the learned trial judge on the issue of recklessness, Ms. Biggs requested that it be made clear to the jury that recklessness *"is absolutely subjective and in terms of the accused's state of mind.."*. To the extent that the issue of recklessness was addressed by the learned trial judge that element of subjectivity was referred to. The learned trial judge told the jury that *"recklessness means the accused man was aware that there was a risk that the woman was not consenting.."* and *"he was aware that there was a real risk that the woman was not consenting"* and a further reference to the accused claiming *"to have mistakenly believed that a woman was consenting"*.

21. The court is satisfied that the learned trial judge dealt sufficiently with the issue of recklessness in his charge to the jury to the extent that it was appropriate to do so having regard to the evidence heard by the jury in this case.

22. Ms. Biggs raised a further requisition at the conclusion of the learned trial judge's charge to the jury. She expressly sought to re-visit the issue of consent and the manner in which the jury had been advised in relation to that matter. The learned trial judge refused to re-consider his stated position in relation to that issue.

23. Subsequently, the jury asked the learned trial judge to *confirm the definition of consent*.

24. Following a further exchange between the learned trial judge and counsel for both sides, he addressed the jury in the following terms:-

> *"..The next issue was definition of consent. What you are asking is what does it mean in law to consent, is that the issue?..Well, it is an issue of fact. It is a word that must be given its plain ordinary meaning and it is an issue of fact as to whether somebody consented or not. You have to draw, you as the jury, have to draw inferences from the evidence as to the state of the mind of the complainant as to whether she consented or not. The prosecution case is that there was first of all a confrontation, as it were, in the apartment downstairs, in that the complainant and D were asking him to go, he wasn't complying with their request. There was evidence from D that he became aggressive, that she retreated into her room. There is evidence from the complainant that he punched her with full force to the face. Then there was evidence of being pushed down the stairs. She also gave evidence that she was screaming and shouting as they went down the stairs. Then there was her evidence that she was pushed around the corner. Then all was evidence that she was told to put her hands up against the pebbledash wall. Then she was told to come away from the wall, to bend over and he raped her. She also gave evidence that she said that she experienced discomfort during the two minutes of the alleged rape and that she gave up saying anything to him because she knew he wasn't going to stop. She said that she gave up after the accused had entered her. So on the prosecution case there is evidence of violence. There is evidence of shouting..sorry, violence on his part and all is evidence of shouting, even roaring on her part. And then there is evidence of resistance to the point where he actually enters her.*
>
> *Just in relation to that it is provided by statute that: "it is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person, without the consent of that person any failure or omission by that person to offer resistance to the act, does not of itself constitute consent to the act. So on the prosecution case, she is resisting to the point that he enters her, but then she gives up, as it were, from that point. But that submission, if you accept it to be a submission on her evidence, it does not amount to consent. But the issue of consent is at all times an issue of fact and you have to decide that on the evidence that you have. As I said to you, you have two very different narratives of what happened, you have the complainant's narrative, which I have just described, which is characterised by violence on his part, resistance on her part manifested in shouting and roaring, and then you have his version of events, which I described to you when I charged you initially. She took his hand as they came down the stairs. He says that she sought to initiate sex, or at least to invite him to have sex at the door. They then went around the corner and she then bent over spontaneously and then he said no, we must go further, otherwise your daughter will see us. Then they went further and then she bent over and they had consensual sex which she enjoyed. They are the two starkly divergent accounts that you have.."*

25. It is difficult to envisage what more might have been said to the jury on the issue of consent. What was said to them was said in plain language and was understandable. The court therefore rejects the submission that there was any inadequacy in what was stated by the learned trial judge to the jury on the issue of consent.

26. The court is satisfied that the trial was fair and that the verdict reached was one which was reasonably open to it to return on the evidence presented in the course of the trial.

27. The appeal against conviction is therefore dismissed.