THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

194/14

The People at the Suit of the Director of Public Prosecutions

V

Samir Mansour

Appellant

Judgment of the Court (ex tempore) delivered on the 9th day of June 2015 by

Mr. Justice Birmingham

1. On the 10th July, 2014, the appellant was convicted by a jury, which returned a unanimous verdict, sitting in the Central Criminal Court, of the offence of rape. The alleged offence had occurred on the 8th January, 2010 and there was but one count on the indictment.

2. One issue only is raised on this appeal and that is that it said that the judge erred in failing to discharge the jury when certain evidence was given by the complainant. The evidence which precipitated the application for a discharge was given on day 2 of the trial. It is probably convenient to quote it at this stage:

> "Prosecution counsel asked What was he doing to you at that stage?
>
> A. He still had his fingers inside me and he started kind of biting around my nipples and he started – he started just kind of rubbing his penis all over me. When he was on top of me I was still tying to get free but I couldn't. He was – he was I could feel his belly on top of me it was just and he put his finger in front of my eye.
>
> Counsel Yes
>
> A. And said he would poke it out if I moved."

3. In order to provide some context for the application to discharge it is necessary to say something about the previous history of the proceedings, which by the time the trial started on the 1st July, 2014, was quite a lengthy one and indeed a somewhat convoluted one. This was in fact the fourth occasion on which the appellant had appeared before the Central Criminal Court charged with the offence of rape.

4. Previously he had been tried on four counts a s. 4 Rape, a section 2 sexual assault offence under the Criminal Law Rape Amendment Act 1990, an offence under s. 5 of the Non Fatal Offences Against the Person Act and an offence under s. 15 of the Non Fatal Offences Against the Person Act, that is to say an offence of false imprisonment.

5. On that first trial, a guilty verdict was returned, but that guilty verdict was the subject of an appeal and that saw the verdicts quashed and a re-trial directed. The second trial got under way and an issue arose apparently in relation to a juror or jurors with the result that the jury was discharged. Pretty much immediately a new jury was empanelled to hear the case in what was now going to be the third time that Mr. Mansour stood trial. That third trial resulted in a verdict of not guilty in respect of the sexual assault and not guilty in respect of the s. 5 Non Fatal Offences Against the Person Act count. But there was a disagreement in relation to the rape count and the false imprisonment.

6. So far as the s. 5 Non Fatal Offences Against the Person Act count, which is the focus of attention at this stage is concerned, it is appropriate to note that both the statement of offence and the particulars of offence at the trial which resulted in a verdict of not guilty had referred to a threat to kill or to cause serious harm. In passing, it may be said that there must be some argument that this rendered the account bad for duplicity. It is also appropriate to note that the focus of pretty much all the attention at that third trial was on the aspect of a threat to kill. That was the recollection of the trial judge, who presided, who was the same trial judge who presided at the later trial which has now given rise to this appeal. His recollection in that regard was confirmed by a perusal of the transcript.

7. When the fourth trial was listed, there was a single count on the indictment. In those circumstances, counsel for both sides addressed their minds to the significance for the trial of the fact that there had been prior acquittals on two counts, that is to say the s. 4 Rape and the s. 5 Non Fatal Offences Against the Person Act count. They discussed the matter and arising from those discussions, the leading counsel for the prosecution by agreement with his colleagues spoke to the complainant before she gave evidence and in the course of the application to discharge, he reported to the court on those discussions in these terms:

> "In my respectful submission this is an application of little substance. With Mr. Condon's (the defence counsel) permission, I spoke to the injured party in relation to matters on which the accused had been acquitted and advised her not to give evidence in relation to the threat to kill or the s. 4 Rape and that was the limit of it. The previous trial to all intents and purposes was run on the basis that there was a threat to kill and that is reflected in your Lordship's charge that has just been -"

The judge then interjected to say:-

"Well that was my recollection of it"

Counsel said yes and the judge said:

"But as I say Mr. Marrinan I do not have a photographic memory.' (Counsel for the prosecution).

8. Counsel for the defence feels that the understanding that he had, related to matters on which there had been an acquittal. He says that it is unacceptable that there should have been any reference to a matter to where an acquittal had resulted and that given the manner in which the indictment was drawn at the earlier trial, which in turn was reflected on the issue paper that was before the jury, that there had been an acquittal on the threat to cause serious harm aspect.

9. In the court's view, the focus now has to be on the question of any unfairness or prejudice. Did what happened give rise to prejudice or unfairness? Did it render the trial unsatisfactory? The answer to that question is very clearly no. The issue the jury had to determine was whether the sexual activity was consensual or whether the prosecution had proved it to be non consensual and had done so to the standard of proof beyond reasonable doubt. If the issue to be considered by the jury is isolated in that fashion, then it is clear beyond reasonable argument that the threat to poke the eye out formed a part and indeed a very important part of the *res gestae* of the incident.

10. Having purportedly set out to describe what had occurred to her, the appellant made reference to a remark in the nature of a threat, which she said was made by the accused appellant. That she would do is in entirely understandable. It would not be easy for a witness who has sworn to tell the truth, the whole truth and nothing but the truth to have done otherwise. This was not a case of a witness referring to matters that were extraneous unrelated and unrelated of a prejudicial nature. This was a witness providing a detail in respect of the experience to which she said she was subjected.

11. In these circumstances this Court finds itself in agreement with the submission made by prosecution counsel to the trial judge that the application to discharge was of little substance. Certainly, it is the case that the trial judge was well within his rights in declining to accede to the application.

12. Accordingly this Court will reject this ground of appeal and having done so, will now dismiss the present appeal.