THE COURT OF APPEAL

Record No. 151/2016

Birmingham J.
Sheehan J.
Mahon J.

Between/

The Director of Public Prosecutions

Respondent

- and –

M. B.

Appellant

JUDGMENT of the Court delivered on the 3rd day of November 2016 by Mr. Justice Mahon

1. The appellant was convicted in the Central Criminal Court on 16th March 2016 of one count of indecent assault, contrary to Common Law and as provided for by s. 10 of the Criminal Law (Rape) 1981. He was sentenced on 30th May 2016 to two years and six months imprisonment, said sentence to date from 9th May 2016. The appellant has appealed his conviction and sentence. This judgment relates solely to his conviction appeal.

2. The appellant was charged with ten counts in total. Two were of indecently assaulting Ms. A on dates unknown between 19th April 1983 and 18th April 1985 in different, but adjoining locations, in Co. Laois. The other eight counts were of rape contrary to Common Law as provided for by s. 48 of the Offences against the Person Act 1861 and as provided for by s. 2 of the Criminal Law (Rape) Act 1981, in which the alleged victim was also Ms. A. The alleged rapes occurred within the same date line and in the same general location as were alleged in the indecent assault counts. Following a seven day trial the appellant was convicted on one of the indecent assault charges, Count 4, the particulars of which are that:-

> *"… (M.B.), a male person, did on a date unknown between 19th April 1983 and 18th April 1985 (both dates inclusive) in a shed (subsequently amended to a field) at Ballycarroll, Portarlington, in the County of Laois indecently assaulted (Ms. A) a female person."*

3. The appellant's grounds of appeal are as follows:-

> (1) The learned trial judge erred and was wrong in law in refusing an application to disallow the tendering of evidence by witness number 2, Mr. B, in circumstances where it was reliant upon what the witness indicated he observed when he was five years old, and subsequently admitted to be four years old, in excess of thirty years later, or indeed in failing to hold an enquiry as to whether such evidence reached a standard as to which a jury could rely upon it in considering a verdict.
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> (2) The learned trial judge erred and was wrong in law in failing to give a warning to the jury in all the circumstances of the case as to the reliability of witness number 2, Mr. B, or a warning to urge caution in considering his testimony.

The application to disallow the evidence of Mr. B

4. Mr. B and Ms. A are brother and sister respectively. Mr. B was four years old at the time of the alleged indecent assault in respect of which the appellant was found guilty, although he initially believed himself to have been five years old.

5. On the second day of the trial, and as Mr. B was about to be called as a witness for the prosecution, Mr. Peart S.C. on behalf of the appellant made an application (in the absence of the jury) to have the evidence of Mr. B excluded. His application was primarily based on the fact that Mr. B was four years old, probably about four and three quarter years old, whereas he believed himself to have been five years old, at the time of the alleged indecent assault, and that the evidence of a four year old, some thirty one years later, should be deemed by the court to be unreliable. While the age issue was the primary motivation for the application to exclude Mr. B's evidence, reference was also made to the fact that the evidence of Ms. A, which had concluded at this point in time, was in some respects inconsistent with the information provided in the statement of Mr. B, particularly as to the location of the assault on his sister.

6. In contending for the exclusion of Mr. B as a witness, Mr. Peart stated:-

> *"… I am relying as my strong point on the fact that he does not even know his own age and that he was four, not five and that .. he does not even know how old he was when he says this occurs. He has got it wrong. I am saying that it is hopelessly unreliable for the reason that he was allegedly five, transpires to be four, and he is now trying to say what happened thirty one years later. But I am saying that even if we needed to have extra reasons why his evidence is unreliable, one can first of all say it contradicts other evidence already given if he gives his evidence that way and secondly I would say that it is uncorroborated and in fact you would have expected, if there is any reliance to be put on it at all, you would have expected the complainant to have said not only did this happen but my brother saw it and she does not…"*

7. In her ruling in relation to this application, the learned trial judge stated as follows:-

> *"..In relation to the application that I exclude the evidence of Mr. B, Mr. Peart submits that on any form of scrutiny of this evidence that it falls below the standard of reliability. He complains that the potential witness, Mr. B is incorrect as to his age, that the date of birth is 1980 and that consequently the child can have been no more than four years of age*

when he says he saw what he alleges he saw. Mr. Peart makes further submissions in relation to contradictory portions as he alleges contained in the statements and that the matter was not in fact mentioned by the complainant amongst other issues.

The issue of reliability is a matter entirely for a jury to assess and to consider. It is something which goes towards the weight of a witness and is not the touchstone of admissibility. That being, the reliability of any witness is a matter for the jury's assessment. Questions such as his age, the contradictions allegedly contained in his statement as to locations and any other matters are entirely matters within the remit of a jury to assess and going towards the weight of the witness but not towards the admissibility of a witness's evidence in the first instance."

8. The learned trial judge did however accede to one part of Mr. Peart's application. He had sought to exclude evidence to be given by Mr. B as to what he, Mr. B, had said to his sister, Ms. A, as being hearsay. The learned trial judge agreed with the submission and directed no such evidence be led in the presence of the jury.

9. Mr. B proceeded to gave evidence in considerable detail as to what he claimed he witnessed as between the appellant and his sister, Ms. A, while they were both lying down in a field. He was extensively cross examined by Mr. Peart. Mr. B maintained that he was five years old at the time, and that the incident he witnessed occurred in or around October. He described how he and his sister, Ms. A, together with his brother and the appellant were walking to a field close to his home. He described how Ms. A and the appellant *went over the gate first* leaving himself and his brother at the gate. Having picked blackberries for a short while, he and his brother proceeded to climb over the gate. As he did so he said that he noticed Ms. A and the appellant lying on the ground. He described in some detail how he witnessed the appellant touching his sister *at the front and the back and he was kissing her and I could see him opening up his trousers and I could see his trousers going down so far.* He also said that he saw his sister's underwear, and that she turned around and with tears in her eyes said *just go away, go away*. He then said that he and his brother then walked towards another field, that he asked his brother why their sister was crying and he was assured that nothing was wrong. Ms. A did not subsequently mention the matter to him.

10. Mr. B was cross examined as to his age at the time. Mr. B acknowledged that he may not have been five and was probably four years old at the time, possibly three or four months short of his fifth birthday. He was also extensively cross examined as to the location in which the incident involving the appellant and Ms. A was supposed to have occurred.

11. At the conclusion of the evidence, on the fourth day of the trial, Mr. Peart made a wide ranging application to the court in advance of the learned trial judge charging the jury. *Inter alia*, the learned trial judge was requested to caution the jury *"to be careful when dealing with the evidence"*, specifically referring to the evidence of the victim and Mr. B. He requested that the learned trial judge would *"indicate to the jury that his evidence is hopelessly unreliable and that he should not rely upon it at all."* He asked that a corroboration warning be given in line with the Court of Criminal decision in *DPP v. JEM* [2000] 4 I.R. 385.

12. The learned trial judge ruled as follows:-

"Well, I have considered very carefully the submissions made as regards a corroboration warning in respect of which I have a discretion under s. 7 of the 1990 Criminal Law (Rape) Amendment Act. In this instance, I am not satisfied to give a corroboration warning. It is the position that there is evidence which is capable in law of corroborating the complainant's testimony, that is the evidence of her brother, (Mr. B). Secondly, the position in law is that there must be an evidential basis for suggesting that the complainant's evidence may be unreliable and I am not satisfied in this instance that that is the position and therefore I am not satisfied to give a corroboration warning. It is the position that there has been no suggestion that the evidence of the complainant was vague or any issue such as that. ***I will give a delay warning****. It is an old case and I will contextualise that warning to indicate that the accused man's aunt was deceased prior to the making of the complaint, that the accused man's mother died prior to the making of the complaint, and that there are no photographs of the building, the sheds, the location or the area from 1993, 1994 or .. excuse me, 1983, 84 or 85."* [Emphasis added]

Discussion

13. The appellant has referred the court to the case of *R v. Malicki* [2009] EWCA Crim 365. That case concerned an appeal of a conviction of a count of sexual assault of a child under the age of thirteen in which the complainant was four years and eight months old at the time of the incident. The accused went on trial approximately fourteen months after the alleged incident. An application was made to the trial judge to exclude the child's evidence because of lack of competency, or that the evidence should be excluded under s. 78 of the Police and Criminal Evidence Act 1984, and that the case should be stopped because of the delay in bringing the matter to trial. At issue was the competency of a girl of approximately six years of age to give evidence in the accused's trial. A lot of emphasis was placed on the apparent confusion and lack of certainty exhibited by the child when giving evidence. On the facts of the case, the trial judge was held to have been wrong to have deemed the child to have been a competent witness.

14. The facts in *Malicki* are clearly distinguishable from the facts in this case. Malicki involved taking evidence from a six year old child some eighteen months after the event complained of. In this case the learned trial judge was asked to exclude evidence from a mature adult of an event that occurred over thirty years previously. Notwithstanding the frailty of memory that might be expected after thirty years of an incident that occurred in early childhood, a mature adult is likely to have a greater appreciation of the requirement to give a careful, truthful and accurate account than would a very young child. In either event, it is normally the role of the trial judge to decide on the issue of the competency of a witness in either of these circumstances.

15. Much emphasis is placed by the appellant on the fact that, at the time he made his statement in relation to the subject matter of this prosecution he believed that he was five years old at the time of the event in question, whereas on cross examination he accepted that as a matter of probability he was three or four months shy of his fifth birthday. At its highest, the difference in question is approximately four months. The Court is satisfied that in the circumstances of this case, the difference between, on the one hand, the age of four years and eight months approximately, and, on the other hand, the age of five years is of little significance, particularly in the context of recalling events approximately thirty one years later. The fact that the appellant may have been four years and eight months old, and not five years old, is not therefore particularly relevant. The Court does not believe that the fact that Mr. B miscalculated his age by approximately four months some thirty one years after the event is indicative, in itself, of his evidence being unreliable.

16. It is argued on behalf of the appellant that following the application to disallow evidence from Mr. B, the learned trial judge ought to have embarked on a *voir dire* in which his evidence and the evidence of other relevant witnesses might be considered, and that in this way the learned trial judge would be placed in a position to rule on the reliability of Mr. B's evidence. This is, in the Court's view,

a novel submission. It is difficult to envisage any circumstances in which a trial judge would embark on such an enquiry in such circumstances, and particularly where the basis for such an application is the contention that, based on the witness's statement in the book of evidence that the witness's evidence, if given, may lack credibility or reliability. In any event, no application for a *voir dire* was made to the learned trial judge.

17. The court is satisfied that in the circumstances of this case the decision of the learned trial judge to deem the reliability of the evidence of Mr. B to be a matter for consideration by the jury to have been correct.

18. The second part of this appeal concerns the learned trial judge's charge to the jury. Prior to the charge, an application was made to the effect that a warning ought to be given to the jury in line with the judgment in *DPP v. JEM* [2001] 4 I.R. 385. This submission appears to be based on the view that *JEM* confers the discretion on judges to warn or advise jurors as to the reliability of witnesses generally. In fact the judgment *JEM* is concerned with the issue as to whether or not the corroboration warning should be given in relation to the evidence of a complainant in a sexually offence case.

19. In the course of her charge to the jury, the learned trial judge stated:-

> *"The credibility and the reliability of each and every witness is a matter entirely for you and for your assessment and, in fact, from where you are seated you have not only the best possibility of hearing what witnesses have to say but you also are in the best position that you can see the witnesses. You can see and you saw how each witness delivered their evidence, their demeanour and all of that forms part of your assessment as to the reliability and the credibility of each and every witness and that is entirely a matter for you. So, you may accept what a witness says entirely. You may reject what a witness says entirely. You may accept part of a witness's evidence and you may reject any other part. So, you understand that, that it is entirely a matter for you as to what detail you consider to be important. The weight to be attached to the testimony of any witness, in other words, is this a very important witness, is this very important evidence, is it less important in the context of the allegations, all of those matters can only be assessed by you."*

20. In the Court's view, this was a near perfect direction to the jury as to how they should approach the reliability and credibility of witnesses who gave evidence in the case. It was clear, concise and easily understood.

21. Importantly, and in ease of the appellant, the learned trial judge did give the jury a *delay* warning. She stated:-

> *"There is a further matter which applies in a case of this age or antiquity, and there is a special warning that I must give you in this type of a case and that is because this is a case where the events alleged are alleged to have occurred over thirty years ago, and it is the position that if the alleged victim had complained of the conduct that she alleges against the accused within a short period of time, it might have been possible for him to check diary or to check wit his friends or associates, or simply to check his memory and so to produce material which might have indicated that he was not with the complainant on the occasions that she alleges. Other witnesses might have been capable of being called. In this regard the accused man's aunt, Ms. P. B., you heard on the evidence died in 2009 and his mother, you heard on the evidence died in 2007. Furthermore, there are no photographs of the various locations, either the structure that you have heard about in the area known as down below or the surrounding areas from that time period, that being 1983, '84 or '85. Because the case is an old case these prospects have diminished or have disappeared altogether and the prosecution are not entitled to take advantage of this. You must therefore bear in mind that I am warning you that in these cases where there is such a delay, as exists in this particular case, there is a special need to exercise caution if you are minded to convict. Take it into account, the delay, when you are considering the issues of the guilt of the accused on the various counts on the indictment. It is undoubtedly the situation that it is much more difficult for an accused man to defend against an old complaint, if, notwithstanding this warning and having taken account of it, beyond a reasonable doubt of the guilt of the accused on one or more counts, you are entitled to act on that decision."*

22. Furthermore, the jury in this case had had the benefit of a lengthy, detailed and robust cross examination by Mr. Peart of Mr. B. The learned trial judge in her charge to the jury recounted the evidence of Mr. B and the extent to which that evidence was sought to be undermined in cross examination. It was well within their competence to accept or reject all, or parts of, Mr. B's evidence as to what he believed he saw over thirty years previously. Equally, the jury were well aware that Mr. B was recounting events of many years previously, and at a time when he was aged four or five years old.

23. The appeal is therefore dismissed.