THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 140

The President
Birmingham J.
Sheehan J.
267/12

The People at the Suit of the Director of Public Prosecutions

V

W.T.

Appellant

Judgment of the Court delivered on the 27th day of March 2015 by

Mr. Justice Birmingham

1. On the 13th June, 2012, the appellant was convicted of 56 counts of sexual assault stated to have been committed between 1993 and 2000. The offences related to two separate locations and the appellant was sentenced to four years imprisonment in respect of the offences that related to each location. The sentences were made consecutive to each other, so that the effective sentence was one of eight years imprisonment.

2. The offences were allegedly committed against a young girl L who lived at a flat in Ballymun with her older brother and mother. It is of some significance that the complainant's mother had a very serious drink problem, this is relevant to her capacity to care for and protect her daughter. The appellant occupied a different flat in Ballymun, but entered into a relationship with the complainant's mother. On the indictment there were counts in respect of each of these two flats. The abuse is said to have occurred when the complainant was between six/seven years of age and eleven/twelve years of age. So far as the abuse at the flat where the complainant resided is concerned, the evidence given by the complainant is that the appellant would call around on a regular basis and that her mother would drink with the appellant to a stage where she would pass out and that the appellant would then come into the complainant's bedroom. He would wake her up, kissing and "feeling her", he would put his hands down her pants and take her out of bed and make her masturbate him until he ejaculated.

3. So far as the alleged abuse in the flat of the appellant is concerned, the evidence given by the complainant was that she used to cycle around the Ballymun area with her friends and that, as she was doing so, the appellant would call out to her from his window and ask her to go to a van shop in order to get cigarette papers/tobacco. She would bring the items back to his flat and he would bring her into a back room of the flat where there were items such as TV's and car parts. The room was referred to as the "storeroom" during the trial.

4. The complainant describes that the last act of abuse occurred on an occasion when a chip pan fire occurred at the flat where she lived, she says that at the time she was eleven or twelve, closer to twelve years of age. The complainant describes how on the occasion her fingers were burnt and a neighbour put out the fire. Then the fire brigade came and put gel on her fingers. Her brother came home to the flat and she was allowed to sleep in his room that night. However, her brother later went out and left the door on the latch because he had no keys to get back in. The complainant, who was alone in the flat, was asleep at some stage, when the appellant walked in. He was drunk and proceeded to abuse her, leaving after a few minutes.

5. In 2009 the complainant went to Store Street garda station as a result of which a garda investigation began. On the 29th March, 2010, the appellant attended on a voluntary basis at Ballymun garda station and was interviewed. He denied all allegations made against him and repeated these denials when he gave evidence at his trial.

The appeal

6. The sole ground of appeal relates to a contention that the trial judge should have stopped the trial on foot of an application made to her in that regard, because of the delay that had occurred in the case coming to trial and the prejudice that this had caused for the appellant. Three matters are alleged to give rise to actual and specific prejudice. These are, in reverse order of significance, the fact that it is not possible to date the occasion when the chip pan fire occurred, the death of the appellant's father who resided with him at the flat where much of the abuse is alleged to have occurred and the death of AT, the sister of the appellant.

7. So far as the fire records were concerned, there was evidence that records from 2000 onwards are readily accessible and indeed the records from 2004 onwards are computerised. Records relating to incidents pre 1996 are destroyed and for the period 1996 to 2004 the task of locating any particular record would be a monumental one. In practical terms it is not possible, at this remove, to determine the date of the fire.

8. The appellant acknowledges that this is the least substantial of the three grounds relied on. It is the view of the Court that there is no substance at all to this complaint. There was no dispute that a fire occurred. Notwithstanding that, in the written submissions, the point is made that if the fire had occurred at a point in time significantly different from when the complainant said it did, that this would have had significant implications for her credibility. However, this suggestion is entirely speculative and is not grounded on the facts of the case.

9. So far as the deaths of the appellant's father and sister are concerned, it is a curious feature of the case that, notwithstanding the arguments that were canvassed about delay, neither date of death was put before the court and jury.

10. The issue of the dates of death was raised by way of a question from the jury on the second day of their deliberation. There was some discussion between the trial judge and counsel as to how to respond, but when the jurors returned to court, they were reminded that the only reference to the issue was that Mr. T, in evidence, said that he thought that his sister was alive at the time of the chip pan fire. The evidence at trial was that the fire occurred sometime in or around the period of 1998/1999/2000. If the

appellant "thought" his sister was alive at the time of the fire, this would seem to suggest a degree of uncertainty on his part as to when the death of his sister occurred, whether before or after the fire, but it would also suggest that the death occurred at some time reasonably proximate to the chip pan fire or, to put it slightly differently, reasonably proximate to the time the abuse is alleged to have come to an end i.e. when the complainant was still only eleven/twelve years of age. This is relevant to the arguments in relation to delay.

11. In *S.O'C. v. DPP* (judgment of O'Malley J. of the 7th February, 2014), the applicant had sought to prohibit his trial, contending that by reason of delay he was prejudiced in his defence to the extent that there was a risk of an unfair trial which could not be remedied by the rulings or directions of a trial judge. It was alleged that prejudice arose from the fact that evidence had been lost by reason of the delay. The applicant in that case pointed in particular to the death of a psychiatrist to whom the complainant said she spoke in relation to the events that had occurred. In the course of her judgment O'Malley J. commented:-

> "Secondly, it seems to me that when an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an available witness might have had something to say that would contradict the complainant's account and that of other witnesses.
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> In this case, it is theoretically possible that C gave an account to Dr. O'Carroll which was wholly at variance with that given to others and consistent with the innocence of the applicant, or which, at least, was materially inconsistent with her other accounts. On the basis of the evidence, however, that is not a real possibility.
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> The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she had given materially inconsistent accounts in other instances. I do not consider that the presumption of innocence requires the court to assume, in the absence of any supporting evidence that it did happen in relation to Dr. O'Carroll.
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> This is not to suggest that the applicant bears an onus of proving his innocence, it is simply that the establishment of a 'real risk' must involve establishing a 'real possibility' that the evidence did exist, which could have been helpful, but is no longer available."

12. So far as the father of the appellant is concerned, he had resided with the appellant at all material times. However, it is not suggested by anyone that he ever witnessed any untoward activity or anything else relevant to the matters that were in dispute between the parties. In a situation where there was agreement that the complainant was in and out of the appellant's flat on a regular basis, anything that the appellant's father might have had to say was likely to be of very limited relevance. It is notoriously the case that child abuse occurs in secret. Abusers organise their affairs so as to abuse at a time when they are alone with their victim and when they are unlikely to be disturbed. Accordingly, in the view of the Court what Mr. T. Senior might have had to say was likely to be of such limited relevance that it could not provide a basis for stopping the trial.

13. We turn then to the death of the appellant's sister, Ms. A, and the fact that she was unavailable to give evidence which is really the key issue from the appellant's perspective. The evidence was that she was a "permanent fixture" in the apartment. In this case, the complainant does indicate that on one occasion Ms. A witnessed abuse occurring. On behalf of the appellant, the point is made, and in the view of the Court is correctly made, that if the complainant could be contradicted in respect of one specific count that this would have a knock on effect and would undermine the complainant's evidence in relation to the other counts on the indictment. Dealing with an incident of abuse that occurred at the home of the appellant, the complainant commented as follows: "A, walked in once and she just closed the door and walked back out". The complainant described Ms. A as opening the door "kind of half way opened it and just shut it straight away". Later the complainant said "she (Ms. A) opened it half way, I seen her face and she closed the door, so I'm assuming she seen it". The complainant's statement to the gardaí appeared to suggest that it was the appellant who closed the door on this occasion, whereas her evidence at trial was that this was done by Ms. A.

14. During the course of her cross examination the complainant was asked if she believed that Ms. A was just letting the abuse happen and she replied: "well if she – yes, I think so. Well she opened the door and seen anyway, and she walked back out, like she – she opened it about half way. I don't know like. I suppose so". Later she commented: "well I saw her face so obviously she seen my face, so yes, she did know".

15. In assessing the significance of the absence of Ms. A, the Court has considered what evidence she might have had to give. One possibility is that her evidence would have been that she recalled the occasion as described by the complainant. If that was so, her evidence would have corroborated the complainant's account. A second possibility is that she would have said that she had no memory of going to the storeroom and witnessing anything. Her evidence would therefore have been entirely neutral. A variation on this would have been that she had no recollection of the incident as described, but believes she would have remembered any such incident if it had occurred, even at a time far removed. It is possible that she would have been so firm in her belief that she would have said that the incident of abuse was not witnessed by her. It would have been the case that any evidence she would have had to give would have been diminished by reason of her lifestyle, she was an alcoholic, which might have suggested in the particular circumstances of this case that she was not a reliable historian. Moreover, even if on an occasion when abuse occurred, Ms. A went to the storeroom and opened the door, it is not clear whether anything untoward would have been observed. The opening of the door might have been before or after actual abuse occurred.

16. The Court accepts that the fact that Ms. A was introduced to the narrative as someone who witnessed or may well have witnessed an act of abuse does mean that she was a potentially significant witness. If she had been alive it is likely that both sides would have inquired of her what, if anything, she had to contribute. However, what her evidence would have been is, at this stage, pure speculation. The suggestion that she might have had evidence to give which would have served to undermine the prosecution case is also no more than speculation. In these circumstances the Court cannot conclude that the trial judge was in error in deciding to permit the trial to proceed and accordingly the appeal against conviction will be dismissed. In reaching the decision that it has, the Court is also mindful of the fact that it appears likely that Ms. A died on a date unascertained but close to when the complainant says that the abuse came to an end. Accordingly, it has not been established that it is the delay on the part of the complainant in coming forward to the gardaí and the consequent delay in the matter coming to trial that has deprived the appellant of the evidence of Ms. A.

17. Accordingly, this argument too is rejected and so the appeal fails.