THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

293/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

P.D.

Appellant

JUDGMENT of the Court delivered on the 20th day of December 2016 by Mr. Justice Sheehan

1. This is an appeal against conviction.

2. On the 26th June, 2015, the appellant was convicted by a unanimous jury verdict on twelve counts of sexually assaulting his granddaughter SS over a three year period between the 12th February, 1991 and the 31st March, 1994, when the injured party was aged between five and eight years old.

3. Mr. Colgan on behalf of the appellant advances two grounds of appeal:-

> 1. The learned trial judge erred in law and on the facts of the case in failing or refusing to discharge the jury in circumstances where the prosecution evidence was vague and tenuous and in circumstances where the allegations complained of were sheer improbabilities.
>
> 2. The learned trial judge erred in law in misdirecting the jury as to how they should go about their deliberations in circumstances where the jury complained of insufficient evidence to support all counts on the indictment.

4. The allegations made by the complainant against her grandfather arose in circumstances where the complainant as a young child used to be brought by her mother every Sunday to visit and spend time with her grandparents at their home. Under cross examination the complainant agreed that there could have been up to six children and nine adults at any one time in her grandparents' home on a Sunday and she also agreed their home was a small one. In the course of her evidence she described being in bed naked beside her grandfather having been called upstairs by him, but was unable to say whether or not anything happened in the bed. She also described a particular sexual assault on her when she was about five years old which she said occurred in the kitchen when she was sitting on her grandfather's knee. On this particular occasion she said that her grandfather digitally penetrated her. She said that at the time she was wearing white tights and a green skirt.

5. The complainant also told the Court that her grandfather tongue kissed her when she was told to kiss him goodbye. She said that her grandfather called her to his bedroom on each Sunday that she visited.

6. The complainant also stated that she had told her former boyfriend about being abused by her grandfather during a visit to Mayo, but she was unable to remember the time or place when she told him. Her boyfriend gave evidence and confirmed that the complainant had told him that she had been abused and he also said that she told him some time between 2005 and 2010 when they were visiting his family in Mayo. The complainant agreed also that she had told him that her grandfather had abused others whom she named. One of these was her brother R. The appellant had been acquitted of indecently assaulting him at a previous jury trial. Two other cousins whom the complainant identified as being in bed naked when she was in bed with her grandfather did not support the complainant. One cousin stated she had never been abused by her grandfather and the other stated she could not remember ever having been abused by her grandfather.

7. In the course of his submissions that the trial judge ought to have withdrawn the case from the jury, counsel for the appellant relied primarily on the following matters:-

> 1. The complainant's evidence was that the assault in the kitchen had taken place when she was five years old and she was unable to relate this assault to either counts 1, 2, 3, and 4 on the indictment.
>
> 2. The complainant had said she was wearing a green skirt and white tights and that the digital penetration happened in the kitchen and there was an improbability about this when there were a lot of people around.
>
> 3. The vagueness of the circumstances of the complainant telling her boyfriend at a time she was aged between 17 and 24.
>
> 4. The vagueness of the complainant's evidence as to how she ended up naked in her grandfather's bed.
>
> 5. The fact that her brother R had made a complaint which was not upheld and further that her cousins JM and CM had respectively no recollection of being naked in their grandfather's bed or of any assault by the appellant.

8. In support of his application for a direction, counsel for the appellant relied on the judgment of the Court of Criminal Appeal in *DPP v. Martin Leacy* (Unreported, Court of Criminal Appeal, 3rd July 2002) delivered by Geoghegan J.:-

"The legal principles applicable to the granting or refusing of a direction were accepted by Mr. Vaughan Buckley to be those laid down by the English Court of Appeal in *Galbraith* (1981) 73 Cr. App. R. 124 and reported also (*inter alia*) [1981] 1 WLR 1039. At p. 1042 in the latter report, Lord Lane C.J. is quoted as follows:

> 'How then should the judge approach a submission of no case'?
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury . . . There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.'

In Blackstone's *Criminal Practice* (1991) there is considerable discussion of this case and related cases in section D 12 and the learned authors 'with some hesitancy' set out in section D 12.31 the following propositions as representing the effect of the English decisions but primarily *Galbraith* .

> '(a) If there is no evidence to prove an essential element of the offence a submission must obviously succeed.
>
> (b) If there is some evidence which - taken at face value -establishes each essential element, then the case should normally be left to the jury. The judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases, …)
>
> (c) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as *Shippey*) where the inconsistencies (whether in the witness's evidence viewed by itself or between him and other prosecution witnesses) are so great that any reasonable tribunal would be forced to the conclusion that the witnesses is untruthful. In such a case (and in the absence of other evidence capable of founding a case) the judge shall withdraw the case from the jury.'

This citation would seem to represent also what would generally be understood to be the law in this jurisdiction in relation to applications for a direction."

9. In opposing this ground of appeal, counsel for the respondent submitted that the difficulties which counsel for the appellant had highlighted were properly evaluated by the trial judge in the course of his ruling on the application for a direction. The respondent further submitted that even if it was conceded that the evidence was weak or tenuous there would be nothing unusual about this in a trial as frequently some or all of the evidence is weak. In the present case the complainant had given her evidence and the issue of her reliability and the strength or weakness of her evidence was a matter for the jury's consideration.

Decision

10. In the course of considering the application for a direction, the learned trial judge carefully considered the evidence, the case law and the indictment and went on to conclude as follows:

> "In respect of the vagueness and lack of specifics I am satisfied in this case that having regard to the defence that none of these alleged incidents ever happened that they are not prejudiced in the sense of being unable to seek out contemporaneous facts to support denial. The accused says "this never happened, it didn't occur, what she is saying is incorrect, it didn't happen and did not happen in his house", but I then must have regard to the totality of matters and I am satisfied having regard to the totality of matters that in respect of her evidence that she did remain consistent in respect of the clothing she was wearing. She was consistent in respect of the allegations and contentions that she made against her grandfather and remained consistent in respect of these allegations. Then in respect of the legal ingredients, first in respect of her contention that there was digital penetration of her vagina, the second contention in respect of being undressed and naked in her grandfather's bedroom and the third contention, an allegation that he put his tongue in her lips or mouth. In respect of the latter two, I am satisfied firstly, that a young female child undressed naked in a bed with a male adult accompanied or attended by some circumstances of indecency on the part of the offender and without the consent of the other person does amount to sexual assault. The kissing of a male adult with his tongue on the lips/mouth of a young child accompanied or attended by some circumstances of indecency on the part of the offender and without the consent of the other person does amount to sexual assault. Of course it is a matter for the jury to determine by Irish standard norms to decide whether this in fact does amount to or all matters amount to sexual assault.
>
> *I am satisfied having regard to the principles that as in this case where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty. I am satisfied that it is the situation in this case having regard to the evidence of SS and that it is appropriate to allow the matter to be tried by the jury."*

11. It can be seen from this thorough analysis that the trial judge gave great care to his decision in this matter and it is entirely in line with the judgment in *Leacy*. It is also relevant to note here McGrath on *Evidence* (2nd Ed.) p. 53, para. 2/92:-

> "Given that a trial judge is required to review the totality of the evidence for the purpose of ruling in an application for a direction and will have the benefit of having seen the witnesses give evidence and is exercising discretion albeit one that has to be exercised judicially if he or she refuses to withdraw the case from the jury it will be difficult to overturn that decision on appeal."

12. The decision as to whether or not allow the case to go to the jury was peculiarly a matter for the trial judge. He heard the complainant and the other witnesses in the case. In our view he exercised his discretion in this matter carefully and correctly and accordingly this ground of appeal must fail.

Second ground of appeal

13. This ground of appeal arises in circumstances where following their initial deliberations the jury returned to court with a number of questions. The following is the relevant extract from the transcript on day 3, p. 3, line 21 to p. 4, line 7.

> Foreman:Your honour the members of the jury have a couple of questions we would like your guidance on please.
>
> Judge: Very well.
>
> Foreman:One we are being asked to give a verdict on twelve charges yet we have only got extracts in relation to three charges. What are the other nine?
>
> Judge: Yes, the other questions please.
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> Foreman:The second question is why were there no pictures given to us of the kitchen given that every other room in the house had been photographed at all angles?
>
> Judge: Yes.
>
> Foreman:Does a statement given in the garda station carry the same weight given as a statement given under oath in court? Was the counsellor asked to be a witness?
>
> Judge: Pardon.
>
> Foreman:Was the counsellor asked to be a witness that's it.
>
> Judge: Well Mr. Foreman in respect of your replies these are matters first I will discuss with counsel in respect of what they say in respect of the questions and because when I answer there should be no disagreement in respect of my approach on your answer, so I will ask you to retire."

14. Counsel for the appellant submitted that the jury ought to be told that if they were unable to find evidence to support the remaining nine charges then the benefit of the doubt should be given to the accused and they must acquit on those counts. Counsel for the respondent opposed this and submitted that as one of the extracts disclosed that the complainant had said there were lots of other times her grandfather abused her, that this effectively spanned the entire indictment and that this should be brought to the attention of the jurors.

Decision

15. It is clear from the jury questions that the extracts being referred to were extracts from the complainant's statement which had been put to the appellant when he was being interviewed by the gardaí. These memoranda of interview had been received by the jury as exhibits.

16. Having heard counsel on this matter, the learned trial judge dealt with the question in the following way:

> Judge: Mr. Connell and members of the jury, in respect of your questions I am going to deal with them in the following order. In respect of you first question, in respect of all counts, the jury must have regard to the evidence of Ms. SS given in respect of the occasions she alleges and this is a matter for the jury. Second, these are the photographs that were taken of the house and this is what you must deal with. Third, the interviews of the accused forms part of the totality of the evidence and is a matter for the jury what weight and it is a matter for the jury what weight or importance to attach to this evidence or any evidence given in the trial and members of the jury no adverse inference can or should be drawn from a decision of the accused not to give evidence in the course of the trial. Fourth, the counsellor is a not a witness on the book of evidence and it is only witnesses on the book of evidence are required as witnesses. Very well, so members of the jury I would ask you to retire."

17. It was of course the case that the principal evidence was the evidence given on oath by the complainant. The memoranda of interview were part of the prosecution case and it was through those memoranda that the extracts from the complainant's original statement of complaint to the gardaí had arisen for consideration by the jury. Indeed it appears that the jury question may have arisen from an error by one or more jurors to the effect that they required further extracts from the complainant's statement of complaint before they could convict. Nevertheless whatever reason prompted the jury question, we are satisfied that the trial judge was entirely correct in answering this question in the way that he did and accordingly this ground of appeal must also fail. Therefore this appeal is dismissed.