THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

221/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

P.H.

Appellant

JUDGMENT of the Court (*ex tempore*) delivered on the 28th day of July, 2015 by

Mr. Justice Birmingham

1. On the 31st July, 2013, the appellant was convicted of a count of rape, a count of s. 4 rape, that is to say oral rape, and three counts of sexual assault. He now appeals against that conviction. The grounds of appeal as appear on the notice are:

> 1. That the judge erred in refusing to accede to a defence application for a direction at the close of the prosecution case.
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> 2. That the judge erred in refusing to accede to a defence application for a direction at the conclusion of all the evidence in the case.
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> 3. That the verdict was against the weight of the evidence.
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> 4. That the trial was unsatisfactory and the verdict unsafe.

2. Counsel for the appellant readily conceded that the case really boils down to whether there ought to have been a direction at the conclusion of all the evidence in the case.

3. The counts as they appear on the indictment were as follows:

> Count 1: rape P.H. on a date unknown between the 1st day of August 1993 and the 9th day of August 1993, at the location, had sexual intercourse with the complainant who did not consent to the sexual intercourse and he knew or was reckless as to whether she was consenting.
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> Count 2: section 4 rape, P.H. on a date unknown between the 1st August 1993, and the 9th August 1993, at a location, sexually assaulted the complainant in circumstances which included the penetration of her mouth by his penis.
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> Count 3: sexual assault, P.H. on a date unknown between the 1st August, 1993 and the 9th August 1993, at a house, sexually assaulted the complainant.
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> Count 4: sexual assault, P.H. on a date between the 1st August 1993 and the 9th August 1993, in a bedroom of the house, sexually assaulted the complainant.
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> Count 5: sexual assault P.H. on a date between the 1st August 1993 and the 9th August 1993, in a hayfield adjacent to the house, sexually assaulted the complainant.

4. In order to put the grounds of appeal in context, and in particular to offer context for the contention that this was a case where there should have been a direction, it is appropriate to refer to the narrative that was presented by the complainant.

5. Unusually for old cases involving allegations of child sex abuse, the dates of the alleged offences can in this case, be identified with considerable precision. In 1993, the complainant was nine years of age. In August of that year she was living with her family in Co. Kerry. The Christening of her first cousin took place on the 1st August, 1993. By reference to that ascertainable date, it is possible to date other events that are central to this case. Among those who travelled for the Christening were the appellant, who is the uncle through marriage of the complainant, and his wife. They were to act as godparents. The appellant had travelled from Boston where he had been living and working for some time.

6. At the Christening, the complainant was asked whether she would she like to go to Connemara for a week on holidays. A factor in this suggestion being put to her was that a cousin of the complainant who was the same age as she was, was in Connemara at that time.

7. On Monday morning, 2nd August, 1993, she travelled with the appellant in his rented car from Co. Kerry to Connemara. She states that at one stage on the journey, that the appellant stopped the car in order to go to the toilet and when he came back to the car his pants and underpants were down and that he was exposed. She says that the toilet stop was close to Ennis and that he travelled in this fashion from Ennis to a place close to their destination.

8. They arrived at the home of the mother of the appellant, and the complainant says that she was asked to go for a bath and that the appellant came in and washed her.

9. The sleeping arrangements in the house were the source of controversy at trial. According to the complainant, there was a bedroom where there was a double bed against one wall and a parallel single bed underneath a window. The intention was that she and her cousin would sleep in the double bed and that the appellant was to sleep on the single bed. However, she says that on that

first night that the appellant hopped into the bed between the two girls and slept with his hand around her that night inside her pyjama top. This incident is dealt with at count 4 of the indictment. The complainant says that the next day, she, her cousin, the appellant and his brother went to a house further down the road from the home. She says that at the house there was as she puts it, a "funeral situation". However, there was no coffin, but she recalls people speaking of a funeral and that there was a suggestion that there was a funeral. People were talking about the banshee. She describes that there were two old style farmhouse chairs underneath the kitchen window and that the appellant was sitting on one and his brother on the other and that she was sitting on the appellant's lap. A game of tickling and messing started, but this progressed to a stage where the appellant put his hands up under her shorts and began rubbing her vaginal area through her underwear. She says that subsequently she, her cousin and the appellant went to a downstairs bedroom where a game took place which involved the appellant putting a sheep's rug on his back and asking the girls to hop up on it. Apart from rocking back and forth, the appellant was stationary during this incident and he then asked the complainant to lie down on the floor which she did and he repeated the same motion, this time with her underneath him. The incident in this house is dealt with at count 3 on the indictment.

10. On the following day, the appellant and his brother were saving hay. The complainant and her cousin went down to the hayfield. There was water in the field. Initially, in statements she had described it as a lake, but in the course of her evidence, spoke of a stream with pools of water in it running through the field. A photo of the field was introduced during the course of the trial and it showed a narrow stream. She said that a game started and that the men were chasing the girls, there was tickling and pushing and the men kind of shoved herself and her cousin into the water which resulted in the two of them being all wet. The appellant told them to take off their clothes in order to let them dry, which they did. The girls were lying on the grass and then the appellant came over and lay down between the two of them, he was wearing just pants and was shirtless. He rolled over on top or her, pulled down his pants, opened the zip and rubbed his penis up and down in her vaginal area. This incident is dealt with at count 5 on the indictment.

11. On the Saturday of that week, the plan was for people to go to Saturday evening mass in the car that had been rented by the appellant. She says that the car was parked at the side of the house that the appellant told her to come over by the car and then said "close you eyes, open you mouth" and he then put his penis into her mouth. In the ordinary way, photos were introduced at the trial showing the family home. These photos were taken in 2012. Visible in the photos, to the left of the house as one looks at it, is a container and the complainant says that the car that featured in this oral rape was parked where the container now is. At trial, the defence went to considerable lengths to try and establish as a fact, that it would have been impossible to park a car beside the house in 1993. The driveway that is now there did not exist at the time and the narrow path and steep gradient that were there would have made parking a car an impossibility. This incident is the subject of count 2.

12. On the Sunday or Monday, there is a slight degree of uncertainty about which day it was, the complainant was to return to Kerry. She explained that she had never seen a thatched house before, but on the particular road there were two or three houses together that were thatched and thatching work was taking place at a house which she believed was the home of the appellant's brother and she was brought along to observe thatching in progress. She said that the appellant's brother was there, but that he left after a short while. According to the complainant, she and the appellant went up the stairs to where there was one room and she describes the fact that there was a "horrible old dusky damp kind of smell" there. In that room was an old bed in the corner and the appellant said to her to take off her clothes and get on the bed and he then raped her. When she dressed and came down the stairs, the appellant told her not to ever mention what had happened to anyone. The rape incident is dealt with at count 1 on the indictment.

13. There are a number of aspects of the trial that require mention. The defence are very critical of the conduct of the investigation by gardaí. In summer 1997, the complainant spoke about these matters to a social worker. Arising from this, gardaí interviewed and took a statement from the complainant's cousin that same year, but nothing else seems to have happened. This may be understandable as the complainant did not want to provide a statement at that stage.

14. However, in August and September 2005, the complainant made a statement of complaint to the gardaí in Co. Kerry. In August 2006, the appellant returned to Ireland from the US having been deported having served a prison sentence for improper sexual activity with other members of his family. It appears that the appellant's solicitor alerted the gardaí to the fact that he had returned, but it was not until the 5th April, 2007 that he was arrested and was then interviewed during the course of detention before being released. He was not charged with the offences until the 27th October, 2011, four and a half years later.

The evidence of the complainant's cousin

15. It will be recalled that the complainant's cousin was alleged to have been present for three of the offences, the sexual assault in a bedroom of the house, the incident in the hayfield and the incident at the house where there was "a funeral situation". She was, therefore, potentially a significant witness. The prosecution were reluctant to call her as a witness. No statement from her appeared in the book of evidence. Eventually, she gave evidence to the trial by video link from Australia having been called by the prosecution on the invitation/direction of the trial judge.

16. At trial, the complainant's cousin indicated that she could remember very little of the week that she and the complainant had spent together in Connemara. She had previously made a statement to a social worker and a garda in 1997, in which she had indicated that there was no misbehaviour by the appellant during that week and that she never remembered him coming into the bedroom where the girls were at night. In 2007, when she made a further statement to gardaí at Galway garda station, she said that she recalled being held over the river and the appellant picking her up and pretending to drop her into the river but not actually doing so. She had not got her clothes wet. At trial, she gave evidence of the sleeping arrangements during the visit of the complainant and said that the arrangement was that the two girls slept in what would normally be the grandmother's double bed and that her grandmother slept in the single bed in the same room. The defence contended that this evidence in relation to the sleeping arrangements is particularly significant given that the complainant was recorded as describing similar arrangements in 1997 when she spoke to the social worker, ie. two girls in the double bed and the late mother of the appellant in the single bed.

17. In March 2011 and again on the 16th November, 2012, some days before the first trial was due to start, this was a case where the first trial ended with the discharge of the jury, the complainant went with members of the gardaí to the area. So far as the rape count in count 1 is concerned, she had said that the rape occurred in a house that was being thatched and that she believed was the house of the appellant's brother.

18. In November, 2012, she pointed out a particular house, which was subsequently photographed and which appeared as photographs 3 and 4 in the prosecution album of photos. The house was not a thatched structure and inquiries established that in 1993, it was inhabited by two elderly brothers who died within a week of each other in 1996. It was not occupied by the appellant's brother.

19. The sexual assault that is the subject of count 3 was alleged to have taken place in a house "further down the road". This was the house with the "definite funeral situation". A house pointed out by the complainant was photographed and appears as photo 6 in

the album. Garda inquiries did not establish that there was any death in the area in August 1993, but there was a death, the previous month in London of someone who was originally from the area. It does not appear that the person who died in London had any links to the house in photographs 6.

20. In 1993, the house that is now shown in that photo was occupied by the appellant's aunt who died on the 1st May, 2001, and the appellant's mother died on the 5th December, 2003. As far as the house shown in photos 3 and 4 is concerned, which is identified as the location of the rape, the prosecution did not call any evidence to establish whether it was or was not a thatched structure in 1993. The defence however addressed this issue and adduced oral and photographic evidence at trial that the house was not thatched. The defence also sought to tender evidence by way of a s. 21 notice from a relative of the two elderly men who had occupied the house in 1993 and who is then the current owner of the house. The evidence that he had to offer was that it in his memory, he was born in 1957, and the house was ever thatched.

21. The defence are highly critical of the fact that there was no real garda investigation which sought to identify the houses where offences are alleged to have been committed in good time, which identified the occupants of the houses back in 1993 and what the state of the houses was, whether thatched or not and whether they had an upstairs room or not.

The defence case
22. While the appellant did not give evidence on his own behalf, the defence did call evidence. One of the appellant's brothers gave evidence that he had worked for many years in the construction industry in Britain and that following his return, that he had built the current driveway that is visible in the photographs in the year 2001/2002 and gave evidence that prior to the current driveway being installed, that it would not have been possible to get a car down to the house or to park it alongside the house. That evidence was supported by the testimony of an engineer, who gave evidence about gradients, inclines and the like and also referred to aerial photographs taken at various stages which tended to support the brother's evidence. Another brother was called and he gave evidence that he took over the old family home when the Council built the new home for their mother, the new home being the one which everyone agreed was the one where the complainant's cousin and the complainant had stayed in August 1993.

23. The old family home was thatched at one stage, but the thatch was removed in October 1985. The house never had an upstairs room. It did have a small loft area, accessible by standing on a chair and hoisting oneself up. He also gave evidence that he was not involved in hay saving in 1993 or indeed in hay saving at any time post 1986. That was because in 1986 he felt slighted by his mother who brought a second cup of tea out to a tractor driver, but not one out to him and as he put it, from that day on, he did not do a stroke for her.

The direction application
24. In this case, there were two applications by the defence for a direction. One at the close of the prosecution case and one after all the evidence had been given. The second application represents the high watermark of the defence case. The application made at the end of trial was that it would be manifestly perverse were the jury to conclude that there was any form of car parking at the side of the house in 1993. Counsel for the then defendant asked rhetorically "where was the rape supposed to have occurred. Was it in the house of [the appellant's brother]. Was it in the [other] house".

Comment
25. This was an old case and it is perhaps, trite to say it, but it is the situation that old cases present particular difficulties. One example of that in this case is that the complainant has no real memory of speaking to the social worker in 1997. The garda investigation was a very limited one, failing to establish who the occupants of the houses in the townland were in 1993. The mother and aunt of the appellant are deceased, as were the two men who occupied the house pointed out as the location of the rapes. There was some element of garda investigation in 1997 because the complainant's cousin was interviewed then, but the appellant's aunt who lived in the house at the end of the road where the sheepskin incident is supposed to have occurred was not interviewed and she died in 2001. Again, the appellant's mother was not interviewed, who would have some evidence to give and could certainly have dealt with the suggestion that the complainant was bathed by her son and would also have been in a position to deal with the sleeping arrangements. The evidence at trial would seem to suggest that there were no thatched houses in the townland, as distinct from thatched outhouses in 1993. In the house that was occupied by the appellant's brother there was a loft area accessed by standing on a chair, but no room upstairs.

26. The conviction on the rape count, count no. 1, was inconsistent with the evidence of the appellant's brother, supported by the engineer that there was no upstairs room in his house and if one focuses on the house that was pointed out in November 2012, the reference to thatching is inconsistent with the evidence that it was not a thatched one in 1993. In the case of count No. 2, the oral rape where the parked car features, this is inconsistent with the evidence of another brother and of the engineer that it would have been impossible to park a car there at the time. So far as count No. 3 is concerned, the hands inside the shorts, the sheepskin incident, the house pointed out as the location was at the time, the home of the appellant's aunt and there was no indication of any death in the extended family such to explain a post funeral gathering or indeed a months mind or anything of that nature. Count No. 4, the bedroom incident, is not consistent with the evidence of the complainant's cousin about the sleeping arrangements or with what the complainant is recorded as telling a social worker in 1997. So far as count No. 5 is concerned, the hayfield incident, there are a number of issues. First of all it is hard to see how the narrow stream in the field could ever have been described as a lake. The complainant's cousin says that the girls were not dropped into the stream, but that she was held over it. Holding the girls over the stream would not wet their clothes so as to require the girls to take off their clothes in order to dry them in the sun.

27. Arguing that the case should have been withdrawn from the jury, counsel for the appellant puts his case on an omnibus basis. Referring to the major inconsistencies in the evidence, the inadequate garda investigation and the effects of delay. The respondent argues that the complainant was very clear in her evidence about what had happened to her. While there were certain inconsistencies in the case, the evidence on the core allegations was clear and to the extent that there were inconsistencies that was a matter that was a matter for the jury.

28. The jury in this case received a very careful charge from the trial judge which included a delay warning and a corroboration warning. Having been so warned, the jury after lengthy deliberations decided to convict. Given the difficulties that were in the case from the prosecution perspective, that the jury convicted, must mean that the jury regarded the complainant as a convincing and reliable witness. The complainant can take satisfaction from the fact that the jury who saw her give evidence and saw her being challenged on her evidence clearly believed her.

29. The key defence argument that the case should have been withdrawn at the end of the evidence raises the question whether, at that stage, a jury properly charged could convict.

30. There are a variety of circumstances in this case that give rise to disquiet, including the fact that this is an old case, that there

are a number of factors giving rise to specific prejudice. The deaths of various potentially relevant witnesses, the inconsistencies between the complainant and her cousin. The inconsistencies between what the complainant had to say about the sleeping arrangements back in 1997 and at trial. The fact that the complainant has hardly any memory of being interviewed by the social worker meant that it was very difficult to cross examine her on this aspect, the issues in relation to each of the five counts as already discussed in this judgment.

31. None of these on their own would see the case withdrawn. However, the cumulative effect of all of these means that if an omnibus approach was taken that there has to be concern as to whether the conviction is safe. In the Court's view these concerns are such that the conviction cannot be allowed stand. Accordingly, the Court will allow the appeal and quash the conviction.