THE COURT OF APPEAL

Appeal No. 168/14

Birmingham J.
Sheehan J.
Mahon J.

The Director of Public Prosecutions

Respondent

- and -

Thomas Mooney

Appellant

Judgment of the Court delivered by Mr. Justice Alan Mahon on the 16th day of July 2015

Introduction

1. The appellant was convicted in the Dublin Circuit Criminal Court on 2nd July 2014 of eight counts of indecent assault contrary to Common Law following a five day trial. The appellant was sentenced on 25th July 2014 to concurrent four year sentences in respect of three of the indecent assault counts (counts 1, 4 and 8) with the final two years thereof suspended on conditions. The convictions on the remaining counts (counts 2, 3, 5, 6 and 7) were taken into consideration. The appellant was also placed on the Sex Offenders Register in relation to counts 1, 4 and 8.

2. The victim of all the offences was, at the time they were committed, a child under fifteen years of age. His date of birth is 15th November 1971. The offences took place on dates between 1st July 1983 and 30th June 1985 at 33, Gardiner Street, Dublin, which was the appellant's home. At the time the appellant occupied a basement flat at that address. The appellant is now seventy three years of age; he was in his forties at the time the offences were committed. The indecent assault took place in circumstances where the victim was persuaded to go to the appellant's flat and there perform sexual acts in return for payment. The activity ceased when the young victim was brought before the district court and sent to an industrial school in November 1985 because of truancy from school.

3. There is one ground of appeal in this case:-

> *"The learned trial judge erred in principle in failing to exclude the contents of a statement made by the accused to members of An Garda Síochána in Mountjoy garda station at a time where he was not under arrest nor detained under s. 4 of the Criminal Justice Act 1984 and also in circumstances where there was uncontroverted expert evidence before the court that the accused had extremely limited intellectual capacity and did not understand the caution."*

4. The statement in question was dictated by the appellant and taking down in writing by one of his garda interviewers on 6th July 2010. In the statement, the appellant acknowledged that he had been cautioned, that he was not under arrest and was free to leave the garda station at any time. The appellant went on to make admissions that he had engaged in sexual activity with the victim (and, indeed, others) whom he stated was then fourteen or fifteen years old. The appellant named other individuals who engaged in similar activity and he disclosed that he himself had been sexually abused and had sold sexual favours to men when in his youth. He expressed remorse for having sexually abused young boys.

5. The factual background relating to the circumstances in which the statement was taken are as follows. In the course of investigations arising from a complaint made by the victim in this case, a number of gardaí attended a particular address, being that of a friend of the appellant. While the gardaí had the appellant on a list of suspects in relation to complaints in relation to complaints made by the victim, they were not on this date actively looking for him. To this extent the appellant meeting the gardaí on the occasion was unexpected on both sides. The appellant had arrived at the premises to visit his friend, accompanied by his dog. He was cautioned by Det. Sgt. Cox and asked to accompany the gardaí to Mountjoy garda station which he agreed to do. He was not arrested at any stage on that date, but was informed that he was a suspect in the investigation then underway.

6. The appellant had not sought a solicitor, nor was he advised by the gardaí to speak to a solicitor. The appellant maintained that he had gone to the garda station in the belief that he had no choice but to so do.

7. The appellant was interviewed in an interview room in the garda station for about one hour. He signed the statement which garda witnesses stated that he had dictated to them, and had been written down by one of them and then signed by the appellant. The interview, including the dictation of the statement, was not recorded, even though a recording system was available in the interview room. However, the reading back to the appellant of his signed statement was recorded and the court has had the opportunity to view that recording in full.

8. The admissibility of the statement was the subject of a voir dire in the course of the trial. The learned trial judge ruled as follows:-

> *"I am satisfied that the statement made by Mr. Mooney on 6th July 2010 was a voluntary statement made after proper caution, that the process in taking the statement was fair and that the statement should be admitted into evidence."*

9. Central to the contention by the appellant that the statement ought not to have been admitted into evidence is that the appellant was a person of limited cognitive ability and that in those circumstances the taking of the statement should have been recorded. It was conceded by the appellant that in circumstances where an individual has not been arrested there is no strict legal requirement to record the interviewing of that individual in a garda station. In effect, it is submitted, that having regard to the vulnerable character of the appellant (he being a person of limited cognitive ability) and the fact that the recording system was readily available, his interview ought to have been recorded by the gardaí.

10. Specifically, it is submitted that the taking of a statement from a vulnerable man in a garda station while the video system was turned off should have triggered scepticism on the part of a court been subsequently asked to consider it. For their part, the gardaí, while they accepted that the appellant was not intellectually very bright, believed that he had understood the caution giving to him and was capable of providing a voluntary statement. It was also suggested that the appellant's general health had deteriorated in the period between the making of his statement, and his appearance in court nearly three years later.

11. The court has had the opportunity to view the approximately ten minute long video recording of the statement being read over to the appellant. It is noteworthy that in that recording the appellant appears to be particularly attentive to everything been read to him, and he confirms the accuracy of what is stated frequently throughout the process. He acknowledges the statement as his own and the information stated therein as information provided by him. He is seen to sign the acknowledgement that the statement has been read over to him. His general demeanour is that of a man who is fully engaged in the process at hand, and does not appear particularly vulnerable or to be a man acting under extreme or undue pressure or duress or any lack of capacity to understand. There is nothing to suggest that he did not understand the caution.

12. It is now well established that an individual under arrest is entitled to fair procedures including the right to speak to a solicitor. For example, in *DPP v. Gormley* [2014] IESC 17, the Supreme Court acknowledged the right of access to legal advice during detention in a garda station. It is also the case that the recording of interviews of persons in custody in gardaí station is now a widespread practice.

13. In this case however, the appellant had not been arrested. He had gone voluntarily to the garda station and had engaged in the process of making a statement following caution. There is no evidence to indicate that a formal arrest of the appellant had been avoided or delayed inappropriately or for any particular reason.

14. In those circumstances, there was no requirement to record the making of the statement. There was no evidence to suggest that the appellant was in such a vulnerable state of either mental or physical health that any special or precautionary measures needed to be put in place. Indeed, the recording of the reading of the statement to the appellant which the court has viewed suggests that the appellant was then in a position to deal adequately with the situation he found himself in, albeit undoubtedly a situation which would have been very stressful for him, as it would for anyone in similar circumstances.

15. While there was not in the particular circumstances of this case a legal requirement to record the making of the statement, such a recording could have taken place. It is certainly preferable that in similar situations, available recording facilities should be utilised, particularly where serious criminal activity is the subject of investigation.

16. The appeal is therefore dismissed.