UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 144

[122/19]

The President.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DF

APPELLANT

JUDGMENT of the Court delivered on the 29th day of May 2020 by Birmingham P.

1. On 15th February 2019, at a provincial sitting of the Circuit Criminal Court, the appellant was convicted of one count of sexual assault. Subsequently, on 17th May 2019, he was sentenced to a term of three and a half years' imprisonment with the final year of that sentence suspended. He has now appealed against his conviction. He does so in somewhat unusual circumstances where it was submitted to the trial court, and is now submitted before this Court, that the verdict of the jury was unsafe on grounds of jury bias and ought to have been arrested or set aside.

2. To put the ground raised by way of appeal in context, it should be explained that the trial related to an allegation that the appellant had sexually assaulted Ms. EB, then aged 13 years, on 19th August 2015. According to the complainant, the sexual assault took place while she was on a sleepover in the home of the appellant's partner. The complainant was sharing a

bed with the partner's daughter and on her account, fell asleep, but awoke to find the appellant kneeling beside her, rubbing her stomach. She alleged that he also touched her on her chest, back, neck, and vagina.

3. The grounds of appeal furnished are as follows:

(i) That the verdict is unsafe due to reasonable apprehension of bias, both objective and subjective, on the part of a number of members of the jury, including the Foreman of the Jury;

(ii) That the judge erred in law and in principle in:

(a) finding that he had no jurisdiction as a matter of law to arrest or otherwise set aside the verdict of the jury; and

(b) refusing the appellant's application to arrest or set aside the verdict of the jury on the grounds of bias;

(iii) The prosecution and the trial judge ought to have warned the jury panel, in general, and the jury actually empanelled for this trial that they should not serve on the jury if they:

(i) had a direct or indirect commercial or other connection with the company of which the complainant's father is CEO; or

(ii) lives in or is otherwise connected to the town of [Ballykissangel] (not real name of town)

(iv) That the learned trial judge erred in law and in principle in his charge to the jury.

And on the grounds that no jury, properly charged, could have returned a guilty verdict.

This last ground is surprising, indeed one might say remarkable, given that there was no application at trial to withdraw the case from the jury. However, in the course of the oral

presentation of the appeal, it was clarified that the real relevance of this ground is that it provides a vehicle to point out that this was not a case where the jury was bound to come to the conclusion that the appellant was guilty, rather, that it was a case that could have been decided either way, and so, any concern about bias on the part of the jury, or jurors, has a particular relevance.

4. There are two matters which form part of the background which should be referred to, to put the current application in context. The appellant is an employee of the company of which the complainant's father is an officer. It can safely be said that he knew as well, or better than anyone, that the complainant's father occupied a prominent position in the commercial life of the county where the offence was alleged to have occurred. Secondly, the jury that returned a unanimous guilty verdict was not the first jury that had been sworn to try this case. An earlier jury was sworn on the morning of 5th February 2019. On that occasion, the plan had been for the trial to begin at 2pm. Prior to the jury being put in charge, the appellant raised a concern that one of the members of the jury had posted material on social media relating to sex offending. It is understood that this issue was raised after the appellant, or one of his advisers, had conducted research in relation to the jury on social media. The judge brought the juror into court and enquired if she had posted the material in question and the juror denied doing so. Then, upon a request from the defence, the social media profile of the person was shown to the juror and she was asked if it was her profile and she confirmed that it was not, in fact, hers. In fact, the first jury sworn was discharged when, according to the Assistant or Crier to the trial judge, another member of the jury indicated to him that she had a problem with dealing with these types of cases. In the course of the appeal hearing, it was suggested that it was this fact which led to the searches on social media, giving rise to the interrogation of one juror, something which had not been apparent on the papers.

5. On 12th February 2019, the jury were given the usual warning about not serving if they were disqualified or ineligible or had an interest in the case. The judge then told the jury that he was proposing to ask prosecution counsel to outline the name and address of the accused and the names and addresses of the witnesses for the State. The jury were then given the names and addresses of all the witnesses and were once again warned by the judge, noting that if any member of the jury panel knew any of the parties, or if there were any personal issues which they thought could affect them, that they should let him know before taking the Oath. No issue was raised on behalf of the appellant about the adequacy of the instructions given to the jury panel. This was so, despite the fact that the research, which would seem to have been carried out in respect of the first jury sworn, showed that this must have been an issue very much to the fore in the mind of the appellant or his advisers.

6. On 15th February 2019, the jury returned a unanimous guilty verdict. The case was put back to mid-May 2019 for consideration of sentence. There was no objection to the appellant remaining on bail in the interim.

7. On 14th May 2019, Junior Counsel for the appellant appeared and explained to the trial judge that there had been some unusual developments. He was anxious that the matter would be dealt with by his leader, and he indicated, in somewhat circumspect terms, that there was likely to be an application to arrest the verdict. The judge indicated that the concerns should be set out in writing and this led to a letter being written by the defence solicitor. By any standards, the letter was an unusual one, and it is unfortunate that it is not possible to quote from it, as to do so in any detail would inevitably lead to the identification of the complainant. The letter raised issues in relation to a number of jurors. So far as one juror is concerned, JF, the letter stated that he gave his address as the 'The Diamond, Ballykissangel' [not the actual address quoted] and his occupation as 'Roofer'. The letter goes on that they understand that he is also a barman in a well-known public house in the

town or village of Ballykissangel. The location of the public house is referred to, and it is pointed out that an aunt of the complainant lives in one of the very small number of houses onto which the public house exits. Attention was drawn to the fact that the father of the complainant grew up in Ballykissangel and that his sister still lives there. It was also highlighted that the commercial entity, of which the complainant's father is an officer, has a very large facility close to the small village of Ballykissangel, and a further facility within the village itself. The Foreman of the Jury was identified as the production manager of an engineering company, a comparatively small company with a staff of about 40, and reference was made to the fact that the substantial commercial entity with which the complainant's father is involved is a prominent customer of the engineering company. There follows a paragraph relating to the position of a further juror and a paragraph headed 'Other Jurors'. It points out that named jurors are described as 'Supplies Officer, Fitter, Sales Employee' and as 'working in Construction' and it is suggested that they may have had a connection to the commercial entity with which the complainant's father has an involvement. For good measure, the letter adds "equally, we have no idea whether the spouses and immediate family members of the jurors have had such a connection". There is then reference to the scale and significance of the commercial entity in question, and the letter concludes:

> "[t]he jury ought to have been warned that anyone connected, directly or indirectly with [name of commercial entity] should remove themselves from the panel. Equally, they should have been made aware of the family connection to [Ballykissangel]. Furthermore, the trial ought, in retrospect, to have been the subject of an application to transfer to a different circuit."

Rather optimistically, the letter concludes:

> "[w]e trust you will agree that the verdict in the matter must be set aside and we would respectfully request that you seek instructions from the Director to consent to this."

8. In the aftermath of the letter of 14th May 2019, the Circuit Court dealt with the matter. In urging that the verdict be set aside, counsel on behalf of the now appellant pointed out that the complainant was, of course, a witness at the trial, but so too, were both her parents. It was pointed out that until late in the day, there had been some uncertainty as to whether the complainant's father would give evidence *viva voce*, or whether his statement would be read to the trial court. Counsel said that when the jury panel was in court and the jury was being sworn, no indication was given by the prosecution in relation to any particular concerns that one might have as to connections, or specific connections, with people who were witnesses in the case. Counsel did not blame prosecution counsel, insofar as perhaps it was now realised the difficulties that had been caused, and perhaps it ought to have been obvious at the time that difficulties would stem from the fact that the complainant's father held a senior position in the commercial entity in which the appellant was employed. Counsel observed that hindsight was a great thing, but that looking back, the wiser course would have been for the jury panel to be advised that if anyone had any connections with the commercial entity in question, or any connection with companies that had connections with that commercial entity, or were connected in any way with that entity, or if they had any connections with the complainant's family, then those should have been made known, at the very least, or in fact they should not have served on the jury. Counsel said that the "pervasiveness of the influence" of the commercial entity had only just come to their attention. She then addressed the position of Juror JF and the position of the Foreman of the Jury. Counsel referred to the company, by name, where the Foreman was employed as a production manager, at one stage, describing it as a comparatively small company with a staff of about 40, but at another stage, describing it as "an incredibly small engineering company" in business with the commercial entity. Counsel contended that there was real concern as to the safety of the verdict in the case, for reasons relating to bias and the perception of bias. In the course of her submissions,

counsel made reference to a case of *The People* (*Attorney General) v. Michael Quinn* [1965] IR 366, a case in which both the Court of Criminal Appeal and the Supreme Court delivered judgments. Counsel contended that while at first blush, as she put it, the case of *Michael Quinn* might appear to be authority for the proposition that the trial judge had no function or authority to arrest the verdict, she submitted that that was not a correct reading of the Supreme Court judgment. She submitted that matters had moved on since the case of Michael Quinn, referring specifically to the case of *DPP v. PO'C* [2006] 3 IR 238 which contained the well-known reference from Denham J. (as she then was) at p. 2246, that the trial Court has "a general and inherent power to protect its process from abuse…[which included] a power to safeguard an accused person from oppression or prejudice".

9. Counsel on behalf of the respondent submitted that no reasonable person or objective observer could have had any doubts about the validity of the process from start to finish. Counsel referred to jurisprudence from the European Court of Human Rights that the impartiality of judges, and indeed, jurors must be presumed until there was proof to the contrary, and that in this case, there was absolutely no proof whatsoever that the jury was anything but impartial. Counsel pointed out that the complainant's address and the address of her father were given at the trial, that the appellant had a list of addresses and where they from and what their occupations were. He pointed out that Juror JF was not a neighbour of the complainant's father, and that the complainant's father had left the village of Ballykissangel some 30 years previously. Counsel submitted that the time to object to jurors was before they are sworn in. Counsel for the prosecution referred to the *Michael Quinn* case, making the point that the reason why the defence was forced to say that there had not been a single case of this kind since then, was for the simple reason that matters of this nature were for the Court of Appeal to resolve and that the trial court had to proceed to sentence on foot of the jury verdict. Counsel pointed out that the approach of the English Courts was similar,

referring to a case of *R v. Laming* [1990] CR APP 450, where a trial judge who was persuaded by counsel not to proceed to sentence when an issue was raised about a failure to sign the indictment, was criticised for, in effect, setting himself up as a one-man appellate court. Counsel for the prosecution ended his submissions by protesting that what was before the Circuit Court was utter speculation.

Decision of the Circuit Court

10. The trial judge in the Circuit Court dealt with the issue that had been raised in concise, one might even say, terse terms. He outlined the nature of the advices and warnings given to the jury panel before a jury was selected. He pointed out that the commercial entity of which the complainant's father was a significant figure, was a large employer, and there are many suppliers to that entity in the county where the trial had taken place. The judge referred to the fact that there had been a delay in raising the matter, that the grounds relied upon the then applicant had been set out in writing only on foot of a Court order, and he felt that the proper procedure would have been that an affidavit be lodged, enabling the other side to reply. He said that if the defence had any concern, that they should have made any relevant application prior to the jury being empanelled. The judge said that he did not see any merit in the application and that he was then going to proceed to the sentence hearing. Slightly later in the proceedings, the judge observed that he felt that the question of the arrest of verdict was a matter for the Court of Criminal Appeal, but that he was proceeding with the sentence.

Discussion

11. This Court feels bound to say that it experiences some degree of disquiet about the way in which matters have developed. In this case, the usual warnings and advices were given to members of the jury panel before the jury was selected. It was open to the defence to

seek a more elaborate, extensive or tailored set of warnings and advices if they wished to do so.

12. In the case of *DPP v. McDonagh* [2015] IECA 244, the accused/appellant had been convicted of assaulting a member of An Garda Síochána. Subsequent to conviction, but prior to sentence, the appellant and the defence legal team became aware that a juror had family links with An Garda Síochána. The father of the juror in question was a retired Garda Sergeant and the mother of the juror had worked for An Garda Síochána in a clerical capacity. At para. 10 of the judgment, it was stated:

> "[t]he Court is of the view that if either side in the trial believe that it is appropriate that a more extensive or elaborate direction than is usual should be given to the jury panel, then it is incumbent on that legal team to draw that to the attention of the trial judge and seek such a direction from him."

13. We are of the view that this remark has relevance to the present case. The appellant had worked for the same commercial entity as the complainant's father albeit in a more junior role. In the appellant's case, he had worked there for 11 years as a Supply Chain Manager. At the time of the events giving rise to the trial, he had been resident in the county for a number of years, and must have known as well as anyone, the significant position held by that commercial enterprise in the life of the county, and indeed more generally. Whatever about the appellant's legal team who came from outside the county where the trial took place, the appellant cannot have been unaware of the fact that the commercial enterprise had a significant manufacturing site in Ballykissangel.

14. I think it important to point out that while the complainant's evidence was obviously central to the case and her credibility was in issue, in the sense that it was being put to her that none of the things that she described had ever occurred, her parents' evidence was much less central. Indeed, the evidence to be given by the complainant's father was of such limited

significance that when the trial started, it was something of an open question whether he would be giving his evidence in the courtroom *viva voce* or whether his statement would be read into evidence.

15. The Court is not at all convinced that this is a case where it was ever necessary that there would have been elaborate warnings inviting jurors who might have any connections with the enterprise where the complainant's father worked, to draw this to the attention of the Court and not serve on the jury. The enterprise is undoubtedly a substantial one, and its very size means that all the employees will not necessarily know each other and there may be little, if any, contact between employees based in different locations. We again point out that the central figure at trial, apart from the appellant, was the complainant, a teenager. In such circumstances, elaborate warnings would not be the norm. What basis is there for suggesting that a juror with some links to the entity where the complainant's father was employed would be unable to give a true verdict according to the evidence?

16. The point is made that one of the jurors lives in close proximity to an aunt of the complainant, who is the sister of the complainant's father. However, again, there is an element of special pleading with the benefit of hindsight. In the experience of the members of this Court, it would be unheard of for the advices and warnings given to jurors to embrace any reference to the birthplace of a complainant's father, if that birthplace had been left decades before. By the same token, it would be quite unusual for there to be reference to the home location of relatives of the complainant, or indeed, the home location of relatives of an accused person. In this case, the Circuit Court, and now this Court, has been told that an aunt of the complainant lives in the town or village where the complainant's father grew up. She may have other aunts or uncles scattered around the county or the circuit, as any complainant might have. In relation to the aunt living in Ballykissangel, neither the Circuit Court, nor this Court, was told whether the lady in question goes by the same surname as the complainant

and her father, but one way or another, it seems to us a considerable stretch to suggest that Juror JF would have been expected to make the connection when called forward to take the Oath, and a greater stretch, still, to suggest that he would be unable to give a true verdict according to the evidence.

17. We have not been persuaded that the principal grounds of appeal relied on, those relating to the composition of the jury, are points of real substance, and we will, therefore, dismiss this ground.,

18. So far as the second issue is concerned, we have already referred to the fact that we find it surprising, indeed, remarkable, that such a ground should even be advanced. There was no application for a direction at any stage, and in our view, this was for good reason. The complainant was challenged on her account by defence counsel, but the complainant never resiled. In the course of the appeal hearing, the point was made that there was a sense that the trial had run well from a defence perspective. For our part, we are reliant on the transcript, and the limitations of a transcript are well-known. However, while acknowledging the limitations to which we are subject, we are not at all surprised by the verdict that the jury delivered. We thus have no hesitation in rejecting this ground. Indeed, not for first time in recent memory, we have had to invite an appellant's advocate to consider whether the credibility of the overall submission is undermined by the inclusion of such a ground in circumstances where no application for a direction was made.

19. Overall, nothing we have read or heard has caused us to doubt the fairness of the trial or the safety of the verdict.

20. Accordingly, we will dismiss the appeal.