



THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 347

Record Number: 178/19

**Birmingham P.
McCarthy J.
Kennedy J.**

UNAPPROVED

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PR

APPELLANT

JUDGMENT of the Court delivered on the 9th day of December 2020 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. The appellant was found guilty of one count of sexual assault contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990, as amended.

Background

2. On the night of the 26th November 2016 the complainant, who was at the time 10 years old, and her parents were staying over in the appellant's family home along with the appellant's parents-in-law. The adults in the house attended a table quiz in a nearby pub that evening. A babysitter was hired to look after the children in the house. The appellant left the pub at around 1:43 am with the father of the babysitter to return home to relieve the

babysitter. The complainant described how the appellant came into the bedroom when she was asleep, that she woke up and felt him rubbing her back and then her bottom, and then he digitally penetrated her.

3. The other adults arrived home from the pub shortly thereafter and the complainant made a complaint to her mother that she had been touched by the appellant.

4. The following morning the appellant was confronted with the allegation and he denied it. The complainant was taken to hospital and the gardaí were notified. An investigation ensued and a video interview was conducted with the complainant on the 6th December 2016 pursuant to the Criminal Evidence Act of 1992.

5. The appellant was arrested on the 6th January 2017 and he denied the allegations put to him. The trial commenced on the 15th January 2019 and the appellant was convicted by a majority verdict and sentenced to a term of imprisonment of seven years with three years suspended on terms.

Grounds of appeal

6. The appellant sets out the following grounds of appeal:-

- (1) The learned trial judge erred in law in failing to correctly direct the jury in respect of the standard of proof applicable in a criminal trial.
- (2) The learned trial judge erred in law in failing to correctly direct the jury in respect of reasonable doubt.
- (3) The learned trial judge erred in law in giving the jury an imbalanced and inaccurate charge.
- (4) The learned trial judge erred in law in undermining the defence in his charge to the jury.
- (5) The learned trial judge erred in law in not properly putting the defence case to the jury.

- (6) The learned trial judge erred in law when directing the jury by reading out, in their entirety, transcripts of the interviews with the complainant, which represented in effect the examination-in-chief, but not referring to the cross-examination.
- (7) The learned trial judge erred in law in misdirecting the jury as to the circumstances in which they might acquit, by stating that the jury should not be “afraid to acquit if feeling under pressure” (or words to that effect).
- (8) The learned trial judge erred in law in refusing to accede to requisitions from defence counsel.
- (9) The learned trial judge erred in law in declining to hear submissions from the prosecution on all but one matter arising out of the requisitions of defence counsel.

7. The appellant has grouped these grounds into three broad submissions set out hereunder.

Submissions of the parties

Grounds 3, 6, 8, & 9- Failure to present a fair and balanced charge

8. The central criticism levelled regarding the trial judge’s charge is that it presents an imbalanced view of the evidence as the trial judge read verbatim from a transcript of interview with the complainant conducted by the child specialist interviewer and did not refer to the cross-examination of the complainant. Mr Cody SC for the appellant argues that the judge not only failed to advert to any inconsistencies which it is said arose in cross-examination but failed to refer to the cross-examination at all.

9. The appellant submits that the obligation to ensure fairness and balance dictates that the trial judge ought to have referred to the cross-examination of the complainant,

particularly where the judge recited verbatim the content of the transcript of the DVDs of interview with the child.

10. The trial judge was requisitioned on this point by the defence, which requisition was refused. In essence, it is argued that it was essential that the judge instruct the jury to consider, at a minimum, all of the evidence and in failing to do this, he fell into error.

11. The appellant accepts that there was no obligation on the trial judge to list all the points which arose on cross-examination but once the trial judge had taken it upon himself to read the transcript of interview which took up most of the charge, he should have referred to the cross-examination in order to ensure fairness and balance.

12. The appellant refers to *The People (DPP) v. Hardiman* [2011] IECCA 69 where the Court rejected a ground of appeal concerning a failure of the trial judge to mention something said in a garda statement in the charge. The Court said as follows:-

“A charge does not have to include every single comment or material adduced on behalf of the defence or indeed the prosecution, but must fairly draw the jury's attention to the important elements in the case, including the defence being put forward, and by reference to specific evidence. The charge of the learned trial judge in the present case met all the appropriate criteria applicable to a trial of the type in issue here was complete and detailed, and dealt with all legal requirements, as well as giving a fair synopsis of the evidence of the various parties. Moreover, it is clear that the words mentioned by the judge as being part of the cross-examination, which did not appear in the statement of evidence, clearly implied an allegation of lack of credibility on the part of the witness.”

13. It is said that *Hardiman* can be contrasted with this case as there was simply no mention of the cross-examination at all and the trial judge did not therefore meet his

obligation to fairly draw the jury's attention to important elements in the case by reference to specific evidence.

14. The appellant further draws attention to the contrast between the circumstances of this case and the judgment of McGuinness J. in *The People (DPP) v. DO'S* [2004] IECCA 23:-

“In the course of his lengthy charge to the jury the learned trial judge surveyed the evidence which had been led by both prosecution and defence in some detail. He did not in specific terms summarise either the prosecution case or the defence case for the jury, the jury had, after all, recently heard the speeches of both counsel. However, in his survey of the evidence the learned trial judge was most careful to include the points made in cross-examination by the defence. He also drew the jury's attention to a number of inconsistencies in the evidence of the complainant and of other prosecution witnesses, and highlighted clashes of evidence as between various witnesses.”

15. The respondent contends that the charge was fair and balanced. In relation to the broad assertion that the charge was unfair and imbalanced the respondent submits that the charge must be assessed with regard to substance rather than form. The respondent refers to *The People (DPP) v. Piotrowski* [2014] IECCA 17 at para 3.1:-

“This Court, on appeal, is, however, required to assess whether the substance of the judge's charge dealt adequately and appropriately with all of those matters. It is a question of substance rather than one of form. Indeed, it is worth noting that, in certain other jurisdictions (the United States is a particular example), a judge's direction to a jury is in exact accordance with precise wording applied in each like case. The view in this jurisdiction is that there may be an advantage to allowing the judge to convey the required substance in a more freestyle form which avoids the risk of a jury being less well informed in practice by the repetition of well-worn formulas.”

Discussion

16. When the trial judge concluded his charge, counsel for the appellant raised several requisitions. Specific to these grounds, it was submitted at trial that once the judge read the entire transcript of the interviews with the child, that the judge ought to have specifically adverted to the fact that the complainant was cross-examined by the defence and that the jury should have regard **to all the evidence of the witness.**

17. The argument could be advanced that juries are robust and every member of a jury would be aware that the evidence of a witness is not limited to direct testimony, and quite obviously includes the cross-examination, which in the present case was very lengthy indeed and may have presented somewhat of a challenge to the judge to summarise the salient features.

18. It is certainly the position that a trial judge is not required to rehearse the cross-examination of a witness in detail, but this is not the contention advanced on the part of the appellant. Rather, it is said that in this case, having read the interviews with the child in their entirety, it was incumbent on the judge, at a minimum to remind the jury that this was not the entire evidence of the witness and that it was necessary to assess all the evidence, which of course, included the cross-examination.

19. We note from written and oral submissions, in support of these grounds that it is contended on the part of the appellant that the defence had significantly engaged with and tested the evidence of various witnesses throughout the trial. The submissions point to 17 factors to which the trial judge did not refer during the charge and the appellant uses this list in order to underline the significance of the cross-examination. It is said that many of the factors pointed out in submissions relate to inconsistencies arising on the complainant's evidence.

20. However, when we examine the 17 factors, it appears to us that the vast majority of those issues do not in fact relate directly to the complainant's testimony or any alleged

inconsistencies contained therein. The fact that a judge chooses not to summarise the testimony of some of the witnesses does not in and of itself render a charge imbalanced. It is an assessment for each judge in each trial and is evidence dependent.

Conclusion

21. In our view, in the present case, where the judge adopted the somewhat unusual approach of reading the entire transcript of the interviews, rather than summarising the evidence, it was less than ideal that he made no mention even of the *fact* of cross-examination. We do not consider that it was necessary for the judge to summarise the cross-examination in great detail, but the charge must be a balanced one, by whatever means a judge in any given case, considers appropriate. What is essential is that the judge presents an impartial review of the evidence in a fair and balanced manner. While a judge is under no obligation to remind the jury of all the evidence or all the arguments, nonetheless, the jury must be reminded of the salient features in the trial in order to assist the jury in its role and to direct them to the issues of fact which require determination. Indeed, the optimum charge is one which identifies the legal and evidential issues for the jury with clarity and concision. A succinct charge has much to commend it.

22. We believe that where the entire transcript of the direct testimony was read over verbatim, the judge ought to have invited the jury, at a minimum to consider all the evidence of the witness including her cross-examination. Moreover, he ought to have summarised the salient aspects of the testimony.

23. In many instances, the failure to invite the jury to consider all the evidence would not be considered an error of substance, because as pointed out above, a jury can be expected to know that the evidence includes all the testimony of a witness, and the real question is one of balance and fairness.

24. However, a cause of concern for this Court, is that having read the entire transcript of interviews, and failing to refer at all to the cross-examination, the judge compounded the error by then advising the jury:-

“That is the evidence concerning the night in question from [the complainant].”

25. The jury may well have realised that that was not in fact the position, that the cross-examination was also evidence pertinent for their consideration of the events of the night in issue, but the failure, at a minimum to advise the jury to consider all her testimony having read the transcript and then instructed them that that was, in effect her evidence, renders the charge imbalanced and amounts to an error in principle.

Grounds 4 & 5- Failure to properly put the defence case to the jury

26. The trial judge laid out the defence case as follows:-

“Now, what is the defence case. The defence case is that this did not happen. Yes, PR went into the room, yes, he talked to [the complainant] there, [the complainant] was awake. His son [...] was also there and [...] was asleep and incidentally [...]-- that's the account [son] gave in his evidence but nothing untoward happened is the defence case. There was a chat and the chat was mainly about a present for [the complainant] from PR for Christmas and the Smyth's catalogue was mentioned and at the end of that time the other adults arrived back from the [...] pub and that is, in broad outline, the defence case. Now, unlike with the transcript of the interviews with [the complainant], PR's interviews with the --copy-- memos, I should say, of PR's interviews ... will be available to you and you'll have those to consider.”

27. The appellant accepts that it was not the duty of the trial judge to rehearse the points made in cross-examination or in the closing speech but the trial judge summarised the

defence case only with reference to the memoranda of interview with the appellant and therefore confined the defence case to the content of the memoranda of interview.

28. The appellant refers to the dicta of the Court in *The People (DPP) v. Herda* [2017] IECA 260 as follows:-

“In the instant case, the appellant elected, as she was quite entitled to, not to give evidence. Neither was any evidence called on her behalf. Nevertheless, there is an obligation on a trial judge to explain the defence as inferred by the plea of not guilty and such evidence as emerges from the cross examination of witnesses. In this case, it was clear that the allegation that the appellant deliberately drove her car into the water, or that she was grossly negligent in so doing was denied by her. The onus of proving the case made against the appellant rested with the prosecution and this was made abundantly clear to the jury by the learned trial judge in the course of his charge.”

29. The appellant submits that the remarks of the Court in *Herda* are instructive when considered in contrast with the present case.

30. Aside from the error highlighted above, wherein the trial judge read the transcript of interview of the complainant but failed to refer to her cross-examination, the appellant submits that the trial judge further failed to refer to the defence’s contention in respect of the evidence of the mother as to what she was told by the child on return to the house, it is said that while the respondent relied on this evidence to demonstrate consistency, the appellant contends the evidence showed inconsistency to which the judge did not refer. The appellant argues that the judge failed to mention the evidence of other witnesses as to the demeanour of the child when they returned to the house which it is said did not show distress and, finally, it is argued that the judge failed to say that the medical evidence was, in effect, neutral.

31. The trial judge was requisitioned by the defence on each of these points and he rejected each requisition.

32. The respondent submits that the case of the defence was clearly put to the jury in closing speeches. It was clear that the defence case was that the incident simply had not occurred and that the complainant had fabricated the allegation.

33. Regarding the emphasis placed by the defence on the fact that the trial judge elected not to refer to the cross-examination of the complainant, the respondent makes several points. The first of these is that the lengthy and very detailed cross-examination of a then 12-year-old child, was unlikely to have been forgotten by the jury or anyone present in the court. During this cross-examination it was put to her that her version of the incident did not occur and it was inconsistent in certain aspects.

34. It must further be borne in mind that the matters which arose in cross-examination were repeated in the defence's closing speech, a day before the charge was given to the jury. The jury was very alive to the forensic details of the cross-examination of the complainant's account in the context of an outright denial that anything untoward has occurred

35. The respondent submits that the questions asked by counsel for the defence in cross-examination are not evidence. It is only the answers given which are evidence. In reality the answers on most questions gave rise in most instances to little or no variance, and no variance at all in relation to the central allegation made by the complainant. Any variances which were present were repeated and highlighted in the closing speech of the defence.

36. The respondent further argues that the trial judge read the transcript of interview with the complainant to the jury in his charge in circumstances where the videos had been viewed some 14 days previously and therefore it was necessary to remind the jury of the interview, it being the central plank of the prosecution case. The defence case, insofar as any evidence was concerned, was contained in his memoranda of interview which were furnished to the jury.

37. The respondent refers to *The People (DPP) v. Piotrowski* [2014] IECCA 17:-

“As pointed out in Bishop, it is not the function of this Court to entertain argument which seeks to go through the judge's charge with a fine tooth comb and identify some element of the evidence or argument which, it might be said, had not been fully addressed to the jury. Rather, it is the function of this Court to assess whether the substance of the case made at the trial on behalf of the accused is fairly put.”

38. It is submitted that that is precisely what the appellant seeks to do here - to apply a fine-tooth comb and attempt to identify evidence (in this case those matters put in cross-examination) which the appellant says had not been fully addressed by the trial judge in his charge.

Discussion

39. Mr Cody SC for the appellant, in oral and written submissions argues that the trial judge erred in not only failing to summarise the complainant's cross-examination but failed to mention the very fact that she was cross-examined and failed to reference any aspect of the cross-examination of any of the witnesses for the prosecution. He says that this absence failed to properly put the defence case to the jury.

40. It must be said that the defence case was one of denial. The judge certainly set out that case for the jury, as we have referenced at para. 26 above. Moreover, the jury also had the memoranda of interview to consider. We do not consider that the judge erred in this respect.

41. Moreover, the complaint is that the judge failed to point to evidence in cross-examination, which is contended, assisted the defence case. Mr Cody points to three particular factors, which we feel it unnecessary to traverse in light of our conclusion at para.25 above.

Grounds 1, 2 & 7- Directions to the jury on reasonable doubt

42. The trial judge addressed the jury as follows on reasonable doubt:-

“The next important safeguard, ladies and gentlemen, which is put in place to ensure a fair trial for an accused person is this, the standard of proof that applies in criminal cases is proof beyond reasonable doubt. That's to be contrasted with the standard of proof that applies in civil cases. In my experience, many lay people think of the law purely in terms of the criminal law and indeed this is a criminal case where the issue is guilt or innocence but a great many cases before our courts are civil cases, such as, for example, road traffic accidents giving rise by a claim by one motorist against another that he suffered personal injuries and material damage to his motor car and so on, seeking damages. Other examples would be disputes between neighbours where there might be a claim for an injunction or for a declaration of ownership. Family law cases are on the civil side of the court, where people seek perhaps divorce or judicial separation, perhaps maintenance payments or division of property, matters such as that. These are the issues in civil cases and in civil cases the standard of proof that applies is proof on the balance of probabilities. Civil cases do involve a balancing exercise. The moving party in a civil case is called the plaintiff and the plaintiff has to satisfy the Court in order to succeed that the case he or she is making is more probably correct than the case made by the other side. So, if the plaintiff gets to 51 percent, as it were, tilts the balance even slightly in his or her favour they succeed. That's to be contrasted, as I say, with the standard that applies in criminal cases, proof beyond reasonable doubt is proof to a much higher level of probability.

An analogy might be of some assistance, ladies and gentlemen; imagine, if you will, some important event that's coming up in your own life, your own personal life, perhaps changing your job. If you find yourself in that situation it's something you're going to have to take very seriously indeed because of all of the ramifications. You will probably come up with a list of pros and cons, whether you write them down or

come up with them in your head. You will speak to anybody who might be able to help you in coming to your decision. You'll look at the matter from every conceivable angle up and down and inside out. At the end of that process you come to your decision. If the decision is yes, well while there are one or two relatively slight down sides, overall I can come to the conclusion that it is the right thing to do and I will go ahead and change my job. If, on the other hand, you feel well, there's just this aspect to it or that aspect to it and I and it leaves me in the position that I just am so unsure that I will not go through with it, well that is the equivalent of having a reasonable doubt. If you have such a doubt, of course, it's applied in favour of the accused.”

Submissions of the parties

43. The appellant refers to *The People (DPP) v. Herda* [2017] IECA 260 where the Court considers how the issue of reasonable doubt is to be explained to a jury. The Court accepted that the use of an analogy between the decision the jury has to make and similar life changing decisions is a generally approved approach in this jurisdiction and the Court references *The People (DPP) v. Kiely* (Unreported, Court of Appeal, 21 March 2001) where the trial judge’s explanation of reasonable doubt was found to be comprehensive and thorough.

44. In contrast, it is submitted that the language of the trial judge was incorrect, unclear and misleading. The appellant points to the following aspect of the charge:-

“Now, it is -- you will know from your knowledge of the world, from reading newspapers and radio and television that frequently in our courts juries do convict and those juries are told in broad terms what you are being told in relation to the issue of reasonable doubt. So, you should not be afraid to convict if that is your -- if that is something that you are sure of to that requisite level. Of course, you should not be afraid to acquit if you feel under pressure.”

45. The appellant submits that this excerpt is so unclear on a fundamental issue that the conviction is unsafe as a result.

46. The appellant argues that correct directions are required in respect of the standard of proof beyond a reasonable doubt and there is no question of parsing the charge on this heading as this is a discrete issue which cannot be cured by looking to other parts of the charge

47. The respondent submits that contrary to the appellant's arguments, one can look at how the trial judge addressed the burden and standard of proof by reference to the whole of the charge.

48. The respondent submits that the charge on the concept of reasonable doubt was not incorrect or unclear. The trial judge followed best practice in that he contrasted the civil and criminal standards and thereafter gave the well-rehearsed and approved analogy of making important decisions in a juror's life, as endorsed by the Court in *The People (DPP) v. Herda* [2017] IECA 260 and *The People (DPP) v. Kiely* (Unreported, Court of Appeal, 21 March 2001). The respondent refers to *Herda* where Mahon J. considered the growing complexity of the judge's charge:-

“The task of a trial judge is to advise the jury as to the relevant legal principles which they are required to follow, and to explain them, particularly those that are complicated or nuanced, in ordinary language and in as comprehensible a manner as possible. Perfection in this task should not be expected. A trial judge enjoys a wide discretion as to how he discharges this task. What is important is that the directions to the jury are reasonably clear and that complex legal terminology and principles are explained in ordinary language to the greatest possible extent.”

49. The respondent reiterates that it is the overall fairness and correctness of the charge which should be the yardstick by which it is judged. This Court has repeatedly stated that an appellant is entitled to a fair trial, not a perfect one.

Discussion

50. In every trial, the judge must instruct the jury regarding the presumption of innocence, the burden and the standard of proof. A charge should be clear and obviously accurate. It must be readily apparent that the prosecution bear the onus of proof and that its case must be proven beyond reasonable doubt. This is well trodden ground and the decision of *Herda* is apposite.

51. It is said that the language used by the judge served to confuse the jury. This, it is said, came about when the judge mentioned the words 'slight down sides', and it is contended that this may have confused the jury as to what is meant by a reasonable doubt. Mr Cody argues that this alleged error was compounded by the judge then indicating:-

“Of course, you should not be afraid to acquit if you feel under pressure”

52. It is said that this amounted to a lack of clarity in explaining the term reasonable doubt. The words must be examined in context. In saying this the judge did so in terms of the jury exercising their oath in the proper manner. The judge having instructed the jury on a reasonable doubt went on to say:-

Now, it is -- you will know from your knowledge of the world, from reading newspapers and radio and television that frequently in our courts juries do convict and those juries are told in broad terms what you are being told in relation to the issue of reasonable doubt. So, you should not be afraid to convict if that is your -- if that is something that you are sure of to that requisite level. Of course, you should not be afraid to acquit if you feel under pressure. You must, in accordance with your oath, ladies and gentlemen, give true verdict and that -- if that verdict is to be guilty it must

take into account all of those safeguards that the law puts in place to ensure a fair trial for people facing criminal charges.”

53. It seems to this Court, that the judge sought to convey to the jury that their verdict must be independent of any outside influences and should act in accordance with the oath taken.

Conclusion

54. The charge must be read as a whole. The duty of the judge is to ensure that the jury understand the fundamental legal principles. They must understand that if they have a reasonable doubt, the benefit of that doubt must be given to the accused, but it is important to note that this only arises where a jury hold a reasonable doubt, it does not arise, as is often stated, where the jury have a fickle doubt or a manufactured doubt. It must be a doubt based on reason. In explaining the standard of proof and the benefit of the doubt to the jury, and in using the words ‘slight downside’, it is clear that the judge sought to convey to the jury in ordinary language, that doubt on a peripheral matter, would not prevent the jury reaching the requisite standard of proof.

55. When this is understood, it can quite clearly be seen that the judge’s charge did not dilute in any manner the fundamental principles. There can be no doubt but that the jury were aware on whom the onus of proof lay and the applicable standard of proof. Insofar as it is said that the judge compounded an error by saying:-

“So, you should not be afraid to convict if that is something your – if that is something that you are sure of to that requisite level. Of course, you should not be afraid to acquit if you feel under pressure”.

56. Those words must be read in the context in which they were said. We do not agree that these words undermined the instruction regarding the standard of proof or diluted this fundamental legal principle. The jury can have had no doubt as to the legal principles, it could in fact, be said, that this emphasised the standard of proof for the jury.

57. These grounds therefore fail.

Decision

58. As we have concluded that in the particular circumstances of this trial, the judge erred in his charge, we will quash the conviction. We will hear submissions on a re-trial.