



THE COURT OF APPEAL

[314/18]

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

BETWEEN/

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

**- AND -
S.W.**

APPELLANT

**Judgment (*ex tempore*) of the Court delivered on the 2nd day of December, 2019 by
Mr. Justice Patrick McCarthy**

1. This is an appeal against conviction. The appellant was convicted by a jury on the 30th of October, 2018, after a trial in the Cork Circuit Criminal Court to four counts of sexual assault, those being counts 1, 2, 3, and 10 on the indictment. Three of these offences occurred in the family home of her and her brother, who is the complainant, in Cork, and one took place in Dublin. The appellant was found not guilty on counts 4-9 inclusive. The appellant was sentenced on the 23rd of November, 2018 to six months imprisonment which has been served in full.
2. The background to the case is as follows. The appellant is the older sister of the complainant in the case, K.W, the younger brother by twelve years of the appellant. The offences took place between May 1993 and in or around July 1997. The offending began when the complainant was nine years of age and the appellant was twenty one. The offence in relation to Count 10 occurred when the complainant was twelve years of age. The offences occurred at the family home in Co. Cork, with the exception of Count 10, on occasions when the complainant's and the appellant's parents were away and the appellant was left to mind the complainant. Count 10 occurred at a time when the appellant and the complainant were staying with their family at the Shelbourne Hotel in Dublin, on which occasion the appellant was convicted of sexually assaulting the complainant.

Grounds of Appeal:-

3. The appellant submits the following grounds of appeal in that the trial judge erred:-

i) in refusing the appellant's application to discharge the jury;

and:-

- ii) in law in the manner in which he charged the jury as to the standard of proof in the case and in refusing to re-charge the jury following requisition being made to him on this issue by counsel.
4. Two issues arise on this appeal. The first is the refusal of the learned trial judge to discharge the jury on the grounds that inadmissible evidence of such significance was given by the complainant K.W in the course of cross-examination as to render it necessary to do so, and secondly the second ground is the use of the term "convinced" by the judge in the course of his charge when addressing the issue of a standard of proof at one point it is said that this usage is not a correct statement of the law as to the standard of proof and a confusion could arise in the minds of the jury in that regard.

Ground One

The trial judge erred in refusing the application from counsel for the defence to discharge the jury;

5. On the 25th of October 2018, Day Two of the trial, the principal prosecution witness, K.W, gave evidence to the jury of prior complaints made to others, evidence which was not proposed to be adduced by the prosecution in this trial.
6. We cannot set out the portions of the transcript *in extenso* relevant to the matters here, but it is beyond doubt that the appellant's stance and the cross examination pursuant to her instructions was to the effect that the allegations in question were recently fabricated, and in particular fabricated on the afternoon of the 26th of February, 2015 for the purposes of defending an application in Cork District Court by the appellant for access to the complainant's son, B.
7. At the District Court hearing, extensive cross-examination took place as to why the fact of such offences had not been brought to the attention of a number of persons with particular reference to Dr O'Malley, a General Practitioner to the family, a number of counsellors – what we might describe as two sets of counsellors – , the Gardaí, (inasmuch as the complainant had had contact with the Gardaí prior to time of a complaint) and in proceedings by the complainant's parents who also sought access to their grandchild.
8. The statement of proposed evidence of the complainant contains extensive reference to the fact that he had informed third parties of the sexual misconduct in question. There were some seven persons referred to in the statement; I do not propose to set out the names, but these complaints were made over a number of years and included a former or one-time girlfriend as well of course to his present partner and numerous friends.
9. The appellant and her representatives were accordingly aware of the fact that such statements of complaint had been made. One of those persons indeed gave evidence in the proceedings in the District Court as to complaints made to him by the complainant on the matters in question. Evidence from such persons was of course admissible to rebut the recent fabrication alleged though the prosecution did not see fit to call it. The complaint here however is that notwithstanding the clear thrust and tenor of the cross-

examination, the jury ought to have been discharged. The following exchange took place between counsel and the complainant: -

"Q. You told your story to Judge Kelleher?

A. I did.

Q. And he said - I'm paraphrasing now - he said he didn't want to hear it. He wanted you to report it to the guards, isn't that what he said?

A. And as soon as everything was over well, he did hear it. With respect, Mr Heneghan, he heard a lot of evidence, much the same evidence in the same detail of what we went into today, we talked about the dates, we talked about the visit to Killarney. And having heard that evidence, and having heard evidence from a friend of mine to whom I had made a previous disclosure, he accepted that this statement had been made to somebody else before, that it wasn't something cooked up for an access case. You've asked me about my statement, I said to the gardaí that the first time I mentioned this to somebody was in 2004, to a girl I'd had a relationship with, was in a relationship with at the time. I disclosed it to other friends."

We cannot see how the giving of admissible evidence to this effect are on the facts and in the nature of the defence could give rise to a basis for any protest, let alone a discharge of the jury.

10. We accordingly reject this ground of appeal.

Ground Two

The trial judge erred in law in the manner in which he charged the jury as to the standard of proof in the case and in refusing to re-charge the jury following requisition being made to him on this issue by counsel;

11. The second ground of appeal herein relates to the trial judge's charge on the standard of proof. The appellant submits that the trial judge erred in charging the jury that a reasonable doubt is a doubt of "substance" and secondly, in charging the jury with regard to the meaning of the standard of proof, that "beyond a reasonable doubt" means "convinced".

12. As to this ground pertaining to the judge's charge, the charge must of course be treated in its entirety and throughout the judgment in the clearest terms, the judge hammered home so to speak, the standard of proof required by law and there are on our analysis some fourteen separate references to the standard of proof so required. We do not, again, set out all of the passages in the transcript *in extenso*, but the following passage we think, might indicate the flavour of the charge: -

"The third and final principle I should mention to you is yes, the onus of proof is on the prosecution, but to what standard must they prove a case against the accused. So we say that the prosecution must prove every element of the case against the accused to a standard that is beyond all reasonable doubt."

Further, the judge went on thereafter in the usual manner to compare the criminal and civil standards of proof. He instructed the jury as to the necessity of giving the benefit of any reasonable doubt to the accused where two views of the evidence were concerned and otherwise in what we might call a completely full way elaborating on all relevant principles in this context. The complaint is, however, that in concluding his remarks on the burden of proof, the judge said the following: -

"Any doubt, as I said, must be genuine. Do not jump to conclusions or take a flyer. It is only if you, as a jury, can reach such a conclusion beyond a reasonable doubt, it's only then that you can convict the accused. It is said within, or certainly by a well known highly respected Irish criminal scholar, he has said that the essential meaning of proof beyond a reasonable doubt is that you may not convict unless you are convinced of the person's guilt. That's it in a nutshell."

We think that it is abundantly clear, both from the immediate forms of words used in tandem with the word "convinced" and otherwise that the jury could not have been in the least doubt as to the standard of proof required, and that there was no basis for complaint about the charge under this head. We reject this ground of appeal also.

13. The appeal against conviction is accordingly dismissed.