



THE COURT OF APPEAL

Record Number: 304/18
Neutral Citation Number: [2021] IECA 146

Edwards J.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

P.P.

APPELLANT

JUDGMENT of the Court delivered on the 18th day of May 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. The appellant was tried on two charges of indecent assault contrary to common law as provided for by section 10 of the Criminal Law (Rape) Act, 1981. On the 12th July 2018 he was found guilty of one count of indecent assault.

Background

2. The two counts preferred on the indictment relate to charges of indecent assault of the appellant's niece. The first count, for which the appellant was ultimately found not guilty, concerned a timeframe between August 1982 and January 1985.

3. The second count, of which the appellant was found guilty, was specific and related to an incident in January 1985 when the complainant was nine years old. The appellant was

babysitting the complainant and he rubbed her private parts with his fingers and asked her to do the same to him. The complainant told her father about the assault later that evening but a formal complaint was not made until 2012.

Grounds of appeal

4. The appellant puts forward seven grounds of appeal as outlined in his notice of appeal, however, Mr Whymes BL for the appellant states that the appeal concerns the directions of the trial judge regarding the standard of proof in a criminal trial.

Background

5. No requisitions were raised on the legal principles following the charge, however, the jury asked 3 questions in the course of deliberations, two of which are relevant to this appeal:-

“FOREMAN: It's nothing new. It's just a request to re-clarify for us some of the things that were said already.

JUDGE: By?

FOREMAN: One is to re-clarify for us the law on the principle of reasonable doubt ... statement ... clarity.

JUDGE: Right. Okay, so clarification on okay, reasonable doubt.

FOREMAN: We also request clarification if possible on the principle of the balance of probabilities and how much higher we need to go to reach reasonable doubt.

JUDGE: Well, it's not a question of degrees...”

The judge then instructed the jury *inter alia* as follows:-

“But we're talking about a criminal case in this instance and there's a considerable difference between proving something on the balance of probabilities and proving something beyond a reasonable doubt. And to put it another way, you cannot

convict somebody in an Irish court unless you're convinced on the evidence that the evidence in the case establishes that they are guilty of the offence.”

He then went on to say:-

“So if you've a balancing exercise in that respect where it's equal, you would have to give the benefit of the doubt in circumstances -- if you want to do it in figures and that is not -- some people would say or some people would feel that's not maybe a correct way. There's so many ways you can explain it. **But if it's a 50/50 situation, if you really want to go into figures, you have to give the benefit of the doubt to the accused person. So you have to be sure above that percentage certainly and you have to be convinced, as I said, in dealing with it, because nobody in an Irish court should be convicted of a criminal offence unless they're convinced that that man committed that offence.** It's a high threshold. It's much higher than the civil threshold as such. Now, that's the best way I can explain it to you. You sift through the evidence, use your common sense. You're people of the world. You know -- you can sift through the evidence and come to a verdict provided, as I say, you comply with the directions which I've given you as such.” (our emphasis).

6. When the jury retired both counsel addressed the judge on his remarks with regard to the judge's reference to a “50/50 situation”. Although the trial judge did not accept that he had misdirected the jury he agreed to the action proposed by counsel for the respondent and to recharge the jury in terms of *The People (DPP) v. Cahill* [2001] 3 IR 494, as quoted in *The Judge's Charge in Criminal Trials* by Coonan and Foley (Thomson Round Hall, 2008).

The trial judge recharged the jury as follows:-

“JUDGE: Members of the jury, in case there is any misunderstanding or misinterpretation of what I said to you earlier on, I'm going to clarify this and I'm going to refer to a case of the People (DPP) v. Cahill and that relates to the different standards

of proof in relation to civil actions and criminal actions. Okay. And the quotation comes where the trial judge had instructed the jury the following: "If there are two interpretations on any particular matter that they are evenly balanced ..." and you remember I referred to 50/50 "... you give the benefit of that to the accused. If on the particular issue it is found you give the benefit of it to the accused. But if there is any doubt on the matter in any particular issue you are trying which you have a reasonable doubt, you give the benefit of it to the accused. In a civil case, a case about a traffic accident or a dispute about land the burden of proof of course is on the balance of probabilities. A plaintiff going to court suing a defendant in a civil matter need only prove the case on the balance of probabilities. That is just over 50%. It is a completely different burden of proof in a criminal matter. It has nothing to do with probabilities. It is beyond a reasonable doubt."

Now, my understanding is I already said that to you, but just in case in any way you have any doubt about what I said I'm just referring that as a decision to help you deal with the query you raised. I also by the way emphasised it when I gave my charge in the first instance. I gave you the example of the civil case. I said how much higher the standard of proof was and I used the word convinced. And I mentioned that a few times."

Submissions

The appellant

7. Mr Whymes properly takes no issue with the judge's initial directions to the jury on the standard of proof. However, he says that the second question posed by the jury indicates that the jury was applying an incorrect approach by considering the ultimate issue on a percentage basis. Given this, it is said that the judge's response to the question served to further confuse the jury. While Mr Whymes points to the impugned sentences emphasised

above, he argues that those words must be viewed in the context of the question asked by the jury.

8. The appellant further argues that the final remarks of the trial judge to the jury seemed to suggest that the trial judge thought that a correction was unnecessary. Consequently, there is a perception of confusion concerning the instruction to the jury on the standard of proof.

The respondent

9. In response Mr Connolly BL says that following the trial judge's final remarks to the jury there was no doubt but that the jury was correctly instructed and knew and understood the task at hand. The respondent says when the charge is viewed in its entirety, there is no substance to the appellant's complaint.

10. The respondent argues that given that unanimous verdicts of not guilty and guilty were reached in respect of Counts 1 and 2, one can infer that the jury understood the task at hand and applied the judge's directions to the evidence adduced.

11. Finally, it is said that the judge correctly stated the principles and did so on several occasions from which the jury would have been left in no doubt as to the correct legal principles. Reliance is placed on *The People (DPP) v. McDonagh* [2012] 1 IR 49 and *The People (DPP) v. CM* [2020] IECA 117 in which case this Court reiterated that when assessing any perceived deficiencies in a charge one must consider the totality of the charge.

Discussion

12. We do not intend to rehearse substantial extracts from the judge's charge in this judgment. It is properly accepted on behalf of the appellant that the judge's charge on the fundamental principles prior to the questions posed by the jury was beyond reproach. It is clear that the trial judge instructed the jury on the presumption of innocence and emphasised its importance in the trial process, he explained the burden of proof, and the relationship between the two principles. He then proceeded to address the standard of proof required in

a criminal trial, explaining the meaning of proof beyond reasonable doubt and contrasting the civil and criminal standards. For the purposes of considering the charge as a whole it is worthwhile setting out aspects of the judge's direction on the standard of proof in that in the extracts hereunder, it can be seen that the judge was at pains to ensure the jury were aware of the distinction between the civil and criminal standard of proof.

“Now, there's a very considerable difference between proving something on the balance of probabilities and proving something beyond what we call a reasonable doubt. To put it another way you cannot convict somebody in an Irish Court unless you are convinced that the evidence in the case establishes that they are guilty of that particular offence or offences.”

13. The judge then explained what was meant by a reasonable doubt, giving examples to assist the jury and reiterated the relationship between the burden of proof and the presumption of innocence.

14. There can be no question that the judge diluted the importance of the presumption of innocence, the burden of proof or the standard of proof to be met by the respondent. He explained how to address conflicts in the evidence adduced on the part of the respondent and appellant directing the jury in terms of *The People (AG) v. Byrne* [1974] IR 1 following which he again emphasised the benefit of the doubt.

15. Understandably, no requisitions were raised on the legal principles on the conclusion of the charge. This appeal arises from the response by the trial judge to the jury's request for clarification on the standard of proof and in particular the response to the following:-

“We also request clarification if possible on the principle of the balance of probabilities and how much higher we need to go to reach reasonable doubt.”

The judge proceeded to explain the standard in a civil case and then said:-

“But we’re talking about a criminal case in this instance and there’s a considerable difference between proving something on the balance of probabilities and proving something beyond a reasonable doubt. And to put it another way, you cannot convict somebody in an Irish court unless you’re convinced on the evidence that the evidence in the case establishes that they are guilty of the offence.”

16. Thus far, no complaint could possibly arise. Indeed in his response the judge reiterated some of the earlier portions of his charge but on this occasion, he emphasised that there was a considerable difference between the standards of proof required.

17. The judge explained the meaning of a reasonable doubt and the benefit of the doubt and again gave the *Byrne* direction.

18. The issue can really be limited to a single paragraph of the judge’s charge where he said:-

“But if it’s a 50/50 situation, if you really want to go into figures, you have to give the benefit of the doubt to the accused person. So you have to be sure above that percentage certainly and you have to be convinced, as I said, in dealing with it, because nobody in an Irish court should be convicted of a criminal offence unless they’re convinced that that man committed that offence.”

19. Mr Whymes submits that this must be viewed in the context of the question asked by the jury, asserting possible confusion on their part. However, we cannot agree on the totality of the charge that the judge fell into error. Even should the view be taken that the use of the words ‘But if it’s a 50/50 situation’ were apt to create confusion, one must look at the very next phrase where the judge instructs the jury that the appellant must in those circumstances be given the benefit of the doubt. He then re-iterates yet again that the criminal standard of proof is much higher than the civil standard of proof.

20. While the use of the words in quotes above are best avoided, there can be no issue in our mind on the totality of the charge that the jury were fully apprised of the fundamental principles, the presumption of innocence and the corollaries of that being the onus and standard of proof required. The judge repeatedly advised the jury that the standard in a criminal trial was much higher than that of a civil action and used the word convinced on several occasions. We are not at all persuaded that the jury were led to conflate the civil and criminal standards. It is quite clear that the judge emphasised that the civil standard was not the applicable one.

21. Moreover, it cannot be ignored that the jury returned a verdict of not guilty on one of the counts. It is difficult to see how they failed to apply the relevant standard in those circumstances.

22. Accordingly, the appeal is dismissed.