



THE COURT OF APPEAL

UNAPPROVED JUDGMENT

Neutral Citation Number: [2020] IECA 158

[273/18]

**The President
Kennedy J
Ní Raifeartaigh J**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PB

APPELLANT

JUDGMENT of the Court delivered on the 17th day of June 2020 by Birmingham P

1. On 27th July 2018, after a trial which had commenced on 18th July 2018, the appellant was convicted on 60 of 61 counts which were comprised of various counts of rape and indecent assault that had appeared on the indictment by majority jury verdict. Subsequently, on 25th October 2018, he was sentenced to an aggregate sentence of eight years' imprisonment with the final two years suspended. He has now appealed against his conviction, advancing five grounds of appeal in the Notice of Appeal, these being:

- (i) The trial judge erred in law and in fact in failing to properly address the jury on the danger of contamination between witnesses in this case;

- (ii) The trial judge failed to adequately warn the jury, in the specific circumstances of this case, of the care required and the dangers involved in considering complaints of a sexual nature that go back a long time;
- (iii) The jury's verdicts were perverse and incompatible with the evidence in circumstances where the standard to be reached of proof beyond reasonable doubt was absent;
- (iv) That the jury should not reach a verdict in circumstances where it was under pressure to reach a decision quickly, or under time constraints in any way and the judge had a duty to warn jurors of a risk that they might be required to sit late when considering a verdict, particularly in relation to the two counts of rape. The trial judge failed to give the jury a direction to bring in a majority verdict earlier during the course of these deliberations [This ground was not the subject of any written submissions.]; and
- (v) For these reasons, and such other reasons as may be advanced at the hearing, the conviction of the appellant is unsafe and ought to be quashed.

At the commencement of the oral hearing, which was conducted remotely, counsel indicated that grounds (ii) and (iv) were not being pursued.

2. It is to be noted that the lawyers who have formulated these grounds of appeal and have argued the appeal before this Court were not the lawyers who represented the appellant at trial. This is a matter of some considerable significance in a situation where a number of the grounds now sought to be raised do not appear to have featured at the trial. In particular, it is to be noted that at trial, there was no application for a direction and there were no requisitions on the judge's charge.

Background

3. By way of background, it should be explained that the complainants, Ms. S and Ms. D, are sisters. The appellant was the father of nine children. The complainants were the fifth and sixth children and the family lived outside Limerick. The appellant and his wife, and mother of the complainants, separated in 2004 and he left the family home. Complaints were made to Gardaí in December 2012, four weeks apart. In January 2013, the appellant's wife and mother of the complainants, died.

4. The charges before the Court were presented as sample charges, covering the period 1st January 1975 and 31st December 1984. On the account of Ms. C, she was between the ages of approximately seven years and seventeen years when the abuse took place, while on the account of Ms. B, she was abused between the ages of seven and fifteen years.

5. So far as the complainant Ms. C is concerned, the appellant was convicted of 35 counts of indecent assault. 21 of these involved incidents in the family home, comprising groping, digital penetration and forcing the complainant to masturbate him. Eleven counts related to similar offending behaviour which occurred in the family car. Three further counts related to incidents which took place in a shed at the back of a family home and involved encouraging the complainant's pet dog to lick her vagina. So far as the complainant Ms. B is concerned, the appellant was convicted of 28 counts of indecent assault and two counts of rape. The indecent assault allegations involved allegations of digital penetration and forcing her to masturbate him. The rape allegations relate to a period when Ms. B was between ten and twelve years of age. At trial, the defence called two witnesses, siblings, a brother and a sister of the complainants.

Ground (i) The trial judge erred in law and in fact in failing to properly address the jury on the danger of contamination between witnesses in this case.

6. At the outset, it should be noted that there was no application to sever the indictment and for separate trials in relation to the counts involving each complainant. Equally, at trial, there was no application for a corroboration warning. From certain exchanges that took place between the trial judge and defence counsel, it appears that the reason for this was that defence counsel was very conscious of the fact that any such application was likely to be met with a response that the complainants could potentially cross-corroborate each other.

7. Before moving to the closing speeches and the charge, a discussion took place involving counsel and the trial judge. Counsel on behalf of the appellant indicated that he would be looking for a delay warning and a so-called “good character” warning. There was no controversy about the fact that it was an appropriate case for a delay warning. While the adequacy of what the judge had to say in that regard was raised in the Notice of Appeal and lengthy written submissions were addressed to that issue, in the course of the oral hearing, counsel on behalf of the appellant acknowledged that what the judge had to say in this regard was comprehensive and fulsome.

8. Similarly, there is no live issue at this stage about the good character warning. The judge’s response to these two requests was to ask “what about corroboration?” Defence counsel replied “I say there is no corroboration, but it is a discretion matter for the Court”. The judge said “I know, there is no corroboration, but there is potential corroboration”. Defence counsel said “I am not seeking a warning, so I do not think the Court needs to go there. I mean, I am not seeking a corroboration direction or warning from the Court”. The judge observed:

“while it is for my discretion under the section, and the only area I can identify in terms of corroboration, potentially, is the potential mutual corroboration [typed in transcript as ‘neutral corroboration’] that can develop out of a finding, I think arising out of the McCurdy case, Mr Justice O’Donnell’s judgment, it’s in line with previous

authority that if the judge were to reach a determination in relation to the evidence of one complainant in relation to proof beyond reasonable doubt, that is capable of being corroboration in terms of their consideration of the second complainant”.

Later in the exchange, defence counsel reiterated that he was not seeking a warning, doing so in these terms ‘I am not seeking a warning, because I know it’s a minefield’. In the view of the members of the Court, this reference to a ‘minefield’ is only consistent with a judgment call made by defence counsel that any exploration of the issue of mutual corroboration or cross-corroboration would be disadvantageous from a defence perspective.

9. On behalf of the appellant, it is now asserted that the possibility of collusion in trials of this nature is a very live one where there are multiple complainants who share a close relationship. The appellant said that this has been acknowledged by the courts in this jurisdiction as a factor to be considered on a number of occasions. It is, however, to be noted that a number of the authorities referred to, both from this jurisdiction and from overseas, specifically, Australia, were cases that dealt with the question of whether an indictment should be severed or whether matters should proceed as a unitary trial. The observations in *DPP v. McG* [2012] IECA 98 are of some note in that regard. At para. 26 there, it is stated:

“[t]he risk of collusion is almost always present in sexual offence cases where siblings or close friends are involved. However, in this case, there are important differences as between the detail of the allegations given by the two complainants, such as, for example, the allegation by one complainant only of being shown pornographic material and the allegation by one complainant only of being photographed. Such differences are unlikely to have been present if the complainant had colluded to give evidence designed to support each other.”

That remark might appear particularly apposite in the present case where there is the striking allegation by Ms. S of the involvement of her pet dog.

10. The respondent points out that the question of collusion was not the subject of particular focus by the defence during the trial. No specific requests were put to the judge in that regard, prior to his charge, and there were no requisitions afterwards. The respondent says that the force of the appellant's argument is undermined by the fact that while it was suggested that Ms. D came forward to make up allegations, reported in 2012, because she was still upset with the fact that her father had left her mother for a younger woman in 2004, and at one stage, it was also suggested that Ms. D had wanted the family home and was upset because it had been willed to her brother, though it is pointed out that this suggested reason appeared to evaporate as the trial proceeded, however, no cogent reason was ever seriously advanced as to why Ms. S, otherwise Ms. J, would have concocted the story with her sister. It is pointed out that a sibling called as a defence witness had accepted that neither Ms. D or Ms S had any motive to lie. It is said that in any event, the judge did, in effect, address the issue and attention was drawn to a paragraph where he said:

“[i]t is said that the same issue of credibility is raised in relation to [Ms. S] in terms of her account, because both had somewhat differing accounts or recollections of the incident in question. Both now are clearly reconciled...in the sense, that they are speaking to each other, unlike other members of the family. But they are also here, and it is said, in essence, that both of them are making up stories against their father. And that it all may stem back to motivation to the break-up of the marriage. That is not something that is offered as an explanation, Again, the defence do not have to prove anything. But it is put into the mix as part of the motivation alleged for, potentially alleged for the making of these allegations. And essentially, coming to court to make up allegations of sexual abuse carried out when they were children, which are complete fabrication.”

The appellant says that, while he is prepared to accept that the word “collusion” was not used in the trial (as is clear from a word-search of the transcript), the issue was in reality centre stage in the trial albeit in the guise of issues such as motive for fabrication and the possibility of co-ordinated fabrication. Attention is drawn to the fact that when the now appellant was interviewed by Gardaí, he asserted that his two daughters were making allegations against him that were false and were fabricated.

11. The Court sees some substance in the point made. Undoubtedly, it was the situation that one of two things was true. The activity alleged to have occurred had, in fact, occurred, or the accounts were false, fabricated, wickedly fabricated. This was not a case where there was any possibility of mistake or misunderstanding, in the sense of misinterpreting an innocent gesture of affection or anything of that nature. If this activity had not occurred, then the accounts in which it was described were false accounts. If the accounts were false, then the only reasonable inference was that the false accounts were the result of coordination of positions, of collusion. The jury could be in no doubt as to what was being asked of them.

12. As such, we think the manner in which the trial judge approached the question was an entirely appropriate one in circumstances where no application was a corroboration warning was made and no specific requisition was made at the time. Accordingly, we dismiss this aspect of the appeal.

Ground (iii) The jury’s verdicts were perverse and incompatible with the evidence in circumstances where the standard to be reached of proof beyond reasonable doubt was absent.

13. It is necessary to point out, once more, that this ground is advanced, notwithstanding that there was no application for a direction either at the close of the prosecution case or after the evidence called by the defence was heard. On behalf of the appellant, it is said that

evidence adduced by the defence had substantially compromised the credibility of the complainants, to the extent that the jury could not have been satisfied to the requisite standards. The appellant acknowledges that the jurisprudence of this Court would suggest that it is only in exceptional circumstances that the Court would substitute its assessment of the evidence for the assessment by the jury, but it is said that this was a case that fell within that exceptional category. Particular emphasis is placed on the evidence given by the siblings called to give evidence in support of their father. It was pointed out that the complainants had suggested that these sibling witnesses had been abused as children, but they had denied that.

14. The respondent is dismissive of the suggestion that the case could ever be considered as falling within the exceptional category of cases whereby an appellate court would reject the findings of fact by a jury. The respondent says that what the appellant's characterisation of the evidence of the certain siblings called overstates the position. The appellant presents their evidence as absolutely contradictory of the complainant sisters, but it is said that a closer analysis shows that is not, in fact the case. So far as witness Ms. A is concerned, she was five years senior to Ms. D and had left school at the age of 13 and had started working at an early age. Thus, she was out of the house for long periods during the week and also on Saturdays. It is pointed out that while Ms. A denied knowledge of any sexual abuse, she stopped well short of denying that her sisters had been abused. She accepted that her sisters had no motive to lie, but she also testified that she did not want to believe allegations and that she 'hoped' they were not the truth. Her testimony fell far short of a denial that her sisters had been routinely abused. The respondent says that this was a case where the jury were best placed to evaluate the evidence of the key witnesses. They did so, and came to a conclusion and this Court neither could nor should interfere with that conclusion.

15. This Court feels bound to observe, not for the first time in recent days, that the inclusion of arguments in support of a contention that a verdict is perverse in a case where no

application for a direction was ever even sought, can serve to seriously undermine the credibility of an appellant's submissions. We have referred to the fact that a different legal team has represented the appellant before this Court than appeared on his behalf at trial. In fact, opening the case, the position of Senior Counsel for the appellant shifted further. She argued that the trial was rendered unsatisfactory by reason of the failure of the prosecution to identify and address specifically at the start of the trial, the issue of why a joint trial with two complainants was taking place. She says that it was absolutely incumbent on counsel for the prosecution to clarify the basis on which the jury should approach the evidence of each complainant and what use the jury could make of the evidence of each complainant when considering counts involving the other complainant. Counsel says that this error on the part of the prosecution was then compounded by the failure of the trial judge to address the issue with the jury, and instead, the jury was left at large and without guidance.

16. This Court, and its predecessor, the Court of Criminal Appeal, and indeed, the Supreme Court, have long set their faces against the raising of points on appeal which had not been taken at trial. Perhaps, the best known statement of that principle is to be found in the case of *DPP v. Cronin (No. 2)* [2006] 4 IR 329. The matter was well put by Murray CJ in *DPP v. Boyce* [2005] IECCA 143. whereby he commented:

“[t]he inclusion in grounds of appeal matters calling in question a trial judge's charge to the jury which were not the subject of requisitions has been a subject of observations and statements by this Court in its case-law over the decades. When considering a trial judge's charge to the jury at a distance and out of context of the trial itself it may be too easy or simply facile to suggest that some matters should have been dealt with more fully or with greater emphasis or less so. A trial judge has a delicate balance to strike in giving a summary of the evidence and directing the jury on the law in the context and immediacy of the trial, having regard to the

evidence, the course of the trial, the issues which were of primary controversy, the speeches of counsel and the context of the case as a whole. Counsel for both sides, and in particular the defence, in that immediacy of the context of the trial, are in a special position, at the conclusion of the charge, to identify any matter stated by the judge which could have a material effect on the fairness or balance of the charge and which might require the jury to be redirected. It is in that context that the points of real importance fundamental to the fairness of the trial can be best identified. The Court leans against points of issue with the charge being identified very much later, out of the context of the trial, sometimes by persons who had no connection with the trial, but only after a ‘trawl’ through the transcript, unless of course, the points identified are substantial and of fundamental importance to the fairness of the trial.”

17. In this case, counsel on behalf of the appellant would contend that the points that she has now identified, albeit late in the day, are substantial and of fundamental importance to the fairness of the trial. We are unable to agree. It seems to us that the exchanges which took place in advance of the closing speeches and charge showed that the defence strategy was to stay away from a discussion of cross-corroboration, or mutual corroboration. We can well understand why this view would be taken and perhaps the less said on this topic, the better. Had the issue been addressed in detail, we cannot see how this would have advantaged the appellant in any way, indeed, quite the contrary.

18. We would agree with the appellant to this extent, that it would have been desirable if the prosecution had set out its stall at the start of the case and explained why they were proceeding with counts involving two complainants, and how, in their view, the jury should deal with that situation. Such, however, is a counsel of perfection. As has often been said, an

accused person is entitled to a fair trial, not a perfect trial [See; *U.S. v. Lutwak* 344 U.S. 604, 619 (1953)].

19. We have not been persuaded that the identification of this issue at a point in time remote from the trial gives rise to any concern as to the fairness of the trial or the safety of the verdict.

20. In summary, the position is that we have not been persuaded in relation to either ground of appeal that has been argued. We have not concluded that the trial was unfair or the verdict unsafe, and in the circumstances, we are obliged to dismiss the appeal.