



**THE COURT OF APPEAL**

**Record Number: 104/21**

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

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS  
RESPONDENT**

**- AND -**

**P.S.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 30th day of July 2021 by Ms. Justice Kennedy.**

1. This is an appeal against conviction. The appellant was found guilty of one count of rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act 1990, four counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 and two counts of child neglect contrary to section 246 of the Children Act 2001.

**Background**

2. The offending in question concerns the years 2000 to 2004 when the complainant was between four and eight years old. The appellant is the father of the complainant. The complainant spent most of her childhood in foster care but her father sought and obtained access visits which extended to unsupervised overnight access at his mobile home. In her evidence at trial, the complainant described that incidents of sexual abuse happened over and over again.
3. The two offences of child cruelty involved the complainant drinking a glass of cider while the appellant masturbated in front of her and another occasion where he masturbated in front of her while viewing pornography on the television.

**Grounds of appeal**

4. The appellant puts forward the following grounds of appeal:-

- (1) The Trial Judge erred in refusing to discharge the jury as a result of the charge to the jury; said charge was neither fair nor balanced and erred in respect of key legal principles as set out below:-
  - (i) The Trial Judge's charge was neither fair nor balanced and appeared to primarily focus on undermining the defence closing.
  - (ii) The Trial Judge's charge misdirected the jury on the law and was incorrect in directing the jury on what possible inferences could be drawn in the case;
  - (iii) The learned Trial Judge told the jury that since defence counsel stated in her closing that she was not attacking any witness it can be inferred that it is not the defence case that the complainant was deliberately lying. The learned Trial Judge told the jury that the defence case was that she was mistaken. The Trial judge agreed to recharge the jury on this point, that it was the defence case that the complainant was either mistaken or lying, but did so in a manner which further undermined the defence case;
  - (iv) The Trial Judge gave a delay warning in such a manner as to negate any/all of the purpose of the warning;
  - (v) The Trial Judge's charge shifted the burden of proof onto the defence and, in part, negated the presumption of innocence.
- (2) Furthermore, the prejudice suffered by the Appellant as a result of the judge's charge was compounded when the Trial Judge agreed to re-charge after requisitions.
- (3) The Trial Judge erred in law and/or in fact in refusing to give a corroboration warning to the jury;
- (4) The Trial Judge erred in law and/or in fact if refusing an application at the end of the prosecution case to dismiss one of the sexual assault counts;
- (5) The Trial Judge erred in law and /or in fact in permitting the prosecution to amend the indictment.

**Grounds 1 & 2-The judge's charge**

5. The appellant's primary criticism is that the charge was unfair and unbalanced. In particular, the appellant takes issue with the trial judge commenting that it was never suggested on behalf of the appellant that the complainant was deliberately lying, rather than mistaken. This, it is said totally undermined the appellant's right to a fair trial. The appellant criticises other aspects of the charge but in terms of the above, reference is made to the following observation by the trial judge:-

"Now, I turn to the defence case. The defence case on the evidence has been very ably put by Ms Murphy in her closing speech on behalf of [the appellant]. It is that the incident of oral rape, the incidents of sexual assault and the incidents of cruelty to a child that [the complainant] alleges against [the appellant] simply did not happen. In short, none of these allegations is true. The prosecution and defence agree that the prosecution case depends on the credibility and reliability of [the

complainant] evidence. Ms Murphy asked you to note that on behalf of [the appellant] she has not attacked [the complainant]'s character. In other words it has never been suggested on behalf of [the appellant] that in making these allegations against him [the complainant] is deliberately lying, rather than mistaken. Nonetheless Ms Murphy suggests to you that there are concerns about the credibility of [the complainant] evidence."

6. The appellant submits that this categorisation of the defence was incorrect. It was put to the complainant repeatedly that the matters complained of simply had not happened and it was never suggested that she was mistaken in that regard. The appellant argues that the trial judge mistook attempts by counsel to treat a complainant with respect and dignity as an assertion that the defence had never suggested the complainant was lying.
7. The appellant requisitioned the judge on this aspect of the charge, following which he recharged the jury:-

"Now, while Ms Murphy acknowledges, in the application that she has made to me, that it was never put or suggested to [the complainant] in the course of the cross examination of her that she was lying or being deliberately untruthful in the evidence that she gave, that it was wrong for me to infer from that, and this may be an example of inferences, and from the statement that Ms Murphy made in closing the case, that she had not sought to attack anyone else's character. The submission made is that [the appellant] would wish the jury to know that it is not simply his case that [the complainant] may be mistaken in her evidence, it is his case that either she is mistaken in her evidence or that she is lying. That is the case that I am instructed or that it is submitted to me by counsel on behalf of [the appellant] that he would wish to make. I had indicated to you that I had understood the case being made on behalf of the defence was that, insofar as [the complainant] allegations are, as [the appellant] contends, completely untrue, that that is [the complainant] allegation because she is mistaken rather than lying. The case being put on behalf of the accused, as I now understand it to be, is that the allegations that have been made against [the appellant] are untrue, the allegations based on the testimony of [the complainant] against [the appellant] are untrue and that is because either [the complainant] is mistaken or she is lying and that that is a matter for you. I'm sorry that you had to be brought back but it was perfectly appropriate that you should be in terms of the exercise I have mentioned, counsel exercising a perfect entitlement on behalf of either party to requisition me to correct what is understood to be an error in the charge that I gave you. I accept, without commenting on whether or not I made an error in the manner in which I interpreted, both the manner in which [the complainant] had been cross examined and what was said to you in the course of the closing on behalf of [the appellant], it does seem to me to be appropriate to permit Ms Murphy to put forward her case clearly on behalf of [the appellant] as she perceives it to be and that case, as I have explained to you already once or twice, is that [the appellant] would wish you

to consider whether [the complainant], in making the allegations that she has against him, is mistaken or is lying”

8. It is said that the manner of recharge exacerbated the issue and left the jury with the impression that the defence were making efforts to change the parameters of their case at this late stage. Ms Murphy SC for the appellant contends that the overall impression given by the trial judge was to the effect that the defence was one of shifting sands, thus undermining the defence case.

#### **Submission of the respondent**

9. The respondent submits that the judge’s charge as a whole was fair and balanced and that the trial judge was not precluded from commenting on aspects of the evidence.
10. As regards the contention that the trial judge suggested that the defence did not suggest the complainant was lying rather than mistaken, the respondent submits that the trial judge’s interpretation was one which was reasonably open to him in the circumstances. While there is no obligation on the defence to put it to a witness that they are lying, if it is central to their case the defence should ensure it is put to the witness and the witness is given an opportunity to answer.

#### **Discussion**

11. Whilst Ms. Murphy SC takes issue with other aspects of the judge’s charge, we believe the gravamen of the appeal rests with the aforementioned matter and we intend to confine ourselves to this issue.
12. Three questions arise, firstly, did the trial judge err in how he categorised the defence response to the allegations, secondly, if he did, was the error so significant that it could not be rectified on re-charge and thirdly, did the re-charge rectify the error.
13. During the judge’s charge, a judge will in general direct the jury on the issues of fact for their determination, thus defining the issues and in that regard may remind the jury of the salient evidence. The manner in which a judge does so is within the discretion of the judge, but the charge must be fair, balanced and impartial.
14. A judge is fully entitled to comment on the evidence, but it must be clear to the jury that they are the deciders of fact and comments should not be expressed which would render the charge unbalanced. A charge must, when considered as a whole, be fair. That is the overarching duty of the trial judge; to ensure fairness.
15. We now look to the evidence in the trial and, in particular the cross-examination of the complainant. In summary, it is apparent that the appellant denied the allegations and that this was put directly to the witness. In addition, in the course of cross-examination, it was repeatedly suggested to the witness that the allegations of sexual offending had not happened.
16. The issue, now complained of arose in light of a particular comment by counsel for the appellant:-

“ I have done my best to ensure that the case is put in a respectful way and I have tried to make sure that in defending him I haven’t sought to attack anyone else’s character. He is entitled to defend himself from these very serious allegations and I hope and believe that that has been done in a way so as to minimise distress to all concerned.”

17. In his charge, the judge in referring to this aspect of counsel’s closing speech said:-

“Ms Murphy asked you to note that on behalf of [the appellant] she has not attacked [the complainant]’s character. In other words it has never been suggested on behalf of [the appellant] that in making these allegations against him [the complainant] is deliberately lying, rather than mistaken. Nonetheless Ms Murphy suggests to you that there are concerns about the credibility of [the complainant] evidence.”

18. Ms. Murphy argues that in defending her client she was at pains to cross-examine the complainant in a respectful manner and to make every effort to avoid secondary traumatisation. It is said that having made such efforts, the comment by the trial judge that it had never been suggested to the complainant that she was lying, but that she was mistaken was unfair and undermined the appellant’s right to a fair trial.

#### **Cross-examination**

19. It has long been said that cross-examination should be conducted with appropriate courtesy and consideration for the witness. Ref: *Mechanical & General Inventions Co. Ltd v. Austin* [1935] AC 346. This is true in all cases and has particular resonance in cases involving allegations of a sexual nature.

20. It is of course a requirement that where it will be suggested to the jury that a witness is not to be believed, that this is put to the witness in question. As stated by Lord Halsbury in *Browne v. Dunn* (1893) 6 R. 67 at 76-77 and as referred to in McGrath on Evidence second ed.at p.132:-

“To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

21. The text also quotes from the decision of *R v. Fenlon* (1980) 71 Cr App R. 307 at 313 which states:-

“It is the duty of counsel who intends to suggest that a witness is not telling the truth to make it clear to the witness in cross-examination that he challenges his veracity and to give the witness an opportunity of replying. It need not be done in minute detail, but it is the duty of counsel to make it plain to the witness, albeit he

may be a co-defendant, that his evidence is not accepted and in what respects it is not accepted.”

22. Many counsel at the outset of cross-examination of this kind, make it clear to the witness that the allegations are denied, (as occurred in the present case) and during cross-examination, suggest to the witness that the alleged incidents never occurred. In our view, in the present case, by repeatedly suggesting this to the witness, it was obvious that the underlying suggestion was that the witness was fabricating the allegations. In cases of this nature, where the allegations span a period of time, and, involve a minor, there are really in general, only two possibilities; that the offending happened, in which case a plea may be entered, or that the allegations are fabricated.
23. The key issue is whether the judge by his comment, undermined the defence case to such an extent so as to render the charge unfair and unbalanced.
24. This was a case which turned on the jury’s assessment of the credibility and reliability of the complainant’s testimony. It is true that Ms. Murphy on behalf of her client did not suggest to the witness that she was lying, however, it is implicit in her cross-examination that this was in fact the defence case. That issue was central to the jury’s deliberations, it was for the jury to determine whether they were satisfied of the guilt of the appellant beyond reasonable doubt on the evidence. The comment by the trial judge that it was never suggested to the witness that she was lying, while undoubtedly factually accurate, removed the heart of the defence from the jury, that is that the events, the subject of the allegations never in fact happened. This left, as the high water mark of the defence case, that the complainant was simply mistaken in alleging that she had been sexually abused over a protracted period by the appellant.
25. While mistake as to alleged incidents may certainly be the defence in certain circumstances, in most situations of prolonged abuse, whether the incidents have happened or not is the issue for determination by a jury.
26. Counsel must make it clear to the witness in any given case that the witness’s veracity is under challenge, however, in certain circumstances it is not strictly necessary that the challenge be expressly *stated in minute detail*. Nonetheless, it must be made clear that the witness’s credibility is in issue and that the defence case is that the witness is not to be believed.
27. We are persuaded in the circumstances that the judge’s comment during the summing-up went beyond the legitimate comment by a judge and undermined the defence case significantly. The question then arises as to whether it was possible to remedy the situation following requisition.

**The re-charge.**

28. Firstly, we are of the view that the error by the trial judge was capable of being rectified on re-charge and we now turn to the re-charge on this issue (set out at para. 7 of this judgment) to ascertain whether the re-charge did in fact remedy the error.

29. We are satisfied that the judge went a significant distance in order to address the issue. We have considered the charge as a whole and there is no doubt but that the charge on the legal principles was an impeccable one and bore all the hallmarks of clarity and precision. However, where the characterisation of the defence case by the judge significantly undermined the defence, this required a very clear reversal of the suggestion made by the judge.
30. Particular emphasis is placed by Ms. Murphy on the following extracts from the re-charge:-
- “The case being put on behalf of the accused, as I now understand it to be, is that the allegations that have been made against [the appellant] are untrue, the allegations based on the testimony of [the complainant] against [the appellant] are untrue and that is because either [the complainant] is mistaken or she is lying and that that is a matter for you.”
- “I accept, without commenting on whether or not I made an error in the manner in which I interpreted, both the manner in which [the complainant] had been cross examined and what was said to you in the course of the closing on behalf of [the appellant], it does seem to me to be appropriate to permit Ms Murphy to put forward her case clearly on behalf of [the appellant] as she perceives it to be and that case, as I have explained to you already once or twice, is that [the appellant] would wish you to consider whether [the complainant], in making the allegations that she has against him, is mistaken or is lying” (Our emphasis).
31. Ms. Murphy makes the argument that in re-charging the jury in the above terms, the appellant’s right to a fair trial was far from remedied and indeed she says that the judge’s comments exacerbated the error originally made. She contends that the jury were left with a residual impression that counsel was in fact seeking at a late stage to alter the parameters of the defence.
32. While we are of the view that the judge went a significant distance in re-charging the jury on the issue, we believe that it was necessary in the circumstances for him to go further where the issue went directly to the heart of the defence case. The nature of the comment made by the judge, which was fundamental to the defence case, meant that it was necessary for the judge to state in very clear terms the defence raised. While the judge certainly did so in the earlier portion of the re-charge, unfortunately the impact of his comments rectifying the situation was significantly reduced by his later remarks.
33. In the circumstances, while we are satisfied the comment was capable of remedy in the re-charge, the latter remarks of the judge diluted the impact of his earlier comments in re-charge and in those circumstances we are persuaded that the re-charge did not rectify the original error.
34. Therefore, we are persuaded that the judge’s charge was insufficiently fair and thus undermined the defence case.

35. We will therefore quash the conviction and we will hear the parties regarding a re-trial.