



THE COURT OF APPEAL

Record No: 171/2022

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

S.M.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of July by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 24th June 2022, the appellant was convicted of one count of indecent assault contrary to s. 10 of the Criminal Law (Rape) Act, 1981 relating to complainant A (count 1) and two counts of indecent assault under the same Act, relating to a second complainant, B (counts 2 and 3.) The two complainants are sisters and nieces of the appellant.

2. Count 1 was alleged to have occurred between the 1st of May 1986 and the 31st of October 1987 when A was between the ages of 10 and 12 years and the appellant was 36 to 37 years of age. Counts 2 and 3 were alleged to have occurred between the 25th May 1987 and the 25th May 1989 when B was between the ages of 10 and 12 years and the appellant was between the ages of 37 to 39 years of age.

Factual Background

3. The offences occurred in the family home of the appellant which he shared with his parents, the grandparents of the complainants. The incident the subject of count 1 was alleged to have occurred while A was in the appellant's vehicle, under the guise of teaching her how to drive. She described the appellant asking her to sit on his lap after which, he put his hands under her arms and touched her breasts, rubbing them in a circular motion outside of her clothes.

4. The incident the subject of count 2 was alleged by B to have occurred while she was alone in the house with the appellant. She described the appellant laying her on the bed in her grandparents' room, pulling down her pants and underwear and pulling up her top, kissing towards her groin area and inserting his fingers in her vagina.

5. The incident the subject of count 3 was alleged to have occurred while B was hoovering. She described that the appellant came up behind her, reached over, put his hand down her pants and inserted his fingers into her vagina.

Grounds of Appeal

6. The appellant appeals his conviction on the following sole ground:-

"That the learned trial judge erred in fact and in law in ruling as admissible as rebuttal evidence, the evidence of [C], witness 3 in the Book of Evidence and husband of the first complainant, [A]."

Relevant Background

7. On Day 3 of the trial, the first-named complainant, A, was cross-examined by counsel for the defence about her memory of the incident and a portion of her proposed statement of evidence as follows:-

"Q. I see. So, are you saying to the jury that this incident that you claim occurred at some stage between the -- between the 1st of May 1986 and the 31st of October 1987, that this is something that had disappeared, if it occurred, that had disappeared from your memory?"

A. Well, I wouldn't use the word disappear but, as I say, apparently people can block out traumas.

Q. Well, can I just ask you about this? There's a curious phrase, and I want to ask you about this, or a sentence in your statement of proposed evidence and this is, just to put it in context: "..... [the appellant] said to me: "I'm not sure of the exact words but something like sit up here and I'll show you how to drive." And that's in quotation marks, even though you're not sure of the exact words you say, but anyway, that's the way it's put. And the next sentence reads, I want to read this very slowly: "Something in my memory is telling me that he was tapping his leg with his hand, indicating to me to sit on his lap." Now, what does that mean? One either has a memory or one doesn't, but you're suggesting that there's -- part of your memory facilities has some extra voice or something, that's the way you're --

A. No, no, I'm not. I can

Q. Well, what does it mean?

A. I can remember, as I said in my statement, that they mightn't be the exact words. So -- and as I say, I can visualise him patting his lap.

Q. You can visualise him patting his lap?

A. And asking him to come over here and I'll show you how to drive.

Q. But in your statement of proposed evidence, it doesn't talk about him tapping his lap. It says tapping his leg: "Something in my memory is telling me that he was tapping his leg with his hand indicating to me to sit on his lap."

8. The cross-examination continued as follows after legal argument where emphasis was placed on the term "something in my memory is telling me" in the statement of A:-

"--I was asking you about this expression in your statement of proposed evidence: "Something in my memory is telling me ..." something or other, right, and this is the expression that you used, which is curious, something in my memory is telling me. Now, what I was getting at, arising out of that, is it the position that you are not a person who has maintained a consistent memory of this event that you allege occurred that [the appellant] denies? Are you saying that you recovered it, in other words?"

A. Sorry, am I saying am I--did I what?

Q. You recovered it?

A. Oh, recovered it. Yes, I do admit that some of the details are sketchy, but only some of them.

MR SAMMON: Very well, thank you.

MS BUCKLEY: Judge, I think the portion of the statement that my friend referenced is available. I'm just going to ask that that be shown to the witness.

JUDGE: Yes." (our emphasis).

9. On foot of this exchange, counsel for the prosecution applied to call A's husband, to give rebuttal evidence on the basis that A's evidence was challenged in cross-examination as being a recent fabrication and that the evidence of her husband to the effect that the complainant made a disclosure to him of the alleged indecent assault in the early 2000's was now admissible to rebut the imputation made. Reliance was placed on *Nominal Defendant v Clements* (1960) 104 CLR 476, *R v Coll* (1889) 2 LR IR 522, *Flanagan v Fahy* [1918] 2 IR 361, and *People (DPP) v SO'C* [2017] IECA 23.

10. The account of C was as follows:-

"I remember when the kids were small, I'm not actually sure what year, that [A] told me that she had come to being on her uncle's lap at the wheel of a car and that he started to grope her breasts. She told me that it happened when she was young and that her uncle's name was [the appellant]..."

11. The prosecution relied on the dicta of Dixon CJ in *Nominal Defendant v Clements*:-

"If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a later invention or reconstruction."

12. The defence rejected the assertion that it was suggested to A that the allegation was recently fabricated. It was submitted that the essence of the cross-examination was that the complainant had unfairly held back on making her complaint until 2019. Counsel took the view that the application by the prosecution was a contrived attempt to adduce evidence which would otherwise be inadmissible on account of failing to satisfy the doctrine of recent complaint evidence.

13. The test as outlined by Dixon CJ was accepted and applied by the trial judge who permitted the evidence to rebut the imputation that A had given evidence of a reconstructed memory.

Submissions of the Appellant

14. It is the appellant's position that at no time was it put to the first complainant either implicitly or expressly that she had fabricated her evidence in relation to count 1. It is submitted that in circumstances where the complainant herself had raised the issue of her memory in her statement of proposed evidence by stating that *"something in my memory is telling me..."* it was right, proper and legitimate that she be cross-examined on the issue. Moreover, that it would have been remiss not to have raised the issue with her, when the reliability and credibility of the complainant were central issues for the defence of the accused.

15. The appellant draws a distinction between recently fabricated evidence and evidence related to recovered memory. It is submitted that recently fabricated evidence is evidence regarded as "*an invention of late date*" as per *R v Coll* whereas evidence related to recovered memory may arise from psychological or counselling intervention, with the memory alleged to have been rooted in factual occurrence. It is submitted that defence counsel's exchange with the complainant related to recovered memory and that the issue of recent fabrication did not arise.

16. It is further submitted that in *Nominal Defendant* Dixon CJ went on to say that, because this rule was an exception to the general principle excluding self-serving statements, great care is required in applying it and that a trial judge must (a) be satisfied that the testimony of a witness is attacked on the ground of recent fabrication or that the foundation for such an attack has been laid and (b) that having regard to the time and circumstances in which it was made, it rationally tends to answer the attack.

17. In this regard, it is submitted that the rebuttal evidence as adduced did not satisfy the second limb of the above requirements enunciated by Dixon CJ. It is said that by reference to the year of birth of A's youngest child, 2004 would seem to be the earliest time the conversation between A and C, could have occurred. It is therefore submitted that in circumstances where this disclosure is alleged to have occurred at least 16-20 years after the alleged indecent assault, it is certainly not contemporaneous with the event nor could it be construed as being sufficiently early to be inconsistent with any suggestion of later invention or reconstruction, which it is submitted does not exist in the case.

18. It is submitted that the prejudice which accrued to the appellant in relation to his trial relating to the first named complainant would similarly affect his convictions in relation to the second named complainant as this was a case where system evidence was part of the prosecution case.

Submissions of the Respondent

19. It is the respondent's position that the cross-examination of A implied that her allegation was as a result of a "*recovered memory*" and that she had not maintained a consistent memory of the event. It is submitted one of the aspects of the cross-examination of A was that she had not maintained a consistent memory and therefore, the evidence of C was relevant to rebut this as she had given him an account in and around 2004 that was consistent with her evidence.

20. It is submitted that the trial judge was correct in the exercise of his discretion in allowing the evidence of C to be introduced to rebut the suggestion of recent reconstruction made during cross-examination. Reliance is placed on *People (DPP) v SO'C*, para. 14 wherein this Court noted that unfairness occurs where a jury is left with "*a false impression that there was no complaint until recent times.*" It is submitted that in the present case to have left the jury with the impression that the complainant had not complained to anyone in the intervening years would have been to have left them with a false impression. This Court's attention is also drawn to McGrath on *Evidence* 2nd ed (2020) paras. 3-222 to 3-225 which was cited in the court below by prosecution counsel.

21. In response to the submission that the prejudice accruing to the appellant in relation to the first complainant would similarly affect his convictions in relation to the second complainant, the respondent submits that there was no application for separate trials in respect of the allegations of

each complainant and that the context and the nature of the touching involving A was markedly different to that concerning B. It is further submitted that system evidence was not something that was a significant feature in the trial because of the differences in the nature of the indecent assaults described by the complainants.

22. In addressing whether there is any possibility that there has been a miscarriage of justice as a result of any identified error, the respondent submits that the appellant was convicted by a properly charged jury in circumstances where there was evidence to sustain the verdicts of guilty. In this regard, reliance is placed on excerpts of the appellant's direct and cross-examination set out in the written submissions.

The Appeal

23. Insofar as the ground of appeal is concerned, the law permits of rebuttal evidence to rebut a suggestion of fabrication where, during cross-examination, a witness is alleged to have fabricated evidence.

24. The sole ground of appeal relates to the admission of rebuttal evidence on the basis of the doctrine of recent fabrication or recent invention. It is difficult to see how the question asked by counsel for the defence on any analysis led to the perception that it was suggested to the complainant that she had recently invented the allegation.

25. The complaint was made to the Gardaí some 32 years after the incident, the subject of count 1 on the indictment. The questions posed concerned alleged flawed recollection and alleged recovered memory and the accuracy thereof. It was not a suggestion that the complainant had recently invented the allegation or a question or questions asked which gave rise to that imputation, thus giving rise to the use of the doctrine to adduce otherwise inadmissible complaint evidence.

26. There is no general exception to the rule of law enabling the prosecution to re-examine a witness to show consistency where the cross-examination has revealed an inconsistency. There are circumstances where this may be done in the discretion of the court where, in accordance with *Nominal Defendant v Clements*; there has been an allegation of recent fabrication or invention, the proposed statement is consistent with the evidence given by the witness and in taking account of the time the statement was made, it answers the allegation made of recent invention.

27. However, the starting point is that the attack must constitute one of recent invention; this simply was not the case here. Accordingly, we are persuaded that the judge erred in the exercise of his discretion.

28. The respondent argues that if there was an error, the proviso may be applied. We cannot agree. The evidence adduced was such so as to bolster the complainant's credibility in circumstances where there was no proper basis to adduce the evidence. It can only have operated to reinforce her credibility and cannot be excised from the trial at this point.

29. Finally, the suggestion that only count 1 is under appeal does not withstand scrutiny. As all counts were heard together, the jury were entitled to rely on the similarity of the complaints in that the evidence on each was cross-admissible.

30. Therefore, having found an error regarding the conviction on count 1, the entire conviction must be quashed.