



THE COURT OF APPEAL

Record Number: 172/2022

**The President.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M.B.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 24th day of February 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 26th May 2022, the appellant was convicted of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990. The sole charge preferred on the indictment was one of s. 4 rape, of which the appellant was found not guilty, but was convicted of sexual assault.

Background Facts

2. The offence occurred on the 20th July 2019, when the complainant's parents attended a wedding and arranged for the complainant to stay at her uncle's house with his son, the appellant herein. The appellant was 14 years old at the time of the offence and the complainant was 8 years old. On the 21st July 2019, after she was collected from the appellant's house, the complainant made a disclosure of sexual offending to her mother and was examined at a Sexual Assault Treatment Unit.

3. The complainant was interviewed by specialist interviewers during which interview, the complainant stated that:-

"...he said that, that he needs to tell me a secret and I better not tell anybody else and he told me to lie down on the ground. I lie (sic) down on my belly and then he...I turned back and I seen him trying stick his willy up my bum."

When asked to clarify, she stated "It means that he sticked (sic) his willy up my bum."

4. During cross-examination, the following exchange took place between the complainant, her intermediary and counsel for the accused:-

"Q. Okay. Where was [the appellant]?"

A. He was behind me, I think.

Q. All right. What did he do?

A. Can I write this one down?....

[...]

MS COSGRAVE: Would you like me to read this now?

MR COLGAN: Please, Caroline, yes.

MS COSGRAVE: [the complainant] has written, "He stuck his willy up my butt."

This Appeal

5. The sole ground of appeal states:

"The conviction of the appellant is unsafe in circumstances where the evidence as presented to the jury only allowed for their verdict to be one of either guilty or not guilty in respect of the principal count of Section 4 Rape and not of an alternative verdict of sexual assault."

Submissions of the Appellant

6. In essence, the argument advanced on behalf of the appellant is that the trial judge erred in allowing the alternative verdict of sexual assault to be considered by the jury in circumstances where the evidence advanced on behalf of the prosecution was that anal penetration had occurred. In this regard, the appellant submits that the jury ought to have returned a verdict of guilty or not guilty and that the judge erred in permitting an alternative verdict to be considered, consequently, it is argued that the conviction is unsafe.

Submissions of the Director

7. The Director's argument is that the returning of an alternative verdict of sexual assault where a jury is deliberating on a count of s. 4 rape is specifically and expressly provided for by s. 8(3) of 1990 Act.

8. The Director submits that the approach adopted by the trial judge was correct in law in circumstances where there is a specific legislative provision to the effect that such an alternative verdict is open to the jury where there is evidence that warrants a conviction for the said offence.

Applicable Law

9. S. 8(3) of the Criminal Law (Rape)(Amendment) Act, 1990 provides:-

(3) A person indicted for rape under section 4 may, if the evidence does not warrant a conviction for rape under section 4 but warrants a conviction for aggravated sexual assault or for sexual assault, be found guilty of aggravated sexual assault or of sexual assault, as may be appropriate.

Discussion

10. The background to this offence is set out earlier in this judgment and we do not propose to rehearse the facts in any great detail.

11. The injured party was 8 years old at the time of offending. She was interviewed in the usual manner, during which she said:-

"....he said that, that he needs to tell me a secret and I better not tell anybody else and he told me to lie down on the ground. I lie (sic) down on my belly and then he – I turned back and I seen him trying stick his willy up my bum."

12. She later said:-

"And I was turning around and I was seeing him bending down on me trying to it (sic) and he did."

13. Subsequently, she said:-

"....he had his willy right up to my bum."

14. And with reference to his hands:-

"...he was touching my bum with them to try and get his willy in."

15. At a later stage she said:-

"I could see [the appellant] bending on top of me and he was sticking his willy up my bum with his fingers on my bum."

The witness confirmed penetration. She also made it clear that her underwear was removed.

16. The injured party's mother gave evidence of the complaint made to her and that she noticed bruising on her daughter, specifically some marks similar to a handprint on her bottom and some bruising on her thigh and back.

17. The medical examination disclosed some non-specific perianal erythema or redness in the area and no other injury. Dr. Nelson opined:-

"And then I do say many forms of sexual contact, such as exposure, fondling, rubbing of the penis between the thighs or buttocks, would not be expected to cause damage to the child's anatomy."

18. Appropriately, the trial judge at the conclusion of the evidence, prior to speeches and charge, invited submissions pertaining to her charge. Counsel for the respondent submitted that the jury be instructed regarding the option of alternative verdicts drawing the judge's attention to s. 8(3) of the 1990 Act.

19. The appellant was facing a single count of s. 4 rape. At trial for such an offence, if the jury are not satisfied that the prosecution have reached the required standard of proof in respect of the s. 4 count, the jury may then, if that stage is reached, consider if the prosecution have proven beyond reasonable doubt, the lesser offence of sexual assault. It must be recalled that the greater offence always encompasses the lesser offence.

20. The appellant contends that this was a case where the evidence was that of penetration of the child's anus and that it was clear this was the nature of the recent complaint to her mother

and the contents of the specialist interview. Consequently, the only verdicts available were that of guilty or not guilty of s. 4 rape.

21. This argument is, in our view, misconceived. This is not a situation, as contended by the appellant that the jury must not have believed the 8-year-old complainant. It is simply that the jury were not satisfied beyond reasonable doubt that there was actual penetration, and that therefore an essential ingredient of the offence charged was absent. Consequently, following the instruction of the trial judge, and in accordance with the provisions of s. 8(3), the jury were then entitled to consider if the offence of sexual assault had been proven to the required standard of proof.

22. The issue of an alternative verdict is a matter of law which may arise on the evidence. Indeed, even if counsel for the respondent had not raised the issue, and in our view, it was appropriate that she did so on the conclusion of the evidence, the judge could have raised alternative verdicts of her own motion. Even if the judge did not do so, should the jury have raised alternative verdicts, it would be very difficult to see how any unfairness to the appellant would arise which would render the verdict unsafe.

23. On the evidence, whilst on one view, there was evidence of penetration, it was entirely open to the jury to consider that there was evidence of sexual assault, the removal of or the causing of the underwear to be removed, the exposure of the appellant's penis, and contact with his hands on her bottom.

24. S. 4 rape is defined as sexual assault including the penetration of the anus by the penis. S. 8(3) permits of an alternative verdict of sexual assault if the evidence does not warrant a conviction under s. 4.

25. We are not at all persuaded that there is substance in the argument on the part of the appellant. The jury were fully entitled to conclude they were not satisfied that penetration was proven beyond reasonable doubt and to then proceed to consider whether the Director had proven the offence of sexual assault. There was, in our view, overwhelming evidence enabling the jury to conclude that the respondent had proven the offence of sexual assault beyond reasonable doubt.

Decision

26. Accordingly, we dismiss the appeal.