



THE COURT OF APPEAL

Record No: 198/23

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

JMcM

APPELLANT

JUDGMENT of the Court delivered on the 11th day of July 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 13th March 2023, the appellant was convicted of 9 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, 8 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, as amended, and 17 counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990.

Background

2. The complainant made an allegation of a sexual nature concerning the appellant to her social worker in February 2018 and was subsequently interviewed by specialist gardaí. She gave evidence that between the ages of 8 and 11 she was sexually abused by the appellant whose partner is her stepfather's niece. She stated that she regularly visited the appellant's home, particularly at weekends and holiday periods which included many sleepovers. She gave accounts of sexual assault by way of inappropriate touching, rapes and s. 4 rapes by way of the penetration of her anus and mouth.

Grounds of Appeal

3. The appellant appeals his conviction on the following grounds:-

"(a) The learned trial judge erred in law by permitting an undue proliferation of exceptions, to the hearsay rule upon the footing of a plurality of recent complaints by the complainant and the several seriatim receptions of such purported, recent complaints, more remotely

postponed in time to the posited receivers thereof and in particular, the evidence to, and thereafter testimony, by, [complainant's mother.]

(b) The learned trial judge erred in law and fact in determining as a matter of principle, and statutory principle at that, rather than upon an examination of the testimony and real evidence actually had, (sic) that a corroboration warning was not required.

(c) The learned a trial judge erred in law and fact, in her charge to the jury by drawing no or insufficient attention to the conflicts in the real evidence, and in particular, the expert, physical medical examination of the complainant, acutely relevant to the rape counts, that is to say, 5, 9, 13, 17, 21, 25, 27, 31 and 35."

Submissions of the Parties

Admission of Recent Complaint Evidence from the Complainant's Mother

The Appellant

4. We start our consideration of this ground by reference to the concession made on behalf of the appellant that this complaint has, in essence, been addressed by recent decisions of this Court. The appellant does not abandon the argument but relies on his written submissions.

5. Recent complaint evidence was given by the complainant's social worker, mother and stepfather. Defence counsel at trial objected to the admission of the complainant's mother's evidence in this respect.

6. In ruling that the complainant's mother's evidence was admissible, the trial judge commented:-

"There's no more detail, in the opinion of this Court, in [complainant's mother's] account than in [complainant's step father's] account. And I am of the view that the conditions have been met in relation to Brophy. And that the accounts of both [complainant's step father] and [complainant's mother] can go before the jury. I do not believe given the scant detail provided by [social worker], that two accounts would be excessive in the circumstances."

7. The appellant submits that where the judge found that there was no more detail in the mother's account, the admission of this evidence was in effect, superfluous, impacting on the fairness of the trial. The appellant relies on para. 3-209 of McGrath on *Evidence* (3rd ed.)

The Respondent

8. The respondent submits that the trial judge did not err in admitting the evidence of complaint and that she applied the correct legal principles. It is submitted that the trial judge exercised her discretion correctly when she allowed the recent complaint evidence of both the complainant's mother and stepfather in view of the relatively sparse detail given by the social worker regarding the complainant's disclosure.

9. It is contended that the submission that the trial judge acknowledged that "*[t]here's no more detail, in the opinion of this Court, in [complainant's mother's] account than in [complainant's step father's] account*" is incorrect and must be predicated on a typographical error or inaccuracy in the transcript or an inadvertent mistake, as on two other occasions in the judge's ruling on this issue she expresses the view that the complainant's mother's account is more detailed than the step father's account.

10. It is submitted that the comments of Roch LJ in *R v Valentine* [1996] 2 Cr App R 213 as referred to by Kennedy J in *People (DPP) v PS* [2023] IECA 135 are apposite:-

"We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family."

11. The respondent quotes from the trial judge's directions to the jury on the issue of recent complaint evidence and submits that given their thorough and robust nature, there is no basis for the appellant's submission that there was a risk that the jury would treat the evidence as going to credibility rather than consistency.

Discussion

12. Quite properly, in our view, the appellant does not seek to press this ground of appeal. It is clear from the jurisprudence that more than one complaint may be admissible once the well-known criteria in *People (DPP) v Brophy* [1992] ILRM 709 are met. In the present case, no issue arose regarding those criteria.

13. The complainant made the complaint to her mother on the same day as she complained to the social worker. A trial judge retains a discretion to limit the number of complaints given in order to ensure a fair trial. It is clear that the trial judge in the present case carefully considered the proposed evidence and concluded that the complaint made to the complainant's mother satisfied the necessary criteria and that there was no basis to exclude the evidence. The complaint to the mother contained more detail of the alleged offending than that made to the social worker.

14. It is now common knowledge that a complainant in a case involving sexual allegations may disclose allegations incrementally and this seems to be the position here. In any event, the evidence of recent complaint on the part of the complainant's mother did not really go much further than that of the complaint made to the social worker and so, it is difficult in reality to see any prejudice caused to the appellant.

15. We do not find an error in the manner in which the trial judge exercised her discretion and accordingly, we reject this ground of appeal.

Failure to Deliver a Corroboration Warning

The Appellant

16. Defence counsel applied to the trial judge for a corroboration warning on the basis that medical evidence provided by Dr W did not corroborate the allegations made by the complainant in respect of vaginal or anal rapes. Dr W found the hymen of the complainant intact.

17. It is argued that when one considers the nature and proliferation of the allegations of rape contrary to s. 2 of the 1981 Act, the evidence of Dr W that the hymen was intact rendered the complainant's evidence unreliable to the extent that the judge ought to have granted a warning. It is argued that this unreliability extends to all allegations and that the s. 2 and s. 4 rape allegations should not be viewed in isolation.

18. The judge refused the application, stating that as per *People (DPP) v Woolridge* [2018] IECA 135, *"This Court is of the view that there is nothing which it would consider to be the something special and peculiar which would necessitate the provision of a warning, a corroboration warning."*

19. It is submitted to this Court that where two explanations are reasonably possible, one favourable to the accused and one which is not, the accused should receive the benefit thereof.

20. Emphasis is placed on the finely balanced situation the jury found themselves in, returning 10-2 majority verdicts.

The Respondent

21. The respondent assumes the same position as she did in the court below that there is nothing in this case which warranted the giving of a corroboration warning.

22. The respondent submits that the evidence of Dr W was essentially neutral in character.

23. The Director relies on *People (DPP) v Ferris* [2008] 1 IR 1:-

"The question of whether the jury should be warned about the danger of convicting on the uncorroborated evidence of a complainant being, as already stated, a matter for the exercise by the trial judge, this Court should not intervene unless it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact."

24. The respondent further highlights the discretionary nature of the corroboration warning and the principle that this Court should be slow to intervene with an exercise of that discretion by reference to *People (DPP) v RA* [2016] IECA 110 and *People (DPP) v DN* [2018] IECA 279.

Discussion

25. The complainant described incidents of sexual abuse including *inter alia* vaginal rape and anal rape over a period of time from the age of 8 to 11 years. Following her complaint, she was examined by Dr W who concluded that the complainant's hymen was normal on the date of examination. As is often the case, the witness went on to say that her examination did not preclude child sexual abuse, opining that:-

"whether there was an injury there over time or from the first alleged incident I can't say because she wasn't examined within a close timeframe to that particular examination or to that particular alleged incident." (Transcript of the 6th March 2023, Page 9, Line 21-23)

26. The findings of the doctor may properly be described as neutral findings which do not, in our view, render the evidence of the complainant unreliable. The doctor's evidence was before the jury for their consideration when assessing all the evidence including that of the complainant.

27. The law is well settled at this point on the issue of a corroboration warning. Since s. 7(1) of the Criminal Law Rape (Amendment) Act, 1990, a trial judge has a discretion whether or not to give a warning which depends on the circumstances of any given case and this Court is very slow to intervene in the exercise of that discretion unless it can be demonstrated that it was exercised on a legally incorrect basis or is patently wrong in fact.

28. There may be circumstances where a witness has been shown to be unreliable, this may necessitate the giving of a warning. It all falls to the discretion of the trial judge who may assess the evidence as a whole and determine whether a warning is or is not required.

29. In the present case, we are not at all persuaded that there was any evidence of the kind which mandated a corroboration warning.

30. Accordingly, we reject this ground of appeal.

Failure to Draw Attention to Medical Examination of the Complainant in the Judge's Charge The Appellant

31. This ground is interlinked with the above. Essentially, what is complained of here is that the trial judge failed to give special treatment to Dr W's evidence in her charge.

32. It is submitted that the judge referred to aspects of the defence case but did not refer to the defence contention that it would be unlikely that the hymen would be normal in the circumstances of the alleged offending.

The Respondent

33. The respondent says the charge was a balanced one and that the judge properly summarised the doctor's evidence, the summary reiterating almost the entirety of her evidence.

34. The judge informed the jury that the appellant denied the allegations and directed the jury to the memoranda of interview and videos of interview. She then went on to detail the various criticisms the defence levelled at the garda investigation.

Discussion

35. The first point to note is that no requisition was raised following the judge's charge to the jury. No explanation is offered for this and in terms of the dicta in *People (DPP) v Cronin* [2006] 4 IR 329, it is only if this Court is of the view that a fundamental injustice has occurred due to an error or oversight of substance will a point not raised at trial be permitted to be argued on appeal.

36. The trial judge addressed the evidence of Dr W in some considerable detail and was, in our view, under no obligation to repeat to the jury the submission of counsel on that evidence to the effect that it would be less likely the hymen would be normal in the circumstances of the alleged offending. In fact, when the witness was asked that question, she did not say that it would be less likely but explained:-

"Q. Just dealing with the nature of the abuse, if the -- if the non-consensual sex or the rapes of the vagina or the anus are either rough or repeated, that makes it less likely that there would be -- that the hymen would be normal or intact?"

A. It's very difficult to say, Judge, there are a number of factors, for instance the first is the nature of what allegedly happened. The other issue is, did somebody have a history of bleeding at the time of an alleged incident, and the other and important factor is the healing of various tissues, say superficial injuries like bruises, scratch mark or a small laceration anywhere on the body, including the private area can heal completely and given the passage of time, one may have no residual or remaining findings from what allegedly happened. And on the other hand, a deep injury like deep lacerations may heal, leaving some findings, be it a scar or whatever on that particular part. But so whether there was an injury there over time or from the first alleged incident I can't say because she wasn't examined within a close timeframe to that particular examination or to that particular alleged incident." (Transcript of the 6th March 2023, Page 9, Line 10-23)

37. Even if the appellant were not impeded by virtue of the dicta in *Cronin* in raising this argument on appeal, we are not persuaded that the trial judge erred in her charge. The charge was, as stated, fair and balanced.

38. Accordingly, we reject this ground of appeal.

Decision

39. As we have not found merit in the grounds of appeal, the appeal against conviction is dismissed.