THE COURT OF APPEAL

[139/22]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)

RESPONDENT

AND

M.S.

APPELLANT

JUDGMENT of the Court delivered on the 11th day of July 2023 by Birmingham P.

Introduction

1. On 16th May 2022, following a five-day trial in the Central Criminal Court, the appellant was convicted of six counts of rape contrary to s. 48 of the Offences Against the Person Act, as amended. The appellant now seeks to appeal his conviction. Initially, two grounds of appeal were lodged, one involving an assertion that the verdict was perverse and against the weight of the evidence, but both the written submissions and the oral argument have focused on the second ground of appeal, which is in these terms:

> "The trial judge erred in law in instructing the jury that a lesser weight should be attached to matters put to the jury by defence counsel as they had not been put to the relevant witnesses during trial."

By way of background, it should be explained that the appellant had initially been charged with multiple counts of sexual assault relating to three complainants, his three granddaughters. He entered pleas of guilty to counts of sexual assault involving all three complainants but pleaded not guilty in relation to six counts of rape which had been preferred in relation to one of those three complainants, who will be referred to as S3.

The Trial

2. To provide context for the issue that now arises in relation to the trial judge's charge, it should be explained that the complainant was interviewed by specialist Garda interviewers. The recording of this interview served as her direct evidence at trial, and she was then cross-examined. It is of note that the interview was a detailed one, the specialist Garda interviewer probed the complainant with questions as to how the rapes had occurred. We will refer to some, though not all, of the relevant extracts:

"DK [specialist Garda interviewer]: Ok so you mentioned something happened in that room. […]
DK: Ok so from the start, S3 tell me what happened.
S3: Em, the process of it like?
DK: If you want to tell me that yeah or we can just walk from, from the room.
S3: Well I don't remember much cause I was like ten.
DK: That's ok.
S3: Em, I remember it was he pulled down my pants, took off my shirt, put me on the bed and just, had sex with me there, told me not to move, that's it. That's all I remember.
DK: Ok do you remember where his clothes were? […]
S3: His pants was down and his shirt was on, cardigan was on and that was it.
DK: Ok and he put you on the bed. How did he put what way were you on the bed?
S3: Lying down.
DK: Ok, ok and where was he then.
S3: On top of me.
DK: Ok and you said 'had sex'. Ok what does that mean?
S3: He put his dick up my vagina.
[…]
DK: Ok, and where were you when that conversation happened.
S3: His sitting room.
DK: In his sitting room, ok, so you know the time you told me there about being up in his bedroom, how did that time stop?
S3: Cause I told like, I tried to push him off me.
DK: Ok.
S3: And then he gave in and just said ok and that was it.
DK: Ok, ok, and, and, how do you know he put his dick into your vagina?
S3: Because I felt it, he showed me it.
[…]
DK: […] Ok and where were your hands?
S3: He held them against.
DK: While this was happening.
S3: So I wouldn't be able to like push him away. […]
DK: Ok and what part of them would he hold?
S3: My wrists.
[…]
DK: Ok, and that time, how long do you think the whole thing lasted in the bedroom.
S3: Em two minutes.
DK: Ok, ok em alright so you said then as well that it happened a few times? […] Ok, so can you tell me any other time you can remember.
S3: Em, when [name] used to have music and Mam might be working em, he used to have to babysit us then and that's when in the sitting room, my sitting room.
DK: Ok, so tell me about that?

S3: The same thing that happened in his bedroom, happened in my sitting room.

[…]

DK: What happened?

S3: Em, well the same thing that happened in the bedroom, he pulled down my pants and then it just went from there on.

DK: Ok and how did you get on to the couch?

S3: He pushed me on to it.

DK: Ok alright. Anybody else in the room? […] Ok so he pushed you on to the couch, then what happened?

S3: He had sex with me there.

DK: Ok, what, where were your clothes and stuff?

S3: Still on me just kind of off, like my t-shirt was on and my pants were down.

DK: Ok and how did they get down?

S3: He pulled them down.

[…]

DK: Ok and how were you while it was happening?

S3: Scared.

DK: Ok and where were your hands?

S3: He was holding them.

[…]

DK: Ok so, that, that time that you told me on the couch, ok, did you notice anything about yourself afterwards?

S3: In what way do you mean.

DK: About yourself, about, anything about yourself?

S3: I was sore.

DK: Where were you sore?

S3: Em my hands."

3. The cross-examination of the complainant by the defence counsel was brief. There was no probing of the details in relation to the alleged rapes, but rather, on a number of occasions, counsel put it to the witness that, while her grandfather had admitted to the sexual assaults occurring and had pleaded guilty to sexual assaults, he denied rape, and it was put to her that the rapes had not occurred. On a number of occasions, she responded by saying that what was put to her was "not true", and that the rapes had occurred.

4. The accused, as he was then, gave evidence in his own defence. His direct evidence was very brief and was confined to him confirming that he had entered pleas of guilty to the counts of sexual assault on his granddaughter, S3, when she was a child, but he said the rapes which had been described had not happened.

5. The issue that now arises has its origin in remarks made by defence counsel in the course of her closing speech to the jury, in which she stated as follows:

"[The appellant] is in the unfortunate position where all he can do is say, this did not happen, I did not do these things. What more can he do? But look very carefully at the mechanics of the alleged act and the account that is given by [S3]. There is no reference

to pain from the rape. When she is asked about being sore, she references her hands and when she is asked about anywhere else, she says no. When she is asked, she does say she could feel it in her. But there's no reference to his weight on top of her, there's no reference to an erect penis and there's no reference to any ejaculation. And as I say, I am not trying to be crude, but these are features that you would expect to hear when someone is describing this act, particularly when you're dealing with a child who isn't familiar with these things. And I'd suggest to you that if you carefully examine the evidence, it flies in the face of what [counsel for the prosecution] describes to you as a vivid account being given."

6. Following this, counsel for the prosecution articulated to the Court that there were two matters with which he took issue from the closing speech of the defence. In turning to the first issue, he stated, in the absence of the jury, the following:

"[Counsel for the defence] made a number of points in relation to [S3's] account, such as whether other people were present, that there was no reference to pain other than that her hands were sore, there was no reference to his weight on top of her and there was no reference to ejaculation. Now, these are matters, in my respectful submission, if an account is going to be criticised, it should be put and fairly put, and the witness should be afforded an opportunity to comment on it. Avoiding re-victimisation doesn't mean turning the wheels on their head and it's the case of *Brown* [*v. Dunne* [1893] 6 R 67 HL], which is an old case, but it's referred to repeatedly throughout the authorities. And most recently I think in fact by the Supreme Court in *McDonagh v. Sunday* [*Newspapers* [2017] IESC 46], and I'll just read the passage which says[:]

'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 of explanation[,] and 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].'

So it was put to the witness that there was a denial, she was asked some brief questions about a sofa, *et cetera*. But the matters on which her account was criticised before the jury weren't put and should have been, in my respectful submission."

7. Counsel indicated his second concern related to the fact that, in the Book of Evidence, there had been statements from both of the complainant's parents that when they brought her to the doctor the following day, she was asked if there was intercourse and she had said yes. He said he had spoken to his colleague, counsel for the defence, and had not led the issue because he did not believe it was admissible as recent complaint evidence because the recipient of the statement was not before the court, but he did indicate that he would lead it if there was to be any suggestion of recent fabrication. He referenced the fact that defence counsel had pointed out that a letter which the complainant had given to her mother had made reference to sexual assault, but not used the word "rape".

8. The following Monday, when the court resumed, the trial judge indicated that she had reviewed her notes of the evidence and the transcript and stated:

> "… and I'm of the view that I should tell the jury that they decide on the weight to attach to the evidence, that it has been submitted to them on behalf of [the appellant] that the complainant's account did not make reference to pain or to the weight of [the appellant] on top of her. And that it was not put to the complainant that she had referred to sexual assault in her letter to her mother. These are all matters for the jury, but they were not put to the complainant. But it's entirely a matter for the jury to consider all the evidence and what weight should be attached to the evidence."

9. Defence counsel said:

> "I accept the Court's ruling […] But I, just the jury are then left with the impression that it ought to have been put to the complainant, is that what the Court is ruling?"

The judge replied that it was a matter for the defence to decide whether or not to put matters of that nature to the complainant in cross-examination, but the jury should be told if certain matters had not been put to the complainant. The judge said that, ultimately, it is entirely a matter for the jury to assess the weight to be given to the evidence. The trial judge stated:

> "As I understand it, there's an authority I think, it's *AC* but I may be incorrect, from Ms Justice Baker in relation to this very issue in respect of something not being put to the jury which is relied on then in a closing speech."

The judge stated further:

> "Now, it is entirely a matter for the defence to decide how they're going to run their defence. But I think the jury should be told, these were not put to the complainant."

Defence counsel, in seeking to ensure she understood the ruling, summarised the position as follows:

> "…it does seem to me that the jury are being put in a position where they're being told that if the defence wish to rely on it, they ought to have put it and that would seem to stray into some obligation on the defence."

The judge enquired if there was particular wording counsel for the defence wished for the judge to use. Counsel indicated her concern was that the jury were left with the belief that something underhand occurred on the part of the defence, and it seemed that what was being argued for by the Director is that a defence counsel could not apply for a direction because they did not put certain things to the complainant. Counsel indicated the Court's wording was fine, once it could not be implied that there is an obligation to do it.

10. The trial judge's charge to the jury was as follows:

> "Now, you know that [S3] was, you saw her evidence by way of DVD and then you saw her cross-examination. One matter I want to bring to your attention is that it was submitted to you on behalf of [the appellant] on Friday that [S3's] account made no reference to pain or to the weight of [the appellant] and how it felt to have the weight of [the appellant] who's been described as a big man on top of her. And that her account to her mother in her note was of sexual assault. And that she did not use the word rape, she referred to sexual assault.
>
> Ladies and gentlemen, you weigh up all of the evidence you have heard in the trial. These

were not put to [S3], these submissions which I've referred to were not put to [S3] and it will be a matter to weigh up all of the evidence in relation to what you have heard during the course of the trial and to consider the significance you attach to any of the evidence which you have heard during the course of the trial. Consider all of the evidence and the significance you attach to it."

The Appeal

11. While the approach of the trial judge might appear particularly restrained, the appellant nonetheless submits that the effect of the charge was that the jury were placed in a position where they were told that if the defence wished to rely on an issue, they ought to have put it, and it is said this appears to stray into some obligation being place on the defence. In addition, it is submitted that the jury were left with the impression that something underhand was done by the defence.

12. The section of the closing speech by defence counsel which drew protest from counsel for the prosecution did not canvass any positive defence. The observations following on from a comment about the difficult situation in which the appellant found himself, in that all he could do was say that these things did not happen, invite the jury to look carefully at the mechanics of the alleged act and the account given by the complainant. Counsel pointed out there was no reference to pain from the rape, that when the complainant was asked about being sore, she had referenced her hands, and when she was asked about anywhere else, had said "no". Counsel acknowledged that, when asked, the complainant said that she could feel it in her, but counsel said there was no reference to the weight on top of her, no reference to an erect penis, and no reference to any ejaculation. Counsel said she was not trying to be crude, an observation she had also made earlier, but there were features one would expect to hear when someone was describing this act, particularly when you are dealing with a child not familiar with these things, and she submitted that, upon carefully examining the evidence it contradicted, what prosecution counsel had described was a vivid account on behalf of S3.

Discussion and Decision

13. It does not seem to us that there was anything impermissible about what was said by defence counsel. We do understand how there was a degree of frustration or irritation on the part of prosecution counsel. If questions had been asked, either during the specialist Garda interviews or during cross-examination, as to whether the complainant found penetration painful, whether she was conscious of the weight of the person who was penetrating her, and whether she had ever seen the erect penis of the person penetrating her, it is likely she would have had little or no difficulty in answering. However, for understandable reasons, such questions were not asked. The specialist Garda interviewers wanted to avoid any suggestion of prompting the witness. Understandably, defence counsel would not want to put certain questions to the complainant, as she could not know what answers she would get if she did, and it was possible any answers she might have received would have been unhelpful from her perspective. We can understand how prosecution counsel would have felt it was not possible to ignore the remarks made in the closing

speech of counsel for the defence. In some other jurisdictions, the prosecution would have a right of reply, but there is no provision for that in Irish law.

14. It appears that prosecution counsel hoped for a stronger intervention, whether by way of reprimand or otherwise, than was forthcoming from the trial judge. Had that happened, it might well have given rise to difficulty in the context of the trial, in circumstances where, in our view, defence counsel had not overstepped the line. However, the judge's remarks could scarcely have been more restrained. It seems to us beyond doubt that the judge was entirely within her rights to draw the attention of the jury to the fact that the criticisms of the complainant for not dealing with certain matters in her narrative were in the context that those were not issues raised with her. We do not think it is an answer to that point to say, as defence counsel did, that these were issues canvassed during the course of the specialist interview, and, accordingly, there was no onus on the defence to deal with these issues and the judge should refrain from comment. For our part, we have no doubt that the judge might have chosen to address the issue in less restrained terms, but we are satisfied that the manner in which she did so is not one that can be criticised.

15. Accordingly, we dismiss what is in effect the sole ground of appeal.