THE COURT OF APPEAL

Record Number: 99/21

Birmingham P.
McCarthy J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

EO'C

APPELLANT

JUDGMENT of the Court delivered on the 26th day of July, 2023 by Ms. Justice Tara Burns

1. This is an appeal against conviction. On 22 December 2020 the appellant was convicted by unanimous verdict of the jury of all four counts charged against him on the indictment, namely rape contrary to s. 2 of the Criminal Law (Rape) Act 1981 (as amended), rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990, directing the activities of a prostitute contrary to s. 9 of the Criminal Law (Sexual Offences) Act 1993, and intimidation of a witness contrary to s. 41 of the Criminal Justice Act 1999. The appellant is appealing against his conviction in respect of the rape, the s. 4 rape and the intimidation offences.

Background

2. The appellant and the complainant were known to each other and had a previous sexual history. The appellant was also involved in the complainant's prostitution work. On 27 September 2017, the complainant was at a house which both she and the appellant had access to for the purpose of her prostitution work. The appellant arrived at the house shortly after the complainant and quickly thereafter, he carried the complainant to an upstairs bedroom where he raped her both vaginally and anally. He used a condom during the rapes which he removed and took with him when he left the house. The complainant called her sister after this ordeal and told her that she had been raped without giving any further detail. She also contacted Ruhama, a NGO that works with women affected by prostitution, and left a message on its voice service. Ms. Sarah Benson of Ruhama, called the complainant back.

In the course of that conversation, the complainant reported that she had been raped and provided some detail in relation to what had occurred.

3. The complainant subsequently made a complaint to An Garda Síochána whereupon the appellant was arrested and detained pursuant to the provisions of s. 4 of the Criminal Justice Act 1984. When interviewed in relation to the complainant's allegations, his account of what occurred evolved from sexual contact not having taken place to an acceptance that it had – "*that he had his way with her.*" The appellant's position at trial was that the complainant had consented to the sexual acts.

4. After the complainant made a complaint to An Garda Síochána and the appellant was arrested and interviewed, she received a snapchat from the appellant, which had been sent to all of his contacts. The snapchat was of a drawing depicting a decapitated body with a cannon firing a cannon ball. The words "*Fresh skank*" and "*suffer*" appeared on the drawing as did the sentence "*Being a fantasist shows the world how fake one is. It all comes out in the end*". A further message was posted that day which had the words "*I guess it takes a special kind of rape victim to want to stay close to her rapist*". A naked body of a male wearing a crown was depicted holding aloft a severed female head with words "*Karma*" and "*Suffer*".

Grounds of Appeal

5. By notice of appeal dated 10 May 2021, the appellant indicated his desire to appeal his conviction with an indication that grounds of appeal would be submitted by his legal representatives. On 25 May 2021, an additional notice of appeal was lodged which set out his grounds of appeal as:-

> *"1. That the learned trial judge erred in law and in fact in admitting evidence of recent complaints from multiple witnesses;*
> *2. That the learned trial judge erred in law and in fact in permitting certain evidence to be adduced pertaining to the forensic analysis of the complainant's clothing;*
> *3. Such further and other grounds as may arise on receipt of the transcript."*

By notice of motion dated 23 March 2023, the appellant sought leave to add two further grounds of appeal, having obtained a transcript of the trial in September 2021, namely:-

> *"a) That the learned trial judge erred in law and in fact in that he failed to identify the particular evidence which had been admitted as recent complaint evidence in his charge to the jury, which amounted to a misdirection in law.*
> *b) That the learned trial judge erred in law in misdirecting*

the jury as to the elements of the offence of intimidating a witness and in failing to accede to an application to requisition the jury on foot of an answer to a question from the jury."

This motion was listed before the court on the same day as the appeal hearing.

Recent Complaint Evidence

6. At trial, the respondent sought to lead evidence concerning the recent complaints which were made by the complainant to her sister and Ms. Benson of Ruhama. Another complaint to a friend was intended to be led by the respondent but this witness was not ultimately called.

7. The appellant objected to evidence of the recent complaint to Ms. Benson being given before the jury on the basis that the multiplicity of complaints would create a risk that the jury would mistake the evidence as establishing the truth of what was alleged rather than being evidence relevant to the consistency of the complainant.

8. Having considered submissions and authorities from both the respondent and the appellant, the trial judge ruled as follows:-

"In terms of the chronology Ms [C], a friend … allegedly spoke to [the complainant] at 7.39 pm and her sister … spoke to her at 7.56 pm. [The complainant] left a voice message for Sarah Benson at 8.06pm and Ms Benson returned the call at 8.30pm. In terms of placing the time of the alleged incident, she said that she looked at the dash clock on her car when she came into the yard of her rented property at 6.18 pm, was on the phone to her sister … for 15 or 20 minutes when [the appellant] arrived in the yard. So, it is quite clear all of these matters arose within a very short time, reasonably short time, within certainly an hour/an hour and a half of the alleged incident.

It is clear and it's more clearly set out in McGrath that it rests in the Court's discretion in terms of the number of complaints. McDonagh makes quite clear that a number of complaints can be admitted. At 3.182 in McGrath, second edition, it says, this was in relation to Brophy, "However, the Court did acknowledge that a trial judge had discretion to limit the number of references to complaints in order to ensure fairness in the trial. Although not expressed by the Court of Criminal Appeal in such terms this can be seen to be an instance where a trial judge might apply his or her general discretion to exclude evidence, the prejudicial effect of which exceeds its probative value. It is evident that once the fact and particulars of a complaint are admitted, repetition of the complaint, especially if it is very similar in its terms, does not add much probative value to the complaint. However, it gives rise to a risk of prejudice

because of sheer weight of numbers. If a number of witnesses give evidence repeating the particulars of the same complaint, there is a substantial risk that the jury will not treat such evidence as going merely to the credibility of the Complainant."

Now, in this particular case I don't think that risk arises. They all arose within a very short period of time. The Court will make quite clear to the jury that this arises only in relation to credibility. It's not corroboration. It's not self-narrative and in my view that in my discretion I think it's quite fair because of the close proximity in relation to the matters from the date of the alleged incident and the close proximity of all three complaints that they are admissible."

Discussion and Determination

9. The appellant submits that the trial judge erred in permitting the respondent to adduce the evidence of the two recent complaints. Whilst acknowledging the margin of appreciation which this court must afford to the trial judge's exercise of discretion in the matter, it is argued that the trial judge failed to consider the cumulative effect of each piece of recent complaint evidence and failed to weigh the probative value of the evidence against its potential prejudicial impact, instead focusing on the close proximity of the complaints to each other and to the incident itself. It is further submitted that the trial judge failed to consider what, if any probative value was added by the recent complaint evidence of the complainant's sister, which only consisted of an assertion that the appellant had "*raped*" her and whether such probative value was outweighed by the prejudicial effect, in particular, in light of the admission of more fulsome recent complaint evidence from Ms. Benson.

10. The respondent submits that in the particular circumstances of the complaints made by the complainant, namely that they were made very close to the event and close to each other, the trial judge correctly exercised his discretion to admit both complaints. It is submitted that the complaints formed part of a continuing narrative from the complainant as to what she alleged occurred such that it was appropriate for them both to be admitted in evidence. Reliance is placed on the Court of Appeal decision in *DPP v. MA* [2020] IECA 367 where evidence of two complaints made in quick succession to a friend and a guard in the aftermath of a rape were found to have been properly admitted into evidence.

11. The court notes that the criticism made before us regarding the admission into evidence of both complaints is that the trial judge should have decided to admit the complaint made to Ms. Benson rather than both complaints. That is not the application which was made before the trial judge which instead was that he should limit the admission to the first complaint only, namely the complaint to the complainant's sister. This court will not consider an application which was not made to the trial court and instead will determine whether the trial judge exercised his discretion correctly in admitting both complaints into evidence.

12. As stated in *McGrath on Evidence*, and referred to by the trial judge, there is no rule of law which limits the number of recent complaints which may be adduced in evidence. A trial judge has a discretion in this regard, the exercise of which must be informed by the purpose for the admission of such evidence, namely the establishment of consistency on the part of a complainant. However, repetition of the complaint, if it is very similar in nature, does not add much probative value to the complaint and a risk of prejudice arises as a jury may consider that it goes beyond merely establishing the credibility of a complainant.

13. In the instant case, the first complaint to the complainant's sister simply recorded the fact that the complainant had been raped whereas the second complaint to Ms. Benson gave further detail as to what had occurred. Accordingly, the complaints made were not repetitive or very similar in nature. Rather, the second complaint developed the details of the first complaint. Of importance, the complaints were made in very close proximity to each other and to the incident itself which has a significance in terms of assessing the consistency of the overall complaint made. With respect to the purpose for the admission of such evidence, this evidence taken together most certainly had the potential of establishing consistency on the part of the complainant. In light of the direction which the trial judge indicated he would give to the jury, to the effect that such evidence must be considered by them from the perspective of establishing consistency on the part of the complainant rather than establishing the truth of her allegations, the probative value of this evidence outweighed its prejudicial effect.

14. The evidence of both recent complaints were properly admitted into evidence and the trial judge did not err in this regard.

Charge on Recent Complaint

15. The appellant submits that the trial judge's direction to the jury in relation to how they should consider the "*recent complaint*" evidence was inadequate.

16. The trial judge stated:-

> *"There is a particular principle of evidence in sexual cases, that's in relation to count 1 and 2 in the indictment, and it's called recent complaint evidence. Normally, members of the jury, what someone says to someone else is not allowed to be given in evidence but there is an exception in relation to what's called recent complaint. A voluntary statement made by [the complainant] of a sexual crime, if it is made within a reasonable distance of time from the date of the alleged offence, is allowed in evidence as to the consistency of [the complainant] in her evidence that she is a truthful witness. It is not independent evidence connecting [the appellant] with the crime, in other words it is not corroborative."*

17. Later in his charge, the trial judge provided the jury with a summary of the evidence which included the evidence of the complainant telling her sister and Ms Benson about what she alleged the accused had done to her.

Discussion and Determination

18. The appellant submits that the trial judge failed to specifically point out what evidence he was referring to when he directed them in relation to recent complaint evidence which had the effect of the jury not specifically knowing that it was to treat the evidence of the complainant's sister and Ms. Benson as only being relevant to establishing consistency on the part of the complainant rather than establishing the truth of what she alleged.

19. This court does not accept that proposition. The trial judge's direction in relation to recent complaint evidence was clear and to the effect that it applied to evidence relating to what the complainant had said to another person about a sexual allegation she alleged. The evidence of the complainant's sister and Ms. Benson could not have been considered by the jury to be anything other than a complaint made by the complainant to them about the sexual allegations she was making against the appellant and therefore was subject to the direction regarding recent complaint evidence.

20. An error does not arise in the manner in which the trial judge directed the jury in relation to recent complaint evidence and what evidence that direction related to.

Forensic Evidence

21. Counsel for the appellant submits that the trial judge was incorrect to permit evidence in relation to a forensic examination of the complainant's underwear and jeans be adduced in evidence.

22. The forensic evidence which was sought to be adduced arose in particular and somewhat unusual circumstances.

23. The complainant's position was that the appellant had worn a condom during the rape and anal rape and that he had removed the condom and taken it with him after the rapes. It had been put to the complainant in the course of cross examination that this was not the case and that he had not worn a condom.

24. A forensic examination of the complainant's underwear and jeans had not taken place. The investigating guard mistakenly thought the complainant had washed these items of clothing before she gave them over to the investigating team. The complainant stated in evidence that this had not occurred. When the clothes were submitted to the forensic laboratory, the guard informed the laboratory that they had been washed. Separately, the forensic laboratory has a policy of not conducting forensic analysis when the act of sexual intercourse is accepted to have occurred.

25. The issue as to whether forensic evidence existed on the clothing became a live issue in the case because of the dispute as to whether a condom had been worn. At the end of a strenuous cross examination of the investigation guard which focused on the error she made relating to the washing of the clothes, defence counsel posed the following question:

> *"[The Appellant] is on trial for an alleged rape and we don't know what, if anything, could have arisen from this if that matter had been dealt with by the gardai…?"*

26. On foot of this question, the respondent requested the forensic laboratory to carry out a forensic analysis on the clothing. This did not reveal the presence of semen. The respondent served a notice of additional evidence to adduce this in evidence which the appellant objected to.

27. At trial, the appellant submitted that over three years had passed between when the clothing was first retained by An Garda Síochána and when it was examined; that the appellant had faced the case as it had been laid out in the book of evidence and that for the respondent to amend their hand at such a late hour had resulted in a very real prejudice to the appellant.

28. The respondent contended that the only reason the forensic examination of the clothing had occurred was as a result of the questions put to the investigating guard in the course of cross-examination. The respondent submitted that the question posed by defence counsel, had resulted in the respondent having no other option than to have the analysis completed.

29. The trial judge dealt with the objection in the following manner:-

> *"First of all, the trial judge has an overriding responsibility to provide an accused person with a fair trial and not to prejudice him in any way and the issue that arises is has any prejudice been caused to [the appellant] as a result of a genuine error made, which she was cross-examined at length on it, by [Gda] Muireann Byrne in relation to a communication to the Forensic Science Laboratory. Now, the Court has offered an opportunity both to the prosecution and the defence to have a complete dry run of the forensic scientist's evidence, Dr Breathnach, this morning without any prohibition on that.*
>
> *Now, the undisputed matter is … that the prosecution at no stage intended to introduce the jeans or underwear of [the complainant] and to rely on it in terms of any forensic analysis of it and the issue is complicated in that it's the considered opinion, now Dr Breathnach was a particularly impressive witness in the Court's eyes, she was very clear in her evidence, very clear in both direct and cross-examination as to what is the policy of FSI and she was very clear that on issues of consent and she had a very detailed exact note of [the complainant's]*

account of what happened and [the appellant's] and she said it would not have been the practice of FSI, in terms of their investigation of the matter, to examine the jeans or the underwear of [the complainant] because the issue of consent is not something they could determine in the laboratory. It is a matter of evidence obviously where the principles of law and particularly recklessness are applied and the provisions of the 1981 act. So, that's the first issue.

Now, the position is that the evidence, which I accept, is that Garda Byrne's error was not realised by her until she heard [the complainant's] evidence and that -- in other words that the clothing was not washed. Now, the book of evidence was served on the defence on the 10th of May 2018 and they were on clear notice in the book of evidence in [the complainant's] statement, which I have read out, "On the 2nd of October 2017 at Rathmore Garda Station I handed Detective Garda Donal Dwyer the jeans and knickers that I wore on the evening of the 25th of September 2017 when [the appellant] raped me. I kept these in a bag. They were not washed." Now, the only possible prejudice in any view that could arise is a situation where forensic evidence is served and the defence don't have an opportunity to challenge it themselves but no cross-examination of Dr Breathnach took place in terms of her professional expertise or how she would examine a matter for semen and the defence were quite entitled, on service of that notice, and on the issue of the conflict, which would have obvious from the book of evidence and from [the appellant's] memo of evidence, about the wearing or not of a condom. So, it was open to them, if they so wished, to seek to have the clothing examined. That was a matter for them.

Now, they sought -- the defence sought to cross-examine and fairly well crucify Garda Byrne on the issue in relation to this matter and then, as Ms Lacey has pointed out, to leave up in the air, whether in fact semen or not could be there and the gardaí then took it upon themselves to have the clothing examined. Now, Dr Breathnach in her evidence this morning said that as a matter of science if -- the time lapse does not matter. In other words in relation to the rape examination kit, you have a situation where they are very much time limited and Dr Breathnach has given her expert evidence in relation to that, 3.5 days is the max. So, you are really on the cusp. I mean there was three days but really you were on the cusp of that being of any benefit in terms of independent objective evidence in relation to the presence of semen. Now, we have a situation where her expert evidence is that the semen remains on fabric until they are washed and that it can be retrieved years later and the position is … does any prejudice arise to the defence in relation to this? This is objective, fair evidence of an independent forensic scientist in relation to issues which have arisen in the trial, which weren't brought forward by the prosecution but which were raised by the defence, there was a genuine error here and in my view, you know, the defence can't have it every way and the situation has

arisen now where there has been an examination. I am quite satisfied there is no prejudice to the defence in relation to this matter. It is independent objective evidence in relation to a forensic examination of clothing and I am quite satisfied that it would only be fair, the Court has to have an overriding concern of justice to [the appellant]…. I am quite satisfied that no prejudice arises to the defence from the very fair evidence of Dr Breathnach and it should be heard by the jury as it was rendered in the absence of the jury this morning."

Discussion and Determination

30. This court does not see any error with how the trial judge dealt with the unusual situation which had arisen. The appellant raised an issue in relation to the absence of forensic evidence which in essence asserted that the appellant was prejudiced by the failure to carry out this examination. The forensic analysis was still capable of taking place. Having been conducted, it was appropriate that the results of the examination be adduced in evidence. The question posed by the appellant to the effect that it was not known what the result of that forensic analysis would have been, was now answered. Furthermore, the appellant could either have requested the forensic laboratory to carry out this forensic analysis on the complainant's clothing or have obtained the services of another expert to carry out these tests. He did neither, although aware of the conflict on the evidence regarding the washing of the clothes. In these circumstances, it was fair and appropriate that the results of the forensic analysis be admitted into evidence. No prejudice arose for the appellant in this regard.

Misdirection of Law on Witness Intimidation

31. When directing the jury in relation to the offence of intimidation, the trial judge firstly read s. 41 of the Criminal Justice Act 1999 ('the 1999 Act') to the jury. Section 41 of the 1999 Act states:-

"(1) ...[A] person who

(a) harms or threatens, menaces or in any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness … in proceedings…

(b) with the intention thereby of causing the investigation or the course of justice to be obstructed, perverted or interfered with, shall be guilty of an offence.

…

(3) In proceedings for an offence under this section, proof to the satisfaction of the… jury… that the accused did an act referred to in

subsection (1)(a) shall be evidence that the act was done with the intention required by subsection (1)(b)."

32. The trial judge proceeded to explain the offence further to the jury by stating:-

"What's essential in this offence is what's called mens rea or guilty knowledge. So, the action undertaken has to be for the purpose of putting the person in fear with the intention of causing the investigation to be obstructed, perverted or interfered with. Now, what subsection (3) deals with is that the act itself, you can infer the intention from the act and the act alleged in this indictment is that [the appellant] put up a drawing on Snapchat and some words then added to it. So, that's what the prosecution are alleging in relation to section 3, that the accused did the act referred to subsection (1) (a) shall be evidence that the act was done with the intention required by subsection (1) (b), the act of actually putting it on the computer and it being available to contacts from his subset.".

33. The jury returned with a question in relation to the offence of intimidation which asked for an exact legal explanation of the offence. The trial judge again read s. 41 of the 1999 Act to the jury and then proceeded to say:-

"So you have to be satisfied that [the appellant] had what was called guilty knowledge, the mens rea, the intent to carry out the offence but subsection (3) has this, "In proceedings for an offence under this section, proof to the satisfaction of the court or jury, as the case may be, that the accused did an act referred to in subsection (1)(a) shall be evidence that the act was done with the intention." So you are entitled to infer, if you so wish, you have to be satisfied that [the appellant] had intent, but you can infer if you so wish that the act of putting up the drawing on the Snapchat was an intent by [the appellant] to intimidate the witness."

34. Defence counsel raised a requisition in relation to this direction in the following terms:-

"[T]he act… that's referred to in subsection (1) (a) is an act of threatening, menacing or in any way intimidating. It is not in fact the act, in this case, of the posting of the Snapchat in my respectful submission having regard to what the act says. The jury must first of all consider whether in fact there was an act construed as being intimidating or threatening or menacing and thereafter then they have to consider if that, if they find that someone behaved in that way, then they have to go on to consider whether it was done with a particular intention to cause the investigation or the course of justice to be obstructed, perverted or interfered with but I don't believe it's correct to say that the posting of the Snapchat, Judge, in and of itself is the act that is within contemplation under section 41 (3). What they have to do is

you look -- first of all obviously the Snapchat is relevant, that is the first point, but then they have to go and consider whether someone actually behaved and are satisfied beyond a reasonable doubt whether someone behaved in a threatening or intimidating or menacing way and there, the next step they have to do is then to see, if they were so satisfied that a person had so behaved, whether or not they had the intention to cause the investigation to be obstructed, perverted or interfered with."

35. The trial judge refused to re-charge the jury in relation to the offence of intimidation being of the view that he had correctly charged them regarding the ingredients of the offence, particularly with respect to the issue of mens rea.

Discussion and Determination

36. The appellant sought to construe the trial judge's direction in relation to s. 41 of the 1999 Act as directing the jury that the act of posting on snapchat was in and of itself an act which was threatening, menacing, intimidatory or would put someone in fear. That construction failed to engage with the actual post at issue which was self-evidently of a very concerning nature, and failed to reflect the appellant's position at trial which was that it was directed at the complainant. The nature of the act cannot be divorced from the performance of the act which the appellant has wrongfully sought to distinguish in this instance.

37. Accordingly, while s. 41 of the 1999 Act requires the jury to be satisfied beyond reasonable doubt that an accused carried out an act which was harmful, threatening, menacing, intimidatory or put another in fear, in making that determination the jury are clearly considering the actual act performed which in this case involved the posting of a concerning depiction acknowledged by the appellant to be directed at the complainant.

38. The court is of the opinion that having regard to the actual post and the appellant's position in relation to the purpose of the post, the jury were correctly directed by the trial judge in relation to the constituent elements of the offence of intimidation of a witness as provided for in s. 41 of the 1999 Act.

Conclusions

39. In circumstances where we have not upheld any of the appellant's grounds of appeal or proposed additional grounds of appeal, his appeal against conviction is dismissed.