



THE COURT OF APPEAL

[251/22]

**The President
McCarthy J.
Ní Raifeartaigh J.**

BETWEEN

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

RESPONDENT

AND

P.B.

APPELLANT

JUDGMENT of the Court delivered on the 13th day of November 2023 by Birmingham P.

Introduction

1. Following a trial in the Dublin Circuit Criminal Court, the appellant was convicted on 25th November 2022 of one count of sexual assault, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended. He had stood charged with an offence of sexual assault alleged to have occurred on an occasion between 1st January 2017 and 30th April 2017. The complainant, Ms. A, was aged approximately nine years at the time of the alleged incident. The accused, now appellant, is her father.

2. By way of background, it should be explained that this was not the first occasion on which the appellant had stood trial charged with this offence. On a previous occasion, he had been convicted by a jury, but had successfully appealed ([2022] IECA 111) his conviction to this Court, a retrial was ordered, and on the retrial, he was once more re-convicted. Indeed, the trial which resulted in the first conviction was the second time the appellant had stood trial, the first occasion having ended with the discharge of the jury.

Background

3. At this stage, it is convenient to say something about the factual background. The complainant's parents were separated at the time of the alleged incident. On a particular occasion, the complainant and her mother had gone to the appellant's home. Both the appellant and the mother of the complainant drank alcohol. They, together with the complainant, who had spent time playing with her tablet on the sofa, had watched television together. During the course of the evening, all three occupants of the house retired to the appellant's bed in order to sleep. An

argument between the complainant and her mother, which had developed earlier, continued. At one point, the complainant's mother left the bedroom in order to sleep in a spare bedroom. During the course of the night, it was the prosecution case that the complainant had awoken to find the appellant's hand touching her "[l]ike just going all around like my bum and everything...", that his finger went up her "middle part". The complainant identified the purpose of the middle part as for "[u]m, to have babies". Of note, in the context of the present appeal, is that the complainant was uncertain as to whether the appellant was awake or asleep when he touched her in the manner she described. To say she was uncertain is accurate, but if anything, it overstates the position from the perspective of the prosecution. At various stages, including a conversation she had with her elder sister, and when interviewed by specialist Garda interviewers, the complainant's position appeared to be that she did not think her father had been awake.

Failure to Direct a Verdict of no Case to Answer

4. Following the close of the prosecution case, there was an application to the trial judge for a direction by reference to the principles established by *R v. Galbraith* [1981] 1 WLR 1039. Essentially, the argument advanced in support of the application was that the prosecution evidence, taken at its highest, did not establish that the accused was awake, and it could not be established that the activity described, even if it occurred, represented the actions of a person who was conscious and awake. This failure to direct a verdict of not guilty is at the centre of the present appeal.

5. At this stage, it is necessary to look in more detail at the evidence which had been adduced relevant to the question of whether the appellant was awake or asleep. We would draw attention to the fact that in the earlier judgment of this Court of 12th May 2022 (*DPP v. PB* [2022] IECA 111), extracts from the memorandum which recorded the interview with the complainant conducted by specialist Garda interviewers were appended at the end of the judgment. We will refer once more to the contents of the memorandum of interview. The interview was conducted on 30th January 2018; the complainant was aged ten years old at the time.

"D/Garda Murphy: Tell me all about it.

A: Like what he did?

D/Garda Murphy: Uh-huh.

A: What do you mean?

D/Garda Murphy: Well tell me what he, tell me what he did?

A: Like he put his hand down my trousers, like back and front, and then he put one of his fingers up my, like, in the middle of my bum.

D/Garda Murphy: Okay.

A: And I told him the next morning and then he just started crying and then he asked me was I going to tell my Mam, and I said no, and then I just told her then. I told her like, I don't know, but it was, it wasn't like January or anything this year, it was like at the start of the year like in 2017.

D/Garda Murphy: Okay.

A: I told her. I told my sister in 2017, in September. I don't know what date though.

. . .

A: I think it was in January or February.

D/Garda Murphy: And it was at the start of the year you said.

A: Yeah.

D/Garda Murphy: Which year was it the start of?

A: Um, 2017.

D/Garda Murphy: Okay. And the day that it happened, do you remember anything about that day?

A: No, I can't remember the day, but I can only remember the morning.

D/Garda Murphy: The morning. And what happened in the morning?

A: Um, what I just told you a minute ago.

D/Garda Murphy: What you just told me a minute ago. So that happened in the morning. So was it bright or dark outside?

A: Brightish.

D/Garda Murphy: Okay. Brightish.

A: Yeah.

D/Garda Murphy: And how do you know it was the morning?

A: Because -- I don't really know, but I know it was in the morning because I could see like a little light in the window.

. . .

D/Garda Murphy: Okay. And why were you there that day, do you know?

A: Um, I don't know.

D/Garda Murphy: Did you go to visit for any reason, or was there else anything on, or was it just a visit?

A: Um, no. Like the night my Dad done that?

D/Garda Murphy: Uh-huh.

A: No, because my Ma went down to have a couple of drinks and then they were like kind of drunk and then my Dad just done that the next morning.

...

D/Garda Murphy: ... Do you know did you and your Mam stay over there that night?

A: Yeah.

D/Garda Murphy: And what room would you normally sleep in?

A: I stayed with my Dad because my Mam was kind of a bit drunk.

D/Garda Murphy: Okay. And where would you normally sleep when you're there?

A: With my Dad, because my Dad -- because my Mam doesn't go down.

D/Garda Murphy: Okay. So you normally sleep with your Dad[?]

A: Yeah, and I don't like sleeping in a room on me own.

. . .

D/Garda Murphy: Okay. So, did you -- do you know what time your Dad came to bed at?

A: No.

D/Garda Murphy: No. You don't know. Were you there for a long time or a short time when you went to bed?

A: A long time.

D/Garda Murphy: A long time. And so the thing that happened with your Dad, you said it happened in the morning.

A: Yeah.

D/Garda Murphy: How do you know it was the morning?

A: Because I could see like when -- I find this happens with every like room, when the blinds are pulled down and then the curtains are pulled, there's still like a kind of like gap in the window.

D/Garda Murphy: Okay.

A: And it comes through that.

D/Garda Murphy: Okay. So there was a gap in the window and it was coming through that?

A: Yeah.

D/Garda Murphy: So that's what made you think it was morning time, is it?

A: Yeah.

...

D/Garda Murphy: So what was [the appellant] near to?

A: The desk.

D/Garda Murphy: The desk. Okay so. And you said you could see the light coming in. Is there any reason that you had woken up?

A: Um, yeah.

D/Garda Murphy: Tell me about that?

A: Because I felt my Dad.

D/Garda Murphy: What did you feel your Dad do?

A: Like what he done to me.

D/Garda Murphy: Okay. And you said that he put his hand?

A: Down my trousers, back and front.

D/Garda Murphy: Okay. Do you remember what clothes you had on you?

A: Pyjamas.

...

D/Garda Murphy: ... And how do you know it was your Dad's hand?

A: Because when I woke up I felt my Dad, and then I turned around and he was the only one in the bed and there was no one else in the room or in the bed.

D/Garda Murphy: Okay. And what did you feel your Dad's hand do?

A: Like just going all around like my bum and everything and then just like his finger went up into my middle part.

D/Garda Murphy: Okay.

A: Like in middle.

D/Garda Murphy: Okay so.

A: And then when I woke up my legs were like out like that. (Demonstrating)

D/Garda Murphy: Okay.

A: Like wide opened, and I don't know how they got opened.

D/Garda Murphy: Okay. And you know the way you mentioned the middle part, do you know any other name for that part of your body? Did you ever learn a name for that part of your body in school?

A: No.

D/Garda Murphy: No? Do you know what that part of your body is for?

A: Um, to have babies. (Laughs). I don't know.

. . .

D/Garda Murphy: ... And you said your Dad, your Dad touched that part?

A: Yeah.

D/Garda Murphy: And was it inside or outside or some other way?

A: Like his finger went up.

D/Garda Murphy: His finger went up. And how did you feel when that was happening?

A: I think so. Yeah, it did.

D/Garda Murphy: Okay. And how did you feel when that was happening?

A: Like sad and afraid.

D/Garda Murphy: Okay. What were you afraid of?

A: Like to tell.

D/Garda Murphy: Afraid to tell? Okay. Did you say anything to your Dad when that happened?

A: I told him.

D/Garda Murphy: What did you tell him?

A: I said my bum was hurting me, and it was, and then he said why, and then I just told him.

D/Garda Murphy: What did you tell him[?]

A: What, what he had done.

D/Garda Murphy: Okay. So what did you say to him?

A: I said 'my bum is hurting me', and he said 'why', and I said 'because you put your hand down my trousers and all', and then he said 'I'm sorry', and then he just started crying and all, and then he said 'are you going to tell your Ma?', and I said no.

D/Garda Murphy: Where did you have that conversation with your Dad?

A: In the bed.

D/Garda Murphy: In the bed. Okay. Was it a long time or a short time after the thing happened that you said that to him?

A: Like, like was it a long time I was being talking to him?

D/Garda Murphy: Uh-huh.

A: No.

D/Garda Murphy: Or did you talk to him, did you say all that to him soon after he did what he did, or was it a while after he did it?

A: Um, like when he woke up.

D/Garda Murphy: Huh?

A: When he like woke up or something.

D/Garda Murphy: When he woke up, is it? Was he asleep for long?

A: Um, no. Well not after like.

D/Garda Murphy: After what?

A: Like after what he did like.

D/Garda Murphy: Yeah. Did he sleep for long after what he did?

A: Um, not really.

D/Garda Murphy: Okay. Do you know was he awake when he did what he did?

A: Um, no, I don't think so. I don't really know.

D/Garda Murphy: You don't really know. That's okay so. And you said he put his hand inside your pants at the front and the back[?]

A: Yeah.

D/Garda Murphy: Did he touch any other part of your body?

A: No.

D/Garda Murphy: And how did his hand get in, inside your pants?

A: I don't know.

D/Garda Murphy: You don't know. That's okay. And how did his hands get inside your pants then when he was touching say the front of your body?

A: Because I was just, I was lying straight asleep. Like I was like that asleep.

(Demonstrating).

D/Garda Murphy: Okay.

A: And then I just turned so like, so he could stop.

D/Garda Murphy: Okay.

A: And like because when I was lying straight I could feel it then.

D/Garda Murphy: Okay.

A: And then I woke up, and then I -- I was like, I shouted 'Da, stop', and then, then I turned around and then he just done it to the back.

. . .

D/Garda Murphy: ... And whereabouts on your body did he touch you when he touched your back?

A: My bum. Like the back of my like -- my bum.

D/Garda Murphy: Your bum.

A: Yeah.

D/Garda Murphy: And was that touch, was that inside or outside or near your bum?

A: Inside.

D/Garda Murphy: Inside your bum. And what is your bum for?

A: To go to the toilet.

. . .

D/Garda Murphy: And what way were your clothes when he touched the front part of your body, what way were your clothes?

A: Um, up.

D/Garda Murphy: Up. So when he touched then the back part of your body, what way were your clothes?

A: Up as well like. It was up all the time like.

D/Garda Murphy: Up all the time. Okay. And you said earlier he put his hand inside them, inside your pants?

A: Um, yeah. That was like what he had done like. He didn't do it outside but he had done it inside like my pants.

D/Garda Murphy: Inside your pants. Okay. But they were up all the time, is that right?

A: Yeah.

D/Garda Murphy: Yeah. And did you notice anything about your body afterwards?

A: Um, my bum was hurting, like the middle part was hurting me.

...

D/Garda Murphy: And so just if we can just talk another little bit about the thing that happened with your Dad. The time that something happened, how did it stop, when your Dad did that? How did it stop?

A: Like I was -- I think he just woke up or something because I was like saying stop to him and then he like wouldn't wake up.

D/Garda Murphy: Okay.

A: Or I think he said 'what[?]' and he just fell back asleep then and then -- and then he just woke up himself then and I just told him."

By reference to these extracts, two things seem to emerge. First, the complainant was unsure about whether her father, the appellant, was awake or asleep at the time the incident occurred, and clearly leaned in favour of the view that he was not awake. Second, perhaps more significantly, the details provided of what her father is alleged to have done are really, as a matter of common sense, only consistent with the description being provided of the actions of a conscious, awake individual, unless one was dealing with a demonstrated sleep disorder of a very particular kind, which was never suggested as having been a feature of this case.

6. The application for a direction had regard to and was based in part on the recent complaint evidence provided by the complainant's sister. This was summarised by counsel in the course of the direction application as being to the effect that:

"[A] told me that when she stayed in his house a few weeks ago she stayed in his bed with him and me ma was in the spare room. She said that as she was going to sleep he started touching her private parts and she woke him and told him to stop and said 'It's alright, [A], relax'. She said he gave her a hug and a kiss and said he was sorry. [A] was upset telling me. [A] didn't want to go and tell Ma."

Particular emphasis is placed on the phrase "she woke him". Counsel on behalf of the appellant said it was her submission that the evidence, taken at the highest for the prosecution, was that the complainant was saying she did not know whether her father was awake or asleep. Counsel said the prosecution had to prove that there was an intention to indecently assault. She submitted that the prosecution had to prove three things: that the activity described took place, which, taking their evidence at its highest, they could prove; that the incident occurred in circumstances of indecency, and she accepted, again, taking the case at its highest, this was something they

could do; but she said that, crucially, they also had to prove that the accused intended to act in that way, and she said this was something the prosecution could not prove, even taking the evidence at its highest.

Decision of the Trial Judge

7. In the course of ruling on the matter, the judge indicated that if the matter was left to the jury, the jury would have to go through the evidence in the case and be satisfied beyond a reasonable doubt that the sexual assault occurred, the sexual assault was committed by the accused, and that at the time, he intended to commit such an assault. She went on to add:

“... So they’d have to be satisfied beyond reasonable doubt that he wasn’t asleep at the time. Would you all agree with that summary, yes? It’s properly a matter for the jury to assess the evidence, all right, and so I’ll leave the matter to the jury...”.

Discussion and Decision

8. In our view, while it is undoubtedly the case that the evidence was open to the interpretation that the complainant believed her father was asleep, that is not the end of the matter. The issue is not what the complainant believed, but what actually occurred. It seems to us that the impression the complainant had, or the belief that the complainant had as to whether her father was awake or asleep was not binding on the jury. It seems to us that, jurors, when properly instructed, could conclude that the activity described in such considerable detail by the complainant could only have been the actions of an individual who was conscious and awake, as we have observed that this seems to follow as a matter of common sense. It seems to us that a properly instructed jury could be satisfied beyond reasonable doubt that if the activity as described in fact took place, it must be that the accused was awake and conscious. A jury would also be entitled to have regard to the complainant’s description of how her father reacted when she told him that her “bum” was hurting her, and that this was because he had put his hands down her trousers, that he had said “I’m sorry” and then started crying, and then said, “are you going to tell your Ma?”. In those circumstances, it seems to us that this is a case where the trial judge was well within her rights in leaving the case for consideration by the jury.

A Subsidiary Issue

9. In the course of the appeal, while the major emphasis has been on the question of whether there should have been a directed verdict of not guilty, there is what might be described as a subsidiary issue about the fact that the judge did not give a corroboration warning. It is fair to say this was very much a secondary issue. The question of a corroboration warning was first raised after the evidence and after closing speeches. At that point, defence counsel asked:

“I don’t know if the Court will consider giving a corroboration warning in --”

To which the judge responded:

“Alright, I have carefully considered this... And I’m not giving you a corroboration warning, right... As well as I actually don’t think any value attaches to it...”

Discussion and Decision

10. This Court can well see how the judge would have felt that this was a case where a corroboration warning was of no value. Historically, the rationale for a corroboration warning was a belief that allegations of sexual impropriety are easy to make, in effect, easy to fabricate and

difficult to defend. Now, the giving of a corroboration warning is a matter for the discretion of the judge and applications are usually advanced on the basis that evidence has emerged which would suggest the complainant was unreliable, or in certain respects, untruthful. In this case, the question of unreliability did not arise in the way it usually would in the context of an application for a corroboration warning. In certain respects, the evidence of the complainant was quite advantageous from the perspective of the defence. Both at interview, and when speaking to her sister, the complainant accepted she was not sure that her father was awake when the incident occurred, and indeed, in reality, went further than that in suggesting that he was asleep. However, there was nothing in her evidence to suggest that she was in any doubt about whether the actions, as she had described, had occurred. There was no equivocation on her part as to what had occurred.

11. A further reason why the judge might have concluded it was not a case where a corroboration warning would be of any great value is that it was a case where, arguably, there was corroborative evidence. At one stage, the accused had stated that the complainant had never stayed at his house in 2017, and this observation was the subject of a *Lucas* warning (*R v. Lucas* [1981] QB 720). If the judge had embarked upon a corroboration warning, it is likely she would have referred to this aspect of the evidence as a matter to be considered by the jury, as possibly amounting to corroboration, it being for them to decide whether the evidence was actually corroborative or not. Again, the response of the accused, when asked by the complainant to stop, which was to ask the complainant whether she would be telling her mother, might be seen as potentially capable of amounting to corroboration, as not being the response to be expected from someone who had done nothing wrong and was entirely innocent. Overall, we are in no doubt that this was a case where the decision not to give a corroboration warning was one which was clearly within the judge's discretion.

Decision

12. In summary, we have not been persuaded to uphold either ground of appeal. Therefore, we must dismiss the appeal.