THE COURT OF APPEAL

[10/2018]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN
THE PEOPLE [AT THE SUIT OF THE DIRECTOR OR PUBLIC PROSECUTIONS]
RESPONDENT

AND
CLEMENT LIMEN
APPELLANT

JUDGMENT of the Court delivered on the 19th day of December, 2019 by Mr. Justice McCarthy

1. This is an appeal against the conviction of the appellant. The appellant was convicted by a jury on two counts of rape and one of sexual assault on 31st of May 2017 in the Central Criminal Court. The injured parties were Ms B. and Ms Q. The offences occurred at the appellant's home in Sligo on the 2nd of June 2014. One count of rape was preferred in relation to each complainant with an additional count of sexual assault in respect of Ms Q.

2. The complainants returned to the appellant's apartment with him having met him in a nightclub and in the company of others who left the apartment in due course. They had drinks there and what is described as a "puff" of a joint of cannabis. Ms Q recalled dancing with Ms. B and thereafter her next memory was awakening in a bed to find that the appellant was having intercourse with her. Her next memory thereafter was of Ms B standing beside her and informing her that she had been raped. Ms B. had no recollection of what occurred after she had consumed the alcohol provided by the appellant and her next memory thereafter was of awaking to find the appellant on top of her rubbing one of her legs with his penis and kissing her roughly. She found that her knickers had been removed. When she spoke to Ms Q the latter informed her of what had occurred so far as she was concerned. Ms B was in an extremely distressed state and when she came upon Ms Q the latter was described by her as being very incoherent and disorientated. They left the apartment barefoot and carrying their shoes. A short time afterwards, and at her request, Ms B's husband collected them and took them to a Garda station. When he saw them they were squatting, hugging each other, shaking and crying. They had been seen also by a security officer. The appellant was arrested later that day, detained and interviewed. He denied any rape or sexual assault but said that he had had sexual conduct contact with Ms Q, though consensual. He asserted that an advance had been made to him by Ms B but that he had rebuffed it. Medical evidence following examination of the complainants, particularly in relation to genital injuries was of modest assistance to the prosecution. Certain DNA evidence was adduced consistent with what might be

described as the immediate circumstances of the offences as narrated by the complainants but not going directly to proof of the offences.

***Grounds of Appea*l**

3. The appellant advances as grounds of appeal that the trial judge erred: -

(i) In law or in principle in failing to give directions and warnings in his charge to the jury in relation to System Evidence;

(ii) In law and in fact by ruling that the arrest of the appellant was lawful and by not excluding evidence obtained consequent upon that arrest;

(iii) In law or in fact in ruling that there was no constitutional right to have a solicitor present during interview;

(iv) In law and in fact in ruling that the appellant was fit for interview in respect of the first period of detention and deeming the first interview admissible while excluding the second interview;

And;

(v) Having regard to all of the circumstances relating to the charge to the jury, the trial was unsatisfactory and the verdict was unsafe.

Grounds one and five are closely linked and will be dealt with together.

***Grounds One and Five*: -**

The trial judge erred in law or in principle in failing to give directions and warnings in his charge to the jury in relation to System Evidence;

and

Having regard to all of the circumstances relating to the charge to the jury, the trial was unsatisfactory and the verdict was unsafe.

5. In closing the prosecution case to the jury, prosecuting counsel *inter alia* made the following submission: -

> *"Now, I'd also ask you to consider ladies and gentlemen the fact that elements of the testimony of each girl is so similar. Now, there are very stark similarities in the evidence given I say independently by these girls to you. Independently of each other. It was never put to these girls in cross-examination, it was never put to either of them that they were colluding with each other, that they had got together to make up a story. That for some reason two of them together decided to make this up. Now, I submit to you that there are very striking similarities in what each girl alleges happened to them separately and that this is capable of supporting their testimony, one of them to the other to you. Both girls had fine clear recollections up to a certain point of the night. Then they were given a drink. Both of them were given a drink by the accused. Then both of them have similar experiences of remembering nothing. Then each of them wakes up to the accused having vaginal intercourse with them. Both of them are still dressed according to their evidence*

apart from their underwear. Now, whether you find that any of these things does in fact support their evidence is a matter for you. But, I submit that the medical evidence, the evidence of their demeanour and the similarities in their testimony is capable of doing so and again Mr Justice Coffey will correct me if I'm wrong in relation to the applicable law.

Now, as I said the Judge will address you in relation to the law and you must take your directions in relation to the law from the Judge. Now, you're fully entitled to reject anything I say or anything the defence put forward to you but you must accept directions in relation to the law from the Judge."

6. Defence counsel submitted to the judge that the passage in question raised the issue of similar fact or system evidence when of course there was no basis for any suggestion that it arose on the evidence. He further complained that no application had been made to the trial judge nor no notice given in relation to it. Prosecuting counsel disclaimed any intention to raise or rely upon the evidence as falling into this category. No one is in any doubt but that no such evidence exists.

7. Earlier, the judge had indicated that he did not propose to give a corroboration warning and since there was evidence capable of being corroborative it is unsurprising that no application was made to him on behalf of the accused to do so. The judge appears to have conceived that by her impugned submission prosecuting counsel was raising the issue of corroboration when he had decided not to give any warning; she was of course perfectly entitled to do so should she have seen fit whether a warning was to be given or not. This is a separate question; the issue here is whether or not the passage could have created the impression in the mind of the jury that similar fact evidence existed when it did not, and if it did whether or not the manner in which the perceived difficulty was dealt with by the judge when raised by defence counsel was correct. The following exchange took place: -

"*MR GREHAN: There is one matter which I'm going to mention to the Court at this stage. It relates to what Ms O'Leary has told the jury where effectively she's introduced into the case the concept of similar fact evidence or striking similarity I think was the phrase that she used. That's very much a legal term of art. As I understand it if you're going to introduce it it's normally preceded by at least notice but I would have also thought an application or a ruling by the trial judge in respect of whether or not it's appropriate in the particular circumstances of the case. Which incidentally I would suggest it's not. I'm not so sure how it's going to be dealt with but I would certainly take issue with it and I would be submitting that the Court should disabuse the jury of that facet of the case being of any particular assistance to them.*

JUDGE: Well, the Court had made it very clear before speeches began that a corroboration warning was not going to be given.

MR GREHAN: Yes.

JUDGE: And therefore no direction would be given to the jury as to what in law could constitute corroboration whether it arises from the demeanour of the complainants, the medical evidence or elsewhere.

MR GREHAN: Yes.

JUDGE: So, insofar as the issue of similar fact evidence has been introduced that is something that was not contemplated by the direction that I gave before speeches began and I don't propose to visit the issue at all having given that direction to counsel. In other words Ms O'Leary if I can just address you there? I made it very clear that I wasn't going to direct the jury as to what could constitute corroboration and you in your speech anticipated that I would in relating to similar fact evidence.

MS O'LEARY: Yes, well I think I made it clear --

JUDGE: But, I'm not going to do that.

MS O'LEARY: -- to the jury that I was just -- these were submissions and they didn't have to accept any of that from me.

JUDGE: No, you're perfectly entitled to do that, Ms O'Leary. You're entitled to say that support for the narratives given by the complainants arises from various parts of the evidence that you visited in the course of your speech. So, you referred to for example the demeanour evidence of the various witnesses, the findings on genital examination. But, when you were relying on the similarities in the narratives of the complainants you said that this was something that in law was capable of constituting support and that the Judge would be directing them on it. When in fact I made it very clear that I wouldn't be directing them.

MS O'LEARY: No, sorry well I didn't mean -- I didn't mean that you would be directing them specifically. I meant that you'd be directing them generally in relation to the law.

JUDGE: I'm sure you didn't intend to create any difficulty. But, it seems to me Mr Grehan that you're correct when you say that the Court should not be telling the jury that that in law is capable of constituting corroboration.

MR GREHAN: Yes. But, I'll be asking the Court to say that it's simply not. That they should leave that as it were, matter, out of their considerations.

JUDGE: Leave what out?

MR GREHAN: Leave the suggestion that one of them in effect cross-corroborates the other. In the sense of --

JUDGE: Well, I don't want to introduce corroboration Mr Grehan. I think that would be very unhelpful.

MR GREHAN: I know, yes.

JUDGE: I think the best way of dealing with it is in fact not to mention it at all.

MR GREHAN: Very well.

JUDGE: Unless you can at 2 o'clock persuade me that there is a way of dealing with the matter.

MR GREHAN: Yes.

JUDGE: Which doesn't introduce the issue of corroboration.

MR GREHAN: I'll reflect on it over lunch.

JUDGE: But, it seems to me I would do more harm than good to your case if I introduce the issue of corroboration.

MR GREHAN: Yes.

JUDGE: And in effect imply that it does arise in relation to other aspects of matters that were canvassed by Ms O'Leary but doesn't arise in relation to that. But, I'll hear you further Mr O'Leary -- or sorry Mr Grehan if there is anything further you wish to say to me at 2 o'clock.

MR GREHAN: I'm obliged."

8. As will be seen from the foregoing defence counsel was afforded liberty to raise the issue again later in the day (after the luncheon adjournment). In fact it was so raised by prosecuting counsel giving rise to the following exchange: -

"*JUDGE: Ms O'Leary, Mr Grehan, is there anything you want to raise now in relation to the legal portion of the charge?*

MR GREHAN: No, I don't think so.

JUDGE: Very good.

MS O'LEARY: If I can just clarify, I think my friend intimated to me that you had made some finding. I just want to clarify that you hadn't made any finding, that it was just left in abeyance and there was nothing else unless it was to be raised?

JUDGE: Findings? What findings did I -- I am not entitled to make any findings.

MS O'LEARY: Well, I thought that was -- if I am wrong, so be it. I --

JUDGE: Well, I never said that I made any findings.

MS O'LEARY: Thank you, Judge.

MR GREHAN: I presume Ms O'Leary is referring to what you said about corroboration.

MS O'LEARY: Well, what I understood was that Mr Grehan was intimating to me that your lordship had found that what I said was raising similar fact evidence which I am not conceding that, so I just wanted to make that clear, but if that is not what happened, that is fine.

JUDGE: Yes, I think I indicated that I wasn't giving a corroboration warning therefore it followed that it was unnecessary for me to address the jury on what is meant, corroboration, or to give them direction as to what in law would be capable of constituting corroboration.

MR GREHAN: Yes.

JUDGE: I think that is as far as matters went. I said that if Mr Grehan wanted me to deal specifically with the issue of similar fact evidence, having regard to the fact that it could do more harm than good, we could revisit the matter, but Mr Grehan doesn't appear to want to revisit the matter.

MR GREHAN: That's correct."

It will be seen accordingly that the judges' initial view that nothing should be said to the jury about the issue was confirmed with the explicit agreement of defence counsel.

9. Whilst counsel for the appellant has specifically, and rightly, disclaimed any suggestion of error or incompetence on the part of defence counsel who appeared at the trial he maintains, nonetheless, that the appellant is entitled to reopen the issue of whether if the impugned passage raised the issue of similar fact evidence, it gave rise to an unsatisfactory trial to the point where the verdict ought to be quashed.

10. The principles applicable when it is sought to raise an issue on appeal in circumstances such as the present have been elaborated in *The People (DPP) v Cronin (No 2)* [2006] 4 IR 329. There, it was held by the Supreme Court that only where the (appellate) court was of the view that, due to some error or oversight of substance, fundamental injustice had occurred should it allow a point not raised at trial to be argued on appeal and, furthermore, that an explanation must be furnished as to why it was not so raised. The point under consideration here was not so raised nor is any explanation given as to why this is so. It is, however, obvious from the transcript that an informed judgement was made by experienced counsel to address the difficulty, if, in truth, there was one at all, in the manner decided by the judge, namely, to say nothing about it in his charge. Since there was no error or oversight nor explanation furnished, we think it is not, strictly speaking, necessary to go on to decide whether some fundamental injustice had occurred.

11. For the avoidance of doubt, however, we think that no possible criticism could be made of defence counsel for the manner in which the complication constituted by what prosecuting counsel said was dealt with. We fear that the use of terms such as "striking similarity"

may have, understandably, perhaps, triggered in the mind of defence counsel the idea that the *modus operandi* adopted by the accused in the commission of the offences was such as to constitute similar fact evidence, whereby in that sense one complainant could corroborate another (and of course they could do so in a number of respects by eye witness testimony). We do not think there was any reason for concern that the jury would have fallen into the error of thinking that there was cross corroboration on a supposed "similar fact" basis because the *modus operandi* was said to be similar. The terms are terms of art, but when used in their ordinary and natural meaning could not give rise to any injustice in the conclusion reached by the jury or render the trial unsatisfactory.

Ground Two

That the trial judge erred in law and in fact by ruling that the arrest of the appellant was lawful and by not excluding evidence obtained consequent upon that arrest;

12. Pursuant to s.6(2) of the Criminal Law Act, 1997, gardaí entered the accused's apartment at 11 a.m. on June 2nd 2014 in order to arrest him. The relevant statutory provisions are as follows: -

"6.— (1) For the purpose of arresting a person on foot of a warrant of arrest or an order of committal, a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where the person is or where the member, with reasonable cause, suspects that person to be, and such warrant or order may be executed in accordance with section 5 .

(2) For the purpose of arresting a person without a warrant for an arrestable offence a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless—

(a) he or she or another such member has observed the person within or entering the dwelling, or

(b) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or

(c) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person would commit an arrestable offence, or

(d) the person ordinarily resides at that dwelling."

13. The primary evidential basis justifying the entry into the appellant's home was the evidence of Sergeant Martin McHale. He and his colleagues, on arrival at the appellant's premises, knocked on the door announcing their presence and identifying themselves as

Gardaí; they received no response but continued to knock and announce themselves; some members said "Gardaí, open the door" through the letterbox. Apparently, after a number of minutes, Sergeant McHale obtained two mobile phone numbers for the appellant from a neighbour but received no answer when he attempted to contact him. At a certain point, the witness and a colleague heard some noise from inside the apartment; he expected someone would open the door but when this did not occur he and his colleagues repeated who they were. It should be added that it was known by the Gardaí that the appellant lived in the premises in question. A second Garda had seen video footage showing the appellant proceeding in the direction of the apartment one and a half hours before invocation of the right of entry under the provision. The trial judge referred in his ruling to the fact that "*it would be an affront to common sense not to suspect that Mr Limen was presence in that apartment at that time*" and on the basis of that conclusion, based on the evidence, he upheld the lawfulness of the entry and arrest which followed (a second round of challenge was advanced in respect of the arrest but that is of no relevance in the present context).

The learned trial judge ruled on the matter as follows: -

> "*Very good. I am satisfied that the relevant guard had reasonable cause to suspect that Mr Limen was in number 19 North Court and that he ordinarily resided there at the time of invoking the relevant statutory provision which is section 6 of the Criminal Law Act of 1997 as I understand it. The evidence is not merely that a noise was heard and indeed heard by more than one guard, but that two of the guards present were aware that Mr Limen ordinarily resided at the relevant address and then there's the added fact that Garda Loughlin viewed the footage that was played to the jury which showed Mr Limen heading back to 19 North Court at approximately 9.30 am, a mere hour and a half before the relevant section was invoked. So in all those circumstances it would be an affront to common sense not to suspect that Mr Limen was present in that apartment at that time and in those circumstances I reject the submission insofar as it challenges the lawfulness of the arrest having regard to the provisions of section 6 of the act of 1997.*
>
> *As regards the second ground of challenge, I am satisfied that Garda McHale did explain the reason for the arrest to Mr Limen and I make that finding of fact having found that Garda McLoughlin is a witness of truth. She's a person whose evidence I accept on this issue. It's true to say that she did not note the giving of such an explanation to Mr Limen in her initial notes or in her original statement and it is of course the case that she, as it were, supplied that deficiency in her additional statement that she made two days ago. But I think it is relevant that in the notes that she prepared at the time she did note his response after caution where the accused made reference explicitly to persons he described as "these two girls". That suggests to me that when she was arresting Mr Limen the words spoken by her went far beyond simply arresting pursuant to section 4(3) of the Criminal Law Act 1997 on suspicion of committing an arrestable offence of rape. Clearly there had to have been reference to two females and it must have been in the context of*

events occurring in very proximate terms, because he was able to make an allegation that these two girls had stolen not only jewellery but also drink and in those circumstances therefore I find that the second challenge is not made out and therefore I reject the challenge insofar as it is advanced on those two grounds."

14. It was for the judge to decide, on the evidence, whether the statutory preconditions to a lawful entry were fulfilled. It seems to us that on the evidence he was well justified in doing so apart altogether from the fact that the trial judge's conclusions of fact deserve particular respect because of the superior position in which he stands to us to make judgements on the evidence. The proposition that the appellant's arrest was unlawful is based upon the untenable proposition that the entry into the dwelling was unlawful and, in turn, since the arrest was lawful there is no basis for contending that evidence obtained consequent upon it should not have been admitted. We accordingly reject this ground also.

Ground Three

That the trial judge erred in law or in fact in ruling that there was no constitutional right to have a solicitor present during interview;

15. No request was made by or in behalf of the appellant for permission for his solicitor, after he had consulted with him (and he had an extensive consultation), to be present during interviews. It must accordingly be open to doubt whether or not on the evidence this point arises at all but we proceed in any event to address it. It was dealt with in clear terms by *The People (The Director of Public Prosecutions) v Barry Doyle* [2018] 1 I.R. 1. There, it was held that whilst the constitution required and guaranteed access to a lawyer by persons detained in Garda custody the presence of a lawyer during interview was not a necessary part of that right. Subsequently, the Supreme Court having rejected the proposition that such a right existed by virtue of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, an application was made by Mr Doyle to the European Court of Human Rights (*Doyle v Ireland, Application No. 51979/17*), in which he contended that, following his arrest, since he was not entitled to have a solicitor present during his police interrogation, there was a failure by the State to vindicate his right to a fair trial as guaranteed by Article 6 of the Convention and the right of access to a lawyer in criminal proceedings. The Court found that whilst the appellant's solicitor was not physically present during the interviews it is clear that he could and did interrupt them to further consult with his client and, in the circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced. Accordingly, no breach of the applicant's Article 6 rights had occurred.

16. In the present case, the judge was accordingly right to reject the submission that there was any invasion of the appellant's rights by virtue of the fact that the solicitor was not present during interview, ignoring the point that it was not sought to exercise any such supposed right.

Ground Four

In law and in fact in ruling that the appellant was fit for interview in respect of the first period of detention and deeming the first interview admissible while excluding the second interview;

17. In this connection it was contended on behalf of the appellant that the trial judge erred in fact in ruling that the accused was fit for interview, after he had been lawfully arrested and detained, in respect of his first period of detention and finding that the contents of the first interview was admissible whilst excluding that of a second.

18. A *voir dire* on the matter took place. A medical practitioner, Dr Carol Duffy examined the appellant after detention. Her evidence was that on the 2nd June, 2014, at Ballymote Garda Station at 14.45pm, she examined the accused who presented as coherent and understood questions asked of him. Although Dr Duffy was of the opinion that there were signs of drinking and the accused was somewhat unsteady on his feet, she considered that he was fit to be interviewed. When cross examined it was put to her that the appellant had not slept much that day or the previous day as he was drinking continuously throughout the night and the previous day. Whilst she agreed that sleep deprivation can have a serious effect on one's ability, she stated that the question of tiredness was not addressed in her report as the accused did not appear fatigued to her at the time.

19. Mr Limen gave evidence that he had been drinking since the 20th of May, roughly a bottle of whiskey per day. He was drinking all day prior to the incident and had only slept for a few minutes prior to Gardaí forcing entry into his apartment and arresting him. He did not sleep at the Garda station after he was arrested and could not recall the examination by Dr Duffy. In cross-examination it was put to him that he had a very good recollection of events and did not appear tired on the tapes of interview. It was further put to him that he spoke to his solicitor on various occasions and did not complain of tiredness.

20. The trial judge ruled on the matter as follows: -

> "*Very good. The evidence satisfies me that the accused was fit to be interviewed in respect of the first period of interview but not in respect of the second period of interview. I have had, in coming to that conclusion, I have had regard to the findings and opinion of Dr Duffy which are unequivocal in respect of his capacity to be interviewed in respect of the period 3.52 to 8-- sorry, 6.57, but which are qualified in respect of the second period. And for that reason, I therefore rule that the second interview should go out.*"

21. The appellant submits that the judge attached disproportionate weight to Dr Duffy's evidence and had insufficient regard for that of the appellant that he was drinking heavily as described, ignoring a real possibility that the appellant could not have been fit for interview for the first period. Both interviews took place a few hours after the appellant was arrested at 11.10 a.m; the first took place between the hours of 3.52 p.m. and 6.57 p.m. and the second between 10.18 p.m. and 11.01 p.m. The appellant argues that in the circumstances the trial judge could not have been satisfied beyond reasonable doubt as to his fitness for the first interview.

22. The conclusion reached by the judge on the evidence that he was fit to be interviewed in respect of the first interview and therefore was admissible was, again, well justified. This ground of appeal is also rejected.

23. We accordingly dismiss this appeal.