THE COURT OF APPEAL

[2020] IECA 284
[273/19]

The President
Kennedy J
Ní Raifeartaigh J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

RM

APPELLANT

JUDGMENT of the Court delivered on the 19th day of October 2020 by Birmingham P

1. Following a trial in the Central Criminal Court, the appellant was convicted on 5th July 2019 on three counts of a four-count indictment alleging serious offences of a sexual nature. He was convicted on count 1 (rape contrary to s. 2 of the Criminal Law (Rape) Act 1981, as amended), count 2 (oral rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990), and count 4 (sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended). A verdict of not guilty was delivered in respect of count 3 on the indictment (anal rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990).

2. Subsequently, on 14th October 2019, the appellant was sentenced to terms of 12 years imprisonment on both the rape and s. 4 rape counts, and to a concurrent term of five years imprisonment on the sexual assault count. Provision was also made for four years post-release supervision.

3. The appellant has now appealed against both the conviction and sentence.

4. Two grounds of appeal have been advanced and, in the course of written submissions and in the course of oral argument, they have been dealt with together. These grounds are:

   (i) That the Court erred in the charge to the jury in describing the account of events given by the complainant and the account given by the appellant as competing accounts and/or in not emphasising sufficiently that a rejection of the appellant's account was not determinative of guilt.

(ii) That the Court erred in the charge to the jury in asserting, or in asserting without more, that there was no third version of events.

5. It would seem, therefore, that the appeal against conviction really involves a criticism of the trial judge's charge. Before turning to consider the charge, it is appropriate to offer some context for the grounds canvassed on appeal.

6. The trial was concerned with events that occurred in the early hours of 16th July 2016 at the home of the appellant in a provincial town in north Munster. The complainant, who was 16 years of age at the time of the offences, was the foster child of the appellant. She was his wife's niece who, alongside two of her sisters, had been taken into foster care in April 2011 and had been placed into the care of the appellant and his wife. The appellant and his wife had three daughters of their own so the family unit comprised six children and two foster parents.

7. At the time of the events which form the subject matter of the proceedings, all the members of the household - other than the complainant and the appellant - had travelled to Kerry to stay in a caravan which the family had there. The initial expectation had been that the complainant would spend the night of 15th July with her grandmother who lived in the same town, but a change of plan and of heart saw the complainant staying with the appellant. The complainant invited a female friend of hers to come over and join them.

8. The Court and jury heard differing accounts of what occurred thereafter. The prosecution case was that the appellant had acquired alcohol, vodka and beer, for the complainant and her friend, and that they played drinking games, including games that involved drinking beer with a straw. At one point, the complainant's friend got sick and vomited and, at that stage, removed herself from the scene and went to bed upstairs. It was the prosecution case that the appellant encouraged her to go upstairs. According to the prosecution, at that stage, the appellant had been dancing with the complainant and kissed her forcefully, using his tongue. It is alleged that the appellant indicated what was going to happen next and that he placed the complainant down on the couch, took his penis out and stuffed it into her mouth. The appellant went away briefly, apparently to check on the friend upstairs, and returned very soon thereafter and renewed his unwanted attentions. This included an act of digital penetration. At that stage, the complainant endeavoured to make her way upstairs, but the appellant insisted that she go into a downstairs bedroom which was usually that of the appellant and his wife. There, the complainant pretended to be asleep in the hope that this might bring an end to all that was occurring, but, on her evidence, it did not. Rather, on her evidence, the appellant persisted in sexual advances towards her which included the penetration of her vagina with his penis. At some point, the complainant made her way upstairs to the room where her friend was. She was in a distressed state. After a while, the two girls left the house or "snuck out", as it was put. The jury heard evidence from various friends of the two girls with whom contact was made. In the course of the sentence hearing, the trial judge summarised what he described as the general run of the evidence as being that the appellant was lurking around for the two days, trying to keep a lid on what was going on.

9. When the foster mother of the complainant returned from Kerry, the complainant confided in her and, eventually, the Gardaí became involved. On 10th August 2016, the appellant was arrested and detained, and the account that he gave was, in essence, that it was the complainant who initiated sexual activity. At trial, the appellant gave evidence in his own defence. The judge summarised his evidence in the course of his charge as follows:

> "… Eventually [the appellant] allowed her [the complainant] to stay. She brought her friend [K] to stay over. Asked about drinking he said that he wasn't paying heed to them. He kind of knew they were drinking. There was music on the telly. [He]was coming in and out. [They] were messing around and I think I asked him what was meant by messing around and he clarified as meaning dancing. [He] was drinking. [The complainant] said -- sorry, [K] said [the complainant] was drunk. [He] told [her] it's time to go to bed […]. [He] said to [K] if you go to bed, she [the complainant] might follow. [The complainant] wanted to stay dancing.
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> She [the complainant] started to back up against [him] and put [his] hands up her top down her front. [He] said 'get the fuck away' and went to the bathroom and when [he] returned, she had her pants down, this is coming back into the sitting room, when [he] came back and was feeling herself. [He] told her to get the fuck to bed and cop on. She would not get up the stairs and was falling on [him] and [he] put her in the downstairs bedroom in [his] bed and got a basin from the kitchen and put it beside her. [He] woke up and she was on top of [him], kissing [him]."

10. The appellant does not take issue with the summary of the evidence provided for the jury by the trial judge. However, the appellant says that elsewhere in the charge, the judge fell into error; in particular, he did so when referring to the two accounts or versions of events, and the fact that there was no third version available for consideration. It is contended that these remarks, when combined, had the effect of misdirecting the jury. In written submissions, the appellant draws attention to the following observations:

    (i) "There's no third version available for you to consider."

    (ii) "You do not have to accept his evidence. If you do not accept his evidence and you conclude that it is false and a lie, then the only other account is that of [the complainant]."

    (iii) "There are really only two versions in evidence of what happened in this case."

    (iv) "So, you can assess those competing versions of a sexual encounter and its – what went before it and its aftermath using your common sense."

11. In the course of oral argument, counsel for the appellant took issue with an additional extract of the charge. That extract was as follows:

> "Which account do you believe to be the truth? Is there anything within an account of what happened which points to it being unreliable or far-fetched or at odds with

> your understanding of the way people think and behave? Is there anything within an account which resonates with you as strikingly accurate human behaviour and thinking or how you would expect a person to react?"

12. On behalf of the appellant, it is submitted that these remarks, certainly if taken in combination, created a risk that if the jury rejected the appellant's version of events, that it would regard itself as automatically obliged to convict. It is said that the risk arises from the emphasis placed on the fact that there were only two versions of events to choose from, and so, if the jury were to reject the appellant's version, the only remaining version was the complainant's. It is contended that the use of the phrase "competing versions", in conjunction with the reference to there being only two versions, created a risk that the jury would understand a rejection of the appellant's version of events as amounting to proof of the prosecution's case beyond reasonable doubt.

13. On behalf of the appellant, attention has been drawn to the case of The People (Attorney General) v. Oglesby [1966] IR 162. However, it can be immediately said that Oglesby was a very different case. In essence, it was a case about the so-called doctrine of recent possession, with the Court of Criminal Appeal asserting in emphatic terms that the so-called doctrine did not exist and that the so-called doctrine was a convenient way of referring to inferences of fact, which, in the absence of any satisfactory explanation by an accused, may be drawn as a matter of common sense from other facts. In that case, the trial judge had directed the jury as follows:

> "In law the position is where a person is found in possession of recently stolen goods and offers no explanation as to how he got them, then the jury are entitled to infer guilty knowledge if they wish. If he offers an explanation which you reject as a fabrication of lies, you are entitled again to infer guilty knowledge. If he offers an explanation which you satisfied is true, which is consistent with innocence, you must acquit him. If he offers an explanation which is consistent with innocence, which might reasonably be true and which raises a doubt in your mind, then again, you should acquit him."

14. As Kenny J pointed out in the Court of Criminal Appeal, the trial judge went on to deal with the explanation offered by the accused and went on to say:

> "If you reject that explanation as a tissue of lies you are entitled to convict. It really comes down to that. What do you think of the accused man, his story in the witness box? Does it raise in your mind a doubt as to his guilt? If it does, acquit him. If you reject it as a pack of lies then convict him. It is as simple … This case appears to me as simple as that, depending on the view you take of the evidence."

15. The respondent, on the other hand, says that the trial judge more than adequately laid out the full parameters of the presumption of innocence. The Director points out that in dealing with the standard of proof, as was to be expected, contrast was made by the trial judge with the civil standard as to "which side was…more likely to be correct" in making clear that this was inapplicable in any criminal case. The trial judge further added that "it

is not even enough that you be satisfied that something is highly probable". The same clarity on the part of the trial judge was, it is contended, evident when he came to deal with inferences where the judge observed:

> "…it is not enough that you conclude that a view favourable to the prosecution is more likely to be correct. In order to conclude fact finding in favour of the prosecution all views, potential explanations or inferences consistent with innocence must be disregarded as unreasonable and incapable of giving rise to a reasonable doubt."

16. It is axiomatic that in considering the charge of a trial judge, the charge must be read as a whole. That is a proposition so obvious that no authority is needed, but if authority was required, it can conveniently be found in the case of R v. Avetysan [2000] 2 RCS 745, the Canadian case so heavily relied on by the appellant. There, it is stated:

> "The basic question remains: does the charge, read as a whole, give rise to a reasonable likelihood that the jury misapprehended the correct standard of proof?"

17. Having posed the question thus, it was answered in these terms:

> "Here, the charge was defective. The jury was not told clearly that the standard of proof was more than a balance of probabilities but less than absolute certainty. Likewise, the jury was not told that it was required to acquit if it concluded only that the accused men were 'probably guilty'. As well, the jury was not told that 'proof beyond a reasonable doubt' is a special concept with a specific meaning in criminal law. Further, there is also a risk that the words used by the trial judge to describe 'reasonable doubt' did not convey to the jurors that they are to remain objective in determining whether the evidence amounts to proof beyond a reasonable doubt. On an ancillary point, the charge did not warn the jury that the burden of proof never shifts from the Crown. Further, while counsel's errors can be corrected by the trial judge in his charge, submissions by counsel cannot remedy a defective charge.
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> The charge, when discussing how to deal with conflicting evidence, suggested that the jury had to resolve the factual question of what happened and may have left the jury with the impression that it had to choose between the two versions of events. The trial judge should have focussed the jury's attention on a third alternative given in W(.D.) -- that the accused men could be acquitted even if their evidence was not believed but a reasonable doubt remained as to their guilt. The jury as well should have been warned not to convict automatically if it found the testimony of the complainant was more credible than that of the accused men. There was some risk that the jury misapprehended the requirement of proof beyond a reasonable doubt in relation to the two irreconcilable versions of events. The admonition to consider 'all of the evidence' does not correct this failing."

18. It seems to the members of this Court that the net issue in the appeal is this: is there a concern that if the charge is read as a whole, it would indicate that there was a risk that if the jury rejected the appellant's version of events, it would regard itself as obliged to convict? Is there, as the appellant contends, such a risk arising from the emphasis placed on there being only two versions of events to choose from?

19. It is the Court's view that the charge, when read as a whole, does not give rise to any such concern. The trial judge repeatedly made clear that there was no obligation on the defence to prove anything; that a verdict of guilty could be returned only if the jury was satisfied beyond reasonable doubt as to the guilt of the accused; and that the jury could only be satisfied if they were prepared to accept the evidence of the complainant and rely on that evidence. It was also made clear that there was no question of having to accept the evidence of the accused; rather, the issue was whether, at a minimum, it was reasonably possible that the appellant's account of the events might be correct, or it was reasonably possible that the complainant's account was fabricated or the product of alcoholic intervention.

The Sentence

20. The sentence hearing took place on 14th October and sentence was pronounced on 13th November. In the course of the sentence hearing, a victim impact statement was provided by the complainant. The statement was a particularly powerful one and, as was referred to by the judge in the course of his sentencing remarks, it is clear that the complainant suffered and continues to suffer enormously as a result of the actions of the appellant. The statement referred to the complainant's attempts to take her own life. The judge observed that he had no doubt that the effect of the molestation will continue to have an adverse effect on the complainant for years to come and this Court has no reason to disagree with that assessment.

21. So far as the then accused now appellant is concerned, he was 41 years of age at the time of the sentence hearing. He had ten previous convictions recorded, none of which were of specific relevance in the context of serious sexual offending. For the most part, the offences are in the nature of public order or minor assaults suggestive of difficulties with alcohol. The Court heard that the appellant had been in receipt of Social Welfare for a significant period of time, but that he had some involvement with his brother in the business of buying and selling second-hand cars and transporting them from England.

22. The plea in mitigation, while acknowledging the seriousness of the offences for which the appellant was convicted, made the point that it was a one-off incident, and that prior to this offence his conduct vis a vis the complainant and her siblings was not a cause of concern, but rather quite the contrary. As the children were fostered in his home, he would have had interaction with social workers and all of this was very positive.

23. In the course of his sentencing remarks, the judge referred to the fact that the offending in question had many aggravating features, identifying the fact that the accused was responsible for the complainant's safety and wellbeing and that she looked up to him. Accordingly, there was a gross breach of trust. The attack was committed in her home. The judge saw it as the culmination of a planned series of actions which were carried out with a view to sexual defilement. The judge referred to the accused inveigling the complainant to stay the night with him when she should have been in her grandmother's house; the fact that he brought in alcohol and produced vodka; and that he then fed alcohol to the complainant and her friend and encouraged them to engage in drinking competitions and to drink beer through straws with a view to getting them drunk. The accused then inveigled the friend to go to bed, and so got her out of the way. The judge observed that the sex acts were the stuff of pornography; that they were violent and degrading and were perpetrated in pursuit of sexual gratification. He said that the accused had thought about these sex acts in advance and had decided that he was not going to be put off by refusal or resistance or by the complainant pretending that she was asleep.

24. The trial judge then identified a figure of 14 years imprisonment as the appropriate headline sentence for both the offence of rape (count 1) and the s. 4 oral rape (count 2). For the sexual assault (count 4), the trial judge identified six years imprisonment as the appropriate headline sentence. He felt it was difficult to identify anything of significant mitigating effect in the case. The most that could be said on behalf of the appellant was that he did not have any recent or serious convictions, nor did he have any previous record of sexual convictions. The trial judge felt, taking everything into account, that the appropriate reduction from each headline sentence for counts 1 and 2 (rape and s. 4 oral rape) should be two years and that a one year reduction should apply to count 4 (sexual assault).

25. He then directly addressed the question of whether to suspend any part of the sentence and said that he saw no basis for the imposition of a part-suspended sentence. There was no indication of any remorse nor was there a willingness to engage with activities which might address the offending.

26. It must be said that the judge's sentencing remarks were very detailed and comprehensive and, subject to one observation which causes concern, are a model of their kind.

27. In the course of written and oral submissions on this appeal, the appellant has focused on the identification of 14 years as the headline sentence and has submitted that this was excessive and out of line with comparable cases. In this regard, the appellant made reference to the decision of the Supreme Court in the case of DPP v. F.E. [2019] IESC 85, where Charleton J. engaged in a very comprehensive review of sentences that had been imposed for sexual offences. The appellant submits that this was not a case where the headline sentence should have fallen within the 10 to 15-year range; moreover, it is

submitted that it is certainly not a case which should have seen a headline sentence fall at the upper end of that range.

Discussion & Conclusion

28. The Court's view is that this was an offence of exceptional gravity. The breach of trust was an exceptionally grave one. In the course of oral argument, counsel on behalf of the respondent referred to an "explosive breach of trust" and it seems to the Court that this phrase was well chosen. Counsel for the appellant has made the point that prior to this incident, the appellant had been a very positive force in the complainant's life. Indeed, this is evident from the complainant's victim impact statement where she referred to the fact that she had always envisaged the accused leading her up the aisle on her wedding day. However, the fact that the appellant was a such positive influence and that he was someone in whom the complainant reposed trust is very much a double-edged sword. It is precisely because trust was reposed that the breach was so grave and so 'explosive', to use the word of counsel.

29. The Court acknowledges that the headline sentence identified was at the upper end of spectrum. However, there were factors present, specifically, the extent of the breach of trust; the circumstances of the offending; and the extraordinarily grave impact that it had on the complainant, something that was entirely foreseeable; that, were it not for one factor, the Court would have been very slow indeed to interfere.

30. The one matter that does give the Court cause to pause and consider interfering with sentence was an observation made by the trial judge in the course of his sentencing remarks when he commented: "I must sentence [RM] with regard to any remission which he may receive on that sentence while in the prison system and I am doing so".

31. The remark in question was properly and specifically brought to our attention by counsel on behalf of the Director. The remark is a surprising one to the extent that we found ourselves wondering whether the transcript might be in error and whether the word 'not' had been left out; however, the indications from counsel were that it was not. The observation in question does not accord with the generally accepted practice. The following comments, helpfully outlined at para. 5.16 of O'Malley's textbook 'Sentencing Law and Practice' (3rd Ed. Round Hall 2016), reflect the generally understood approach:

> "Virtually all offenders sentenced to imprisonment are released before the expiration of the sentence imposed by the court. At a minimum they will usually qualify for standard remission, currently one-quarter of the sentence but potentially one-third in certain cases, and they may well be granted temporary release before the unremitted portion of the sentence is fully served. However, these are matters which a court should not take into account when deciding on the appropriate length

of a custodial sentence. Sentence selection is exclusively a judicial function; sentence implementation is an executive function." (footnotes omitted)

32. Having very properly drawn the Court's attention to the comment made by the trial judge, counsel invited us to consider to what extent the remark fed into the sentencing process and whether it requires an intervention if the sentence was not otherwise regarded as excessive. We have given careful consideration to that question. It seems to us that the observation on the part of the sentencing judge may well give rise to an understanding on the part of those who heard it, including the appellant, that a sentence was being imposed which was longer than may otherwise have been the case because of an expectation that the appellant would eventually benefit from remission or early release.

33. A further indication that the judge was focused on the date of eventual release can be found in the section of the sentencing remarks that addresses the question of post-release supervision, which provides: "he will still be under 50 at his likely release date and I have to deal with that". In that regard, it should be noted that the observation by the trial judge of the requirement to sentence with regard to any remission which the appellant might receive while in the prison system, came immediately before the section of the sentencing remarks that addressed post-release supervision.

34. It does seem to us that the appellant might be left with a legitimate sense of grievance if he felt that he had received a sentence longer than would otherwise have been imposed because the judge felt it proper to take into account the likelihood of remission. Our concerns are heightened by the fact that this issue has arisen in a case where, on any view, the headline sentence imposed was very much at the upper end of the available range.

35. In the circumstances, we believe it is necessary to conclude that an error occurred which requires intervention on our part. The Court will, therefore, quash the sentence handed down in the Central Criminal Court and proceed to resentence.

36. However, in resentencing, we obviously have regard to our assessment of the situation as being one that rests at the upper end of seriousness, and our view that it was clearly a case that called for a headline sentence falling in the 10 to 15-year range identified in F.E. In our view, a headline sentence of 12 and a half years could not, under any circumstances, be regarded as excessive, and so, that is what the Court will identify as the headline sentence. As the trial judge felt it proper to mitigate the headline sentence by two years, we will do likewise; therefore, the sentence to be imposed will be one of 10 and a half years imprisonment. In addition, we will provide for post-release supervision on the same terms as those set out by the sentencing judge in the Central Criminal Court.