THE COURT OF APPEAL

Record Number: 114/17

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

LEO HICKEY

APPELLANT

JUDGMENT of the Court delivered *(ex tempore)* on the 15th day of December 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. The appellant was convicted of eight counts of sexual assault in 2017.

Background

2. The appellant taught the complainant when he was aged between nine and ten years old. The assaults took place on dates between November 1991 and June 1992. The offences related to the touching of the complainant's private parts in several locations in the school including the classroom and the bathrooms. The complainant gave evidence that the incidents in the classroom occurred on approximately 20/25 occasions and on approximately 10 occasions in the bathrooms. The bathroom incidents included compelling the complainant to touch the appellant's penis. The complainant described an incident in the hallway and incidents proximate to the sports pitches. The complainant made a complaint to Gardaí in 2015.

Grounds of appeal

3. In his notice of appeal the appellant puts forward five grounds. However, in written submissions and confirmed in oral hearing, the appellant proposes to rely upon Grounds 1, 3 and 5. Whilst the grounds set out in the notice of appeal are more detailed, in essence the grounds concern:-

   (1) That the verdict of the jury was perverse and unjust and was contrary to the preponderance of the evidence adduced during the trial.

   (3) That the trial judge erred in law in failing to accede to the defence application to direct acquittals on the close of the prosecution case by reason of the inadequacy

or insufficiency of evidence adduced by the prosecution so that the evidence as it stood was such that no reasonable jury could convict.

(5) That the trial judge erred in that he failed and/or refused to adequately summarise the defence case to the jury.

Submissions of the parties

Grounds 1 and 3

Submissions of the appellant

4. The appellant says that while the complainant referred to 26 instances of sexual assault only three incidents of sexual assault were described with any detail.

5. The appellant refers to *The People (DPP) v. Egan* [1989] IR 681 where O'Flaherty J. stated that an appellate court would be entitled to intervene in circumstances where "tenuous" evidence was left to the jury and the jury acted upon that evidence.

6. The setting aside of a verdict on the ground of perversity is clearly an exceptional measure. In *The People (DPP) v. Alchimionek* [2019] IECA 49 Birmingham P. considered the approach to be taken by appellate courts in considering an argument that a jury verdict is against the weight of the evidence:-

> "As has been made clear in cases such as DPP v. Tomkins [2012] IECCA 82 and DPP v. Nadwodny [2015] IECA 307, a decision to quash a verdict because it is perverse is a very exceptional one. This reflects the primacy of the jury in our system of criminal justice. Ordinarily, it is not for appellate courts to substitute their own view of the evidence for that of the jury. A further practical reason why such situations are rare and exceptional is that in any given case where the state of the evidence is such that a conviction would be perverse or would give rise to a miscarriage of justice, one would expect to see an application to the trial Judge to withdraw the case from the jury. If, in such a case, the issue is in fact considered by the jury, then usually, it will be because a Judge, having heard the matter argued, has come to the view that it is a case where a properly charged jury could properly return a verdict of guilty."

7. The appellant accepts that an appellate court may also take account of the fact that witness credibility is a quintessential jury question and a jury is capable of resolving the significance of inconsistencies. However the appellant places reliance on the recent case of *Pell v. The Queen* [2020] HCA 12, where the High Court of Australia decided that the appellate court, in determining whether a jury verdict is unreasonable, should examine whether the jury, acting rationally, in the light of the evidence ought to have entertained a reasonable doubt as to proof of guilt.

8. It is said that the three incidences described in detail concerned an incident in the bathroom, on a lane between the sports pitches and on the school corridor. Regarding the bathroom incident, it is said that the complainant stated that he was asked to bring a note to another teacher, the appellant met him on the way back and brought him into the

toilet where he proceeded to assault him. The complainant described this happening several times. The defence contended that these incidents would have been observed by resource teachers who had classrooms at either end of the school corridor where the appellant had his class. Furthermore, the appellant denied that he ever sent pupils with notes to other teachers.

9. In the second instance, the complainant described how after hurling training the appellant touched him as he was carrying hurls. The complainant later described the incident as the appellant *went* to touch him, the complainant dropped the hurls and ran back to the classroom as the appellant blew his whistle. The appellant points to the discrepancy between the two accounts and suggests that a sexual assault never occurred.

10. In the third instance, the complainant described one occasion on which the appellant placed a tin whistle down his own pants and once he retrieved it, made the complainant play it. Again, the appellant points to the arguments of the defence that this incident would have been in view of the resource teachers and the classroom as there were clear glass windows in place.

11. The appellant further notes that there were no specific dates or times given by the complainant and in fact, he was mistaken as to his age when he first went to the Gardaí.

12. As such, it is submitted that the Court should adopt the reasoning in *Pell* so as to consider whether in assessing the evidence it is reasonably possible that the complainant's account was not correct, such that there is a reasonable doubt as to the applicant's guilt.

13. Ground 3 of the notice of appeal concerns an application to direct an acquittal on the conclusion of the respondent's case. The ground is particularised in that it is contended that the evidence of the complainant was vague and indistinct and that the evidence did not accord with the counts on the indictment.

Submissions of the respondent

14. In respect of Ground 1, the respondent notes that it is clear from the jurisprudence that there is a very high threshold to meet in order for a verdict to be deemed perverse. The Court must look at all the evidence which was before the jury. In *The People (DPP) v. M* [2015] IECA 65 the Court looked at perversity as follows:-

> "It appears to be the case that the verdict is being characterised as perverse simply because the appellant disagrees with the trial judge's decision to allow the prosecution case to go to the jury. The fact that he disagrees with that decision is neither here nor there. To secure a finding of perversity he would have to be in a position to persuade this Court that no jury, properly directed, could have returned a guilty verdict on the evidence in this case."

15. The respondent submits that the appellant is under a misconception that a verdict could be perverse because the trial judge allowed inconsistent evidence to go to the jury. Deciding on inconsistencies of fact is within the domain of the jury and should not be interfered with by an appellate court. The unanimous decision of the jury on all counts

simply makes it clear that the jury accepted the complainant's evidence beyond a reasonable doubt.

16. The respondent submits that there was ample evidence adduced at trial referable to each count on the indictment to allow the case to go to the jury. In his direct examination the complainant described where the assaults took place and how they occurred. Before the complainant's cross-examination an application was made by counsel for the defence seeking to have the case withdrawn from the jury. The trial judge refused this application, stating that there was ample evidence to go before the jury.

17. Furthermore, it was made clear to the jury in the judge's charge that they were to consider each count on the indictment separately. In respect of the period of deliberation, the respondent submits that there is no time limit set on a jury's deliberation, save when they can be directed on returning a majority verdict.

18. In terms of Ground 3 and the trial judge's failure to accede to the defence application of no case to answer, the respondent refers to the ruling on the trial judge on this application as follows:-

> "In my view, there is sufficient evidence on all these counts, both in relation to clarity, time, reference to time, reference to place. There is nothing surprising, it is all within the one school year. There are various incidents, one described on the pitch, an incident or incidents in this classroom and incidents in the toilets. All definable, all set out, incidents of touching, quite clear, and it's a matter for the jury to decide as to whether or not it did happen."

19. The respondent argues that it is well-settled law that it is for the jury to assess the prosecution's evidence even if it contains weaknesses or inconsistencies. As Edwards J. clarified in *The People (DPP) v. M* [2015] IECA 65:-

> "At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.
>
> On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it."

20. The respondent submits that the evidence adduced by the prosecution was neither inadequate nor insufficient where the complainant gave evidence of numerous incidents of

sexual assault within the time period complained of, which accorded with the counts on the indictment.

Discussion and conclusion – Grounds 1 and 3

21. On the conclusion of the prosecution evidence, an application was made for directed acquittals which application was refused. The defence then called evidence, including the appellant and an engineer. The appellant denied touching the complainant and stated that any teacher bringing a child to the toilets would have been observed by the learning support teachers as would any untoward conduct in the corridor. The question of requesting the complainant to take notes to other teachers was also denied.

22. Concerning Ground 1 it is said on the part of the appellant that the verdict was perverse and contrary to the preponderance of the evidence. In particular it is contended that there was a paucity of evidence and an absence of detail. Moreover, it is said there were inconsistencies in the complainant's testimony and conflicts vis-à-vis the respondent and appellant evidence. Thus it is argued that this Court ought to quash the verdicts.

23. Insofar as this ground of appeal is concerned, it is well-settled that quashing a verdict on grounds of perversity is an exceptional measure. As stated by Birmingham P. in the recent decision of this Court in *The People (DPP) v. Alchimionek* [2019] IECA 49 , the decision to set aside a verdict on such grounds is 'a very exceptional one'.

24. An appellate court will be most reluctant to quash a verdict where such argument is founded on the credibility of a witness. This is primarily the position in the present case. Argument is made that the complainant was inconsistent and vague in his evidence. Such issues, if present, are manifestly for a jury's determination. It is obviously not the position that simply because an appellant disagrees with the verdict or because a trial judge refuses an application for a directed acquittal, that a verdict is perverse.

25. In the present case the evidence given by the complainant disclosed the commencement of the abuse on the part of the appellant and its progression. He stated where the incidents of abuse occurred, the nature of such abuse and that it occurred on a regular basis during a particular school year. In our view, the complainant was cogent and resolute in his evidence.

26. Insofar as it is argued that there were inconsistencies in the evidence, any such inconsistencies are quintessentially for the jury to resolve. The inconsistency relied upon in submission, being the incident proximate to the sports pitches, could not be said to be one which would render the verdict unsafe.

27. The evidence disclosed that the appellant took the opportunity when it presented itself to abuse the complainant, whether this was in the bathrooms, the hallway, proximate to the sports pitches or in the classroom. Insofar as it is argued that there was a paucity of evidence, we do not agree. The fact that the complainant's evidence was succinct does not deprive it of force.

28. Issue is taken with the duration of the jury's deliberations before returning verdicts of guilty. It is said that the time taken by the jury of 1 hour and 15 minutes suggests that the jury convicted the appellant on counts upon which there was insufficient evidence.

29. This suggestion is of course entirely speculative. The manner in which a jury reach its verdict is entirely within the province of a jury. The jury were properly advised by the judge as to the standard of proof and that each count should be considered separately.

30. Moreover, it must be recalled that the entire trial concluded within a day. The fact that the jury requested the judge to read his note of the evidence demonstrates the care which the jury took in their determination. It must also be said at this point that the trial judge's note of the evidence was most comprehensive.

31. Finally, the fact that the defence evidence conflicted with the prosecution evidence is manifestly one for the jury's assessment, and it cannot be said that such conflict renders a verdict perverse.

32. There was evidence before the jury on which it was properly open to them to convict the appellant and the jury did so. In the view of this Court, this case does not even approach the type of exceptional case where this Court would see fit to set aside a verdict.

33. Accordingly, this ground fails.

Ground 3

34. Insofar as ground 3 is concerned, much of the aforementioned applies with equal force to this ground. By way of background the application made was moved on the basis that it was unsafe to permit the jury to consider the evidence, that there was an absence of specificity concerning dates and times, that the allegations were vague.

35. The ruling of the trial judge is set out above.

36. In the decision of this Court in *The People (DPP) v. M* [2015] IECA 65, Edwards J. clarified the position concerning an application to withdraw a case from the jury where reliance is placed on *R v. Galbraith* and stated in the now well-known passage:-

> "At the outset the Court wishes to address the misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it."

37. While the trial judge's ruling was succinct, this was a short trial and his ruling addressed the issues raised. He quite properly referred to the fact that there was sufficient evidence in relation to all counts, that the events related to a school year, that there were various incidents described, the location and nature of the incidents and the fact that the matter was for the jury to consider. The evidence adduced by the prosecution was properly before the jury.

38. We find no error in the trial judge's decision to refuse to direct acquittals. The judge's decision on the application for a direction was a legitimate exercise of his discretion.

39. This ground fails.

Ground 5

40. Following requisitions, the trial judge, on application from counsel for the defence, recharged the jury as follows on the defence case:-

> "Now, Madam Foreman, ladies and gentlemen, in case you missed it, ever and always throughout this case, the accused man has denied that he ever touched this boy. He has denied that he ever assaulted him, and you have heard his evidence just recently past about the specifics, even about passing the notes, that he doesn't believe that even on that factually, that that happened in the school at the time. And that is an important thing that you understand that, like, this man has gone into the witness box, as I have said. He has denied specifically and that is his defence which must be considered in the same calm and considered way that you consider all the other evidence, as I have said to you. Thanks."

Submissions of the appellant

41. The appellant submits that the trial judge did not adequately put the defence case to the jury even after requisitions and that it was essential that the judge highlight the salient issues raised in the defence. Moreover, it is said that the judge should have reminded the jury of the defence contention that to commit the offences in the school building without being observed by other staff members and pupils was implausible.

Submissions of the respondent

42. The respondent submits that the trial judge clearly recited the defence case to the jury following requisitions. Furthermore, the respondent draws attention to the fact that the jury requested that the trial judge read his note of the evidence. This note included a recital of the appellant's evidence. The respondent argues that the salient issues raised in the defence at trial were sufficiently summarised by the judge over four pages of the transcript to enable the Jury to deliberate on the facts.

43. In *The People (DPP) v. Piotrowski* [2014] IECCA 17 the following was said:-

> " [T]here is a duty on a trial judge to fairly put both the prosecution and the defence case to the jury. In so doing, the trial judge is not confined to any formulaic rules but rather has an obligation to ensure that the jury are assisted in understanding the substance of the case."

44. The question is one of balance and fairness. In the present case, the trial judge instructed the jury in the following terms:-

> "This is a case in which there are fundamental conflicts in the evidence. There is confusion, memory deviation. Only you can resolve that. It is a case that you have heard all the evidence today over a short period of time and, given the various, as it were, fluctuations, flows, confusions -- I would normally have a note, but in this case I am not actually sure that my note would do justice to the flow of the evidence so I don't propose to read out the note. I have it if you want anything specific, but you heard all the evidence; it wasn't particularly long. You saw how people answered. You know what the complaint is. You know the job that is before you and it is up to you to evaluate the evidence against the background of knowing where the onus of proving the case is, what the State have to do, what you have to do in order to convict; if you have a reasonable doubt, what you must do."

45. There followed a requisition on behalf of the appellant that it was necessary for the judge to put the defence case. The following exchange took place:-

> "Judge: In other words, that at all stages you have denied you did it?
>
> Mr Devlin: Yes.
>
> Judge: Very well. Bring them out. I have no difficulty with that."

Discussion and Conclusion

46. Firstly, we note that the trial judge did not summarise the evidence in the trial, presumably as the evidence itself had taken a short time. However, once asked by counsel on behalf of the appellant to put the defence case to the jury, the trial judge summarised the salient features of the defence case, he reminded the jury that the appellant had given evidence and that that evidence should be considered by them in the same calm and considered way as they considered all the evidence in the case.

47. The defence evidence commenced at 14.22 on the date in question commencing with the evidence of the engineer. This witness produced photographs of the location in question and there then followed the evidence of the appellant. Thus, the concluding evidence in the trial was that of the appellant. Speeches and charge followed immediately thereafter and the jury retired at 15.59.

48. The judge then acceded to the defence requisition and there then followed the question by the jury in terms of the request for the judge to read from his note, which he had mentioned in the course of his charge. This, he did and as we have observed, the note was, in our view, a comprehensive one which of course incorporated the cross-examination of the complainant and the appellant's evidence.

49. This case is very much removed from one where a judge fails to summarise the defence case in a fair and balanced manner. We take quite the contrary view. The judge not only acceded to the defence requisition and concisely stated the defence case, but on request

read from his note of the evidence adduced in this short trial. The charge was entirely balanced and fair.

50. In our view there is no basis to believe the appellant's trial was unsatisfactory, or that his conviction is unsafe.

51. Accordingly, the appeal is dismissed.