

[UNAPPROVED]



THE COURT OF APPEAL

Court of Appeal Record No. [11/2019]

Neutral Citation No: [2021] IECA 347

Edwards J.

McCarthy J.

Keane J.

BETWEEN/

THE PEOPLE AT THE SUIT OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

S.Q.

APPELLANT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 21st day of December 2021

1. S.Q., the appellant herein, was on the 22nd of October 2018 convicted of the rape of one K.S. on the 20th of January 2016. Evidence pertaining to sentence was heard on the 20th of December 2018: a relatively brief summary of the facts was given in evidence by a Sergeant Guerin and victim impact evidence was given by K.S. She had prepared a statement in that regard (in Polish) and a translation thereof was served on the appellant and furnished to the court. Whilst it appears that she gave her evidence in Polish, on perusal of the transcript it is the English translation thereof (an interpreter was present) which appears therein. A plea

in mitigation was heard on the 14th of January 2019 and sentence was imposed on the 21st of January. That sentence was one of six years' imprisonment backdated to the 22nd of October 2018.

2. At one time the complainant and the appellant lived at respective addresses comparatively close to each other and accordingly, the complainant knew the appellant to see for about a year and a half. In any event, in January 2016 the complainant moved to an apartment in the premises in which the offence occurred, and to where the appellant had also moved. Their initial introduction there occurred when she went to a randomly chosen apartment in the building (which turned out to be his) seeking information as to the Wi-Fi code for the building – it appears that it was mere coincidence that it was to the appellant's apartment. Further to this, they met on at least three further occasions either in the hallway of the building or in a shopping centre in which the complainant worked. On a number of occasions, he asked her to meet for coffee, invitations which she declined save that made on the day of the offence. She gave him her phone number that day as she had agreed to go to his apartment and somewhat to her surprise, she was informed that the appellant was to entertain her to dinner. She arrived at around 7pm and they had a number of drinks.

3. At a certain stage during the course of the evening, after they had eaten, she went to the toilet three times elsewhere in the building and on the fourth occasion, immediately prior to the offence, she used the ensuite bathroom in the appellant's bedroom. At some point during the evening she felt unwell. She attributed this to one of the drinks which she had had and sent a text to her employer to the effect that she would not be in position to attend for work the following day.

4. The appellant waited in his bedroom for her whilst she went to the toilet there and, on her evidence, her next memory was "falling off" (as she put it) onto a bed and, thereafter, she had a further memory of lying on the bed and suffering pain in the vagina. She found

that she was naked, and that the appellant was on top of her. He was having intercourse with her, she told him to stop, which he did not at first do and upon repeating that demand he then did so. During the course of the incident he, in substance, told her to be quiet (“shhh”) and put his hand over her mouth at one point.

5. When the incident ended, she did not know where her clothes were, and he gave them to her. She then left the apartment and returned to her own. The complainant gave her mobile phone to the Gardaí, and it is not disputed that there were numerous communications by text between the parties in the afternoon and early evening of the of the 20th, after the event and on the next day. She found that she could not locate a necklace which she had been wearing on the evening in question and she communicated with the appellant since she thought it might have been in his apartment – as indeed it was. It was returned to her in a state of disrepair.

6. She visited a Garda Station on the evening of the following day and initially made a complaint to a Garda Agnew. She arrived at the Garda Station at approximately 9pm. She was then assisted by a Garda Brandley who took her to a Sexual Assault Treatment Unit where she was seen by a Dr Derham. He gave evidence to the effect *inter alia* that when the complainant arrived, she was in the company of Gardaí Agnew and Brandley and a representative of the Rape Crisis Centre. Present during the examination itself was Dr Derham’s nurse, Garda Brandley, and he also said a Rape Crisis Centre representative was present. On an examination of the genital area, amongst Dr Derham’s findings was evidence of trauma consistent with recent vaginal penetration in the vaginal vestibule or entrance. The history given to him by the appellant extended to a statement by her, as he noted it, that the appellant had “*put his right hand over her face and pushed her down*”; she had already given evidence herself about that event. He observed bruising on the inner aspect of the upper lip

consistent with the history of pressure against the face, attributed by him to the pushing of the lip against the teeth.

7. The appellant was interviewed by the Gardaí. The telephone messages were put to him and he advanced explanations in respect of them. It is legitimate to summarise his evidence as being to the effect that consensual sexual intercourse took place between him and the complainant on the evening in question, she having been his guest for dinner and after a number of drinks intercourse occurred.

8. No evidence was adduced of any so-called recent complaint of the offence made by the complainant to show consistency. There is no suggestion in the evidence nor was there material in the book of evidence or any material disclosed to suggest that the complainant was in company when she arrived at the Garda Station on the 21st of October or had spoken to anybody prior to that time about the offence. However, subsequent to the verdict and in the course of her evidence as to the effect of the offence upon her, on the 20th of December 2018, she gave *inter alia* the following evidence (and we think that it is appropriate to quote the relevant passage) viz: -

“Let us go back to the 21st of January 2016 when I told my workmate [R] about everything. Without further ado, he told me to be in front of this house in several minutes and that he would come back to get me, together with his girlfriend, and will tell them everything in peace and quiet. At about 9pm we were all in the Main Street [Garda Station]. Paul [Garda Agnew] opened the door for me and showed me the way to the interrogation room. It was a rather small room with a small desk in the middle of three chairs on its opposite side. R’s girlfriend was with me all the time. She was in the waiting room.

About midnight, my friends went home whereas I and two officers went to SATU. I still remember the fear that accompanied me on my way to the place and the feeling

of uncertainty, what would have happened and what the examination would look like. At first, I was interviewed about what had happened. I was very surprised that I had to talk about everything again, the sense of shame and humiliation accompanying me with every single word I offered relating to what happened.”

9. By virtue of this evidence, for the first time, it became known to counsel (on both sides) and the appellant, that the complainant had told third parties about what had occurred, apparently in detail, at some time on the 21st of October. This was before she was taken by those two friends to the Garda Station. This raised a significant issue: it might well be the case that one or both of those individuals would have made statements to the Gardaí as to what they had been told and anything they said might well have been admissible as evidence of a recent complaint to show the complainant’s consistency or, indeed, in certain circumstances, to prove inconsistency; the latter would arise in the event that, in fact, inconsistencies existed and she denied their version (if different from hers) of what she had said – in other words, such persons could be called to prove her inconsistency but not otherwise. In practice, however, it would be rare for the prosecution, were there any significant element of consistency, not to call such witness or witnesses themselves in chief. It is a question of speculation whether or not anything which might have been said by the complainant to those persons or anything they might have said, ultimately at trial, would have been of benefit to one side or the other i.e. consistent or the converse to a greater or lesser degree.

10. At a point which is unspecified but which, in any event, was not later than the 10th of June 2019, the appellant’s now solicitors Messrs. McGuill became aware of the engagement of the complainant’s friends. They entered into correspondence with the Chief Prosecution Solicitor for the purpose of ascertaining whether or not that which they understood to be the case having regard to what was said by the complainant on the 20th of

December was in fact correct. Further correspondence ensued on that and other aspects of the case. In her letter of the 2nd of October 2019, the Chief Prosecution Solicitor informed Mr. McGuill that: -

“In the statement of Garda Agnew, he states that the girlfriend was present in the interview room for the taking of the statement [of complaint]. R [who had been described by the appellant as her friend] did not sit in attendance (sic) for the statement and no notes were taken from R by Garda Agnew.”

11. It appears that this was incorrect. There was no reference in the statement to such presence. The correct position was set out by letter from the Chief Prosecution Solicitor dated the 5th of October 2020, as follows: -

“No statement was obtained from R or his girlfriend. At the time of reporting the incident, Ms. K S called into [the] Garda Station and spoke with Garda Paul Agnew and stated she wished to make a statement in relation to the incident.

Ms. S was accompanied by a male [R] and a female [R’s girlfriend]. At the time of Ms. S’s speaking with Garda Agnew, R took a seat to the back of the public office and did not converse in any way.

R’s girlfriend accompanied Ms. S to the interview room on the night and sat with her she made her statement. After Ms. Sa made her statement R’s girlfriend left with R and Gardai Agnew and Brandley accompanied Ms. S to the SATU.

No statements were obtained from R and his girlfriend and these statements were, it would appear, omitted in error throughout the investigation.”

12. While a number of grounds of appeal were pleaded, the only one which was pursued was that hinging on the fact that the appellant or his then lawyers were not aware of, and could not have been aware of, the fact of the engagement of the gentleman identified as R. and his girlfriend.

13. Whilst a number of grounds of appeal are pleaded that ground which was pursued is comprehensive. It contains in its body the relevant portion of the victim impact evidence of the complainant, as set out above, and thereafter succinctly summarises the case made on this appeal as follows: -

“The above description [that is that given in the course of the victim impact evidence] in the Victim Impact Statement discloses a recent complaint made by the complainant the day following the alleged attack. No statement was made available to the defence from the persons to whom the complaint was first made. Their presence in the Garda Station and the presence of the unnamed girlfriend in the course of the interview wherein the complainant made a statement of complaint was not recorded by investigating Gardaí or, if it was recorded, it was not disclosed to the defence. The failure of the prosecution to disclose the presence of potential recent complaint witnesses, whose evidence would go to the initial recent complaint and the demeanour of the complainant following the alleged rape, to the defence, either in the Book of Evidence or by way of disclosure, eliminated a potentially crucial line of defence. The prosecution’s failure to obtain [a] witness statement from witnesses who were potentially relevant to the whole of the case, and/or the prosecution’s failure to disclose the existence of such witnesses to the defence resulted in a trial not conducted in due course of law. The trial was thus unsatisfactory and the verdict unsafe.”

14. In the body of the outline written submissions of the appellant (at para. 4) it is contended that: -

*“Gardaí failed to seek out and preserve evidence relevant to the alleged offence contrary to the duty of prosecuting Gardaí as identified in *Braddish v DPP* [2001] 3 IR 127. The prosecution further failed to disclose such relevant evidence which was*

within the knowledge of prosecuting Gardaí, thus depriving the appellant of the opportunity to test the consistency and credibility of the complainant.”

15. Submissions were made also about the doctrine of recent complaint and the importance, accordingly, of any potential evidence of the two persons, the fact of whose engagement was unknown to the defence and it was further contended that where: -

- there was a failure to record the presence of witnesses and to obtain statements from such witnesses who discussed the alleged commission of the offence with the complainant prior to her attending at the Garda Station where:
 - such witnesses were available to investigating Gardaí;
 - such witnesses are relevant to the consistency and credibility of the complainant;
 - the remaining evidence in the case is the complainant’s word against that of the appellant;
 - the conviction of the appellant in such circumstances is unsafe and unsatisfactory and should be quashed.

16. We might note that at this stage it is not correct to say that the “*remaining evidence in the case is the complainant’s word against that of the appellant*”; there is medical evidence of injury and the tenor of the communications by text by the appellant to the complainant, and especially those on the day after the offence, could be seen by a jury as admissions. We need not, however, in the present context elaborate further, but we think it right that this erroneous contention be identified.

17. Reference has been made by both parties to the law pertaining to the receipt in evidence of a recent complaint in sexual offence cases. The prosecutor has suggested in her submissions that what was said in the statement of the complainant to Garda Agnew could

itself have constituted “*a recent complaint*”; this was not sought to be done at the trial for whatever reason and we do not consider the point of any relevance on this appeal. The prosecutor further relies upon the fact that, in cross-examination, it was not sought on behalf of the appellant to ascertain from the complainant whether or not she had discussed what she says occurred with anyone else apart altogether from the fact what might have been said by the persons in question (as we have said above) is speculative.

18. Both parties have referred to *Braddish*. The present state of the law as to the obligations of the Gardaí and the consequences of any breach are elaborated upon on behalf of the respondent to perhaps a greater extent than on behalf of the appellant. In a given case where potentially relevant evidence or potentially relevant information is not known or unavailable it will not, per se, matter whether or not the prosecution have discharged their investigative role in full – it does not necessarily follow from that fact that an unfairness or potential unfairness in the trial arises. Equally, such unfairness might arise even if there is no breach of those obligations. It is not the law that a failure to discharge those obligations must, for example, give rise to punishment of the prosecution by, say, stopping a trial under the jurisdiction in *P.O’C v DPP* [2000] 3 IR 87. Nor is it the law that an accused person, when confronted with a breach of obligation or a potential unfairness may merely “sit back” so to speak and do nothing; he must engage with the facts.

19. It would undoubtedly have been open to the appellant to cause the complainant’s friends to be sought out and potentially either ascertain what their evidence might be or, say, seek to depose them if he knew of their existence. It might further have been the case that the defence would have sought to cross-examine the complainant perhaps in some detail as to what she might have said to such persons, the course of events on the day after the offence before she went to the Garda Station at around 9pm (if they had an evidential basis for doing so) and test any evidence of such persons if they were called to give evidence showing

consistency; in the event that the complainant denied prior inconsistent statements to them they could have been called to prove them.

20. The complainant made no mention to the Gardaí of the fact that she had told those who accompanied her to the Garda station anything about what had occurred. In strictness, accordingly, the Gardaí had no reason to suppose that she had done so. It is accordingly debatable as to whether or not they were in breach of their obligations to seek out evidence in failing to approach them and ascertain whether or not they had any engagement and, if so, ask them to make statements, which presumably they would. We think on balance that in strictness the Gardaí ought to have approached such persons with a view to ascertaining any such engagement and thereafter sought statements. We think accordingly that there was a departure from the duty upon them.

21. We then turn to the question of whether or not in accordance with the basic principles in the authorities beginning with *Braddish*, the fact that the Gardaí fell short of what was required could be said to give rise to a real risk of an unfair trial or, a trial having taken place, means that the trial was unfair and hence unsatisfactory?

22. We think that whether or not this is the case must be entirely speculative. We simply do not know what such persons might have said. No effort that we can see has been made to obtain any information about them. There has been no real engagement with the prosecution about their absence or identity. The appellant relies on the bald facts that their existence and what they might say (if they said anything which was admissible) was unknown at the time of the trial. The position would be quite different if there was any rational basis for saying that evidence inconsistent with anything the complainant might be given – it is only if she did not accept inconsistency that they could be called to prove it. Again, this is speculative and, indeed, in more sense than one, because it not only will require one to speculate about what the complainant might say but also, in turn what might be said by them.

Does prejudice arise because the appellant was deprived of the opportunity of making enquiries which might or might not have yielded fruit because he did not know of their existence? Again, whether or not this might have been the case is speculative – the deprivation may have yielded nothing.

23. We are not satisfied, accordingly, that in the absence either of information to the effect that such persons had an engagement in the matter prior to their arrival with the complainant in the Garda station or what, speculatively, they might say, gives rise to any such risk or renders the trial unsatisfactory. This must be a matter of judgement on a case-by-case basis on the facts and we accordingly dismiss this appeal.

24. We therefore dismiss this appeal.