

**UNAPPROVED**

**NO REDACTION NEEDED**



**THE COURT OF APPEAL**

[123/21]

Neutral Citation No: [2022] IECA 111

**The President  
McCarthy J.  
Kennedy J.**

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**PB**

**APPELLANT**

**JUDGMENT of the Court delivered on the 12<sup>th</sup> day of May 2022 by Birmingham P.**

1. On 24<sup>th</sup> May 2021, the appellant was convicted of a single count of sexual assault, and subsequently, on 6<sup>th</sup> July 2021, he was sentenced to a term of three years and four months imprisonment with the final four months of the sentence suspended on terms. He has appealed against both conviction and severity of sentence and this judgment deals with the conviction aspect of the appeal.

**Background**

2. The background to the case is that the complainant is the daughter of the accused. On an occasion between 1<sup>st</sup> January 2017 and 30<sup>th</sup> April 2017, the complainant and her mother went to visit the appellant at his home. The complainant, A, was ten years of age at the time. The three people present – the complainant, her mother, and the appellant – watched

television together for a period. The complainant's mother and the appellant were drinking alcohol. They began to argue. A stage was reached at which all three went upstairs to the appellant's bed. The argument continued. At one point, the complainant's mother left in order to go to a spare room. The prosecution case at trial, based on the account provided by the complainant, was that, after the complainant's mother had left to go to a spare room, at one point, the complainant woke to find the appellant's hand touching her "back and front", and that, as she described it, his finger up her "middle part". The complainant had described her middle part as where "babies come out".

3. In the course of the trial, the defence did not dispute the fact that the father and daughter were in bed together on the occasion in question, and at one stage were alone in bed together. However, the defence maintained that no sexual assault took place. There were two aspects to the defence case. First, there was a challenge to the suggestion that anything untoward had occurred, and secondly, there was a suggestion that if anything had happened, which was denied, that it happened at a time when the accused was asleep. In this regard, the defence focused on the fact that the complainant, when interviewed by specialist Gardaí, had indicated that the accused was asleep at the time of the incident, and she was reported as having essentially said the same thing to her sister, B.

### **Grounds of Appeal**

4. In the course of the appeal, a number of grounds of appeal have been raised. These might be summarised as follows:

- (i) It is said that the judge erred in refusing to direct a verdict of not guilty at the close of the prosecution case. In essence, the argument made is that, on the close of the prosecution case – and there is reference to both what the complainant had to say to specialist Gardaí in the course of interview and what

her sister records her as having said – a fundamental requirement for conviction could not be established, in that there was no proven intentional assault of the complainant.

- (ii) It is said that the trial judge’s charge, including the manner in which she responded to requisitions, was unsatisfactory. There is a specific criticism of the trial judge for what she had to say in relation to corroboration, and specifically, the fact that she told the jury that they did not need corroboration and could convict solely on the evidence of the complainant. There is a further criticism of the trial judge for refusing to give a direction which was sought, to the effect that members of the jury should not feel under pressure to subscribe to a verdict with which they did not agree. Finally, there is criticism of what the judge had to say in relation to the cross-examination of the sister of the complainant.

### **Refusal to Grant a Direction**

5. The application for the direction of not guilty saw the defence focusing on the fact that, by reference to what the complainant had said to specialist Garda interviewers, and was reported by her sister as having said, the jury could not be satisfied beyond reasonable doubt that the accused was awake at the time the incident occurred, assuming for the purpose of this exercise that an incident had in fact occurred. The prosecution drew attention to the fact that, while the complainant could not state whether the accused was awake or asleep, there was evidence that they had a conversation immediately following the incident, and it was said that there was enough there for a reasonable jury to convict. The judge took some time to consider the application. It appears that she read the transcript of the complainant’s interview and also

listened to the recording of the relevant section of the court proceedings. The Court then came back and ruled:

“It is the Court’s case that the inconsistency or the vagueness or the equivocation regarding the matter clearly comes within the *DPP v. M* [[2015] IECA 65 decision] and the difficulties regarding the evidence given in circumstances where the prosecution case, taken at its height, means that this is clearly a matter for the jury to resolve.”

6. An issue to be probed is as to when the conversations between the complainant and her father occurred: were they in bed immediately after the alleged incident, or did they take place the following morning, and therefore at some time remove? The prosecution interprets the evidence as being that there was a conversation of significance in the immediate aftermath of the untoward activity. A detailed and careful reading of the evidence would suggest that this was an interpretation that was open. We will refer to the details of the evidence presently and, for ease of reference, we have included the relevant extracts of the interviews with A as an appendix to this judgment.

7. The prosecution attach very considerable significance to the timing of the conversation, arguing that if it was accepted as having taken place immediately after the incident, that this would fully justify a conclusion that the accused must have been awake, and was in fact awake, immediately beforehand, when the alleged activity was taking place. The Court has some concerns whether this reasoning was justified, and moreover is of the view that it should have been made absolutely clear to the jury that, irrespective of the view they took as to the timing of the conversation, the focus of their attention had to be on whether they were satisfied beyond reasonable doubt that the accused was awake and was not asleep at the actual moment of touching.

### **Application to Recharge the Jury**

8. The judge concluded her charge to the jury on the afternoon of 20<sup>th</sup> May 2021. At that stage, she invited the jury to consider whether they wanted to begin deliberating there and then, or leave the start of their deliberations to the following morning. The jury retired to consider their options, and in their absence, the judge invited counsel to indicate any requisitions that they had. The defence had a number of requisitions. These might be addressed in sequence.

### **Cross-Examination**

9. One requisition was with regard to the question of the evidence of the complainant's sister. The defence invited the judge to highlight the cross-examination of the complainant's sister. In the course of her charge, the judge had dealt with this by saying:

“You will also recall that B gave evidence to say what she said she was told by A in her statement and [Senior Counsel for the defence] has referred you to this and you will have a note of that evidence and you can consider that and you can consider whether that goes to consistency or not.”

10. To put this in context, it is the case that the judge made clear the significance of the question of whether the accused was asleep or not, telling the jury that “a person who is asleep is a person who is incapable of forming an intent.” She specifically told the jury that if they believed “that it could be reasonably true that the accused was asleep and therefore lacked the ability to form an intent,” that he would be entitled to be acquitted, in that they would indeed be obliged to acquit the accused. The judge's response to the requisition was to indicate that she was not proposing to go through every single point that had been raised.

11. It seems to us that this was a short trial, the evidence was not elaborate or complex, and the judge was well-positioned to decide how detailed her review of the evidence needed

to be. While we will be returning to what was said in relation to the evidence, we are not prepared to uphold this ground as a distinct ground of appeal.

### **Corroboration**

12. The judge did not give a corroboration warning as such. However, she did explain what corroboration was, and, in effect, told the jury that there was no corroboration. She observed that this was not unusual in cases of this nature, because, by its nature, sexual activity tends to occur in private and not in public. She then observed (and it is to this aspect that the defence take objection) that, in order to convict the accused, they did not need corroboration and that the jury might rely on the evidence of the complainant alone should they be satisfied of its truth and credibility, and should they have decided, having considered all the evidence in the trial, that the accused had the necessary intent to commit the sexual assault alleged. In response to a requisition, the trial judge pointed out that she had told the jury if they had a lingering or lurking doubt, or felt that they could not make a decision without further information, they should acquit.

13. The Court does not believe that the manner in which the judge dealt with this issue of corroboration was impermissible, and we are not prepared to uphold this ground of appeal, though in a situation where the judge had decided not to give a corroboration warning, it might have been preferable for her to have said nothing about the issue; see *DPP v. Limen* [2021] IESC 8 in that regard.

### **Charge in Relation to the Jury Being Overborne**

14. The appellant contends that the judge fell into error in refusing to give a direction to the jury to the effect that members of the jury should not feel under pressure to subscribe to a verdict with which they did not agree, in the independent exercise of their judgement, in

accordance with the conscience of each member. The appellant says that such a direction was necessitated by other aspects of the charge. Specifically, the appellant draws attention to the following passages:

“You, the jury, are in charge of the findings of fact and the trial of the accused is by his peers, 12 individual judges of fact, and on the issue of fact you alone are the judges. You were selected at random from the community. Use your common sense, your experience and your knowledge of life when deciding on the facts and the evidence. Members of the jury, **you have taken an oath and a true verdict must be given** in accordance with the evidence.” [Emphasis that of the appellant].

...

So, that’s why it is so important that if you put 12 people together in any type of role in life, there will be people who will be confident, there will be people who are used to speaking up, and there will be people who will be reserved by nature and really, you know what, would prefer not to say what it is that they’re thinking. Well, you know, what I will say to you, members of the jury, and to each and every one of you, there is no place for reserve in your jury room and in your deliberations because you 12 are brought together for the very reason that each one of you have different experiences in life and it’s through bringing all those experiences to life and to considering the matters before you, bringing to bear your experiences of life, that this matter will be determined. So, I’m sure that your foreman will ensure that everybody gets an opportunity to speak but also that you put forward a view on a matter even if nobody else has referred to it. If it’s something that occurs to you as being important, it needs to be verbalised and it needs to be considered.

...

**Whether you agree with it or disagree with it, the law has to be applied and I am asking you at this stage, members of the jury, to bring a unanimous verdict.** That means a verdict upon which you are all agreed as to whether the accused is guilty or not guilty. There should be agreement on the fundamental facts in respect of the charge for which you bring in that verdict. I ask you to decide the charge on the basis of a unanimous verdict, having duly considered all of the issues, the facts and the evidence.” [Emphasis that of the appellant]

**15.** By way of requisition, the defence pointed out that, at the beginning and the end of the charge, language had been used which referred to an obligation to return a verdict. The defence sought that the judge would add that nobody should be overborne. The judge was not prepared to do this. It is of note that at one point in the course of the deliberations, at about 4.05pm on the Friday afternoon, the judge specifically referred to the fact that if members of the jury felt that further time would not assist, they were entitled to disagree. The jury’s response to this was to indicate that they wished to continue deliberating until 4.30pm, which they did, and indeed they continued until 5.30pm, at which stage they were given the majority direction, but again, the judge told them of their entitlement to object. Matters were then adjourned to the following Monday, and at 4.01pm, the jury returned with a majority 10:2 verdict of guilty.

**16.** We are not persuaded that there is any substance to this ground. The timetable relating to the jury’s deliberations would indicate that this was a conscientious and careful jury, one which deliberated at length, and one that chose to continue their deliberations late on a Friday afternoon, after being told of the option of breaking for the weekend. Again, they continued to deliberate at length, even after being expressly told on two occasions of their entitlement to disagree. They had lengthy deliberations throughout Monday, and ultimately returned a majority verdict of 10:2. It seems to us that this is what one would expect to see with careful



and conscientious jurors exercising their responsibilities. We see no basis for any suggestion that jurors may have been overborne and we have no hesitation in declining to uphold this ground of appeal.

### **Decision**

**17.** In summary, there is really only one point that causes members of the Court any concern. It is around the question of whether, given the arguable ambiguities on the state of the evidence as to whether the accused was awake or asleep, the jury could have benefited from a more detailed and focused treatment of this issue during the course of the judge's charge. We recognise that the judge made clear to the jury that if they were not satisfied beyond reasonable doubt that the accused was awake and was not asleep, he was entitled to an acquittal. Indeed, the judge also made clear that he was entitled to an acquittal if they were not satisfied beyond reasonable doubt that he had not touched his daughter, thinking that he was touching his daughter's mother.

**18.** However, the issue of awake/asleep had such a central significance in the context of the trial, and given that there was scope for argument as to what the state of the evidence was on this crucial issue, we think that the jury required additional assistance with the evidence on this topic to be marshalled for them, with their attention being drawn specifically to what the evidence had to say on this topic. The fact that this did not happen does leave us in some doubt whether the verdict can be said to be safe.

**19.** In the circumstances, we feel obliged to quash the conviction.

## Appendix

Included below are pertinent extracts from specialist Garda interviews with Ms. A of 30<sup>th</sup> January 2018.

Page 34:

D/Garda Murphy: Tell me all about it.

A: Like what he did?

D/Garda Murphy: Uh-huh.

A: What do you mean?

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

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

D/Garda Murphy: Okay.

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

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A: I think it was in January or February.

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

A: Yeah.

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

A: Um, 2017.

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

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

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

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

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

A: Brightish.

D/Garda Murphy: Okay. Brightish.

A: Yeah.

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

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

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

A: Um, I don't know.

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

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

D/Garda Murphy: Uh-huh.

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

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

A: No.

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

A: A long time.

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

A: Yeah.

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

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

Page 49:

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

A: Yeah.

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

A: Yeah."

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

A: The desk.

D/Garda Murphy: The desk. Okay so. And you said you could see the light coming in.

Is there any reason that you had woken up?

A: Um, yeah.

D/Garda Murphy: Tell me about that?

A: Because I felt my Dad.

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

A: Like what he done to me.

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

A: Down my trousers, back and front.

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

A: Pyjamas.”

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

A: I told him.

D/Garda Murphy: What did you tell him?

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

D/Garda Murphy: What did you tell him?

A: What, what he had done.

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

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

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

A: In the bed.

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

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

D/Garda Murphy: Uh-huh.

A: No.

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

A: Um, like when he woke up.

D/Garda Murphy: Huh?

A: When he woke up or something.

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

A: Um, no. Well not after like.

D/Garda Murphy: After what?

A: Like after what he did like.

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

A: Um, not really.

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

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

D/Garda Murphy: You don't really know. That's okay so."

Page 57:

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

Page 68:

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

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