THE COURT OF APPEAL

Record Number: 26/2021

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

A. H.

APPELLANT

JUDGMENT of the Court delivered on the 28th day of June 2022 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 21st September 2020, the appellant was convicted by a jury at the Central Criminal Court, sitting in Cork, of rape contrary to section 48 of the Offences Against the Person Act, 1861, as provided for by section 2 of the Criminal Law (Rape) Act, 1981, as amended by section 21 of the Criminal Law (Rape)(Amendment) Act, 1990.

Background

2. On the evening of the 26th August 2017, the complainant went to a restaurant with her parents and aunt. After dinner, the party went to a pub and met up with the appellant and others. The appellant is the partner of the complainant's aunt.

3. The evidence adduced was that, at approximately 2am, the party returned to the apartment where the complainant's aunt lived with the appellant. Further alcohol was

consumed there and the complainant is said to have fallen asleep in a chair in the living room.

4. Circa 4am, the complainant's parents left the apartment to go home and it was agreed that the complainant would stay with her aunt in the apartment.

5. At approximately 5am, the appellant and his partner went to bed, some point thereafter, the appellant left his own bedroom and entered the spare bedroom which the complainant was using. At this point, two different versions of events emerge.

6. On the appellant's version of events; he entered the spare bedroom to use the en-suite bathroom and the complainant was awake in the bed. He said that after coming out of the bathroom, he sat on the end of the bed and that the complainant held his hand and began kissing him and rubbing his penis. He said that she was fully-clothed at this point but that she assisted him in removing her clothes. The appellant's evidence is that he then asked the complainant whether she was on the pill, she answered affirmatively and then he engaged in consensual sex with her, during which he ejaculated.

7. On the complainant's version of events, she was asleep and woke to find the appellant on top of her, penetrating her. She recalled him asking her whether she was on the pill but that this occurred during or after the penetration taking place. She recalled answering in the affirmative. It is her evidence that the appellant then told her not to tell anyone.

8. Later that morning the complainant was driven home by the appellant. It is the complainant's evidence that in the car she pretended that she didn't remember what had happened the night before but that shortly after she returned home she told her mother that she thought the appellant had raped her. The complainant was then taken to the Garda Station and from there to the Sexual Assault Treatment Unit where she was seen by a Dr. Cremin.

9. On the evening of the 27th of August, Gardaí attended at the appellant's apartment with a search warrant. They spoke to the appellant under caution and the Garda Sergeant made notes of the conversation. The appellant informed him of the matters set out at para. 6 above.

Grounds of Appeal

10. The appellant appeals his conviction on four grounds, namely;

    1. *That the judge erred in law and in fact in refusing the appellant's application to rule Google Searches made by the appellant on his telephone as inadmissible in evidence.*

    2. *That the judge erred in law in refusing to recall the jury to identify the defence case on the issue of consent, despite having been asked to do so by way of requisition.*

    3. *That the said conviction is unsafe and unsatisfactory in that the judge erred in law in refusing the appellant's application for a direction in the case.*

4. *That the judge erred in law by frequently and excessively intervening during the examination and cross-examination of the appellant, and thereby disrupted and prejudiced the appellant's evidence to such an extent so as to render the trial unfair.*

Judicial Interventions

Submissions of the appellant

11. As regards this, the fourth ground of appeal, it is stated that throughout the course of the appellant's evidence, the trial judge intervened excessively. It is submitted that during the examination-in-chief and cross-examination, the judge asked in excess of 40 questions.

12. The appellant contends that if interruptions during the examination of a witness are overly frequent in nature, they may render a fair trial impossible*. R v Clewer* (1953) 37 Cr App R 37 is cited in support of this of this proposition. It is also noted that in *Jones v National Coal Board* [1957] 2 QB 55, both sides successfully appealed to the Court of Appeal on the ground that the constant interruptions of counsel by the trial judge during examination and cross-examination of a witness rendered the trial unfair.

13. Moreover, it is said that the foregoing decision was approved in the well-known Irish decision of *The People (DPP) v McGuinness* [1978] IR 189 in which an appeal against conviction was successful where there were excessive interventions by the trial judge in cross-examination of the complainant. The court in that case also observed that active participation by a judge in the examination-in-chief of witnesses is undesirable due to the perception of impartiality on the part of the trial judge which might arise.

14. The case of *Peter Farrelly v District Judge Anne Watkin* [2015] IEHC 117 is cited as authority for the contention that the interventions of a trial judge must not go beyond seeking clarification and ensuring the impartiality of the trial. Similarly, quotation is made from the recent case of *Konadu v DPP* [2018] IEHC 72 wherein it was noted that the judge must "rigorously" avoid the possibility that interventions might yield the belief that he or she has taken a particular view of a witness. Reference is also made to the case of *The People (DPP) v DC* [2019] IECA 367 in which Edwards J. quoted a passage from *R v Inns* [2018] EWCA Crim 1081 with approval.

15. It is contended that the trial judge in the instant case failed to "rigorously" avoid the possibility that his interventions might give the view that he had taken a particular view of the case and the evidence of the appellant.

16. Accordingly, it is submitted that the excessive interventions of the judge during both the examination-in-chief and cross-examination of the appellant rendered his trial unfair and therefore his conviction should be set aside in this regard.

Submissions of the respondent

17. In addressing the fourth ground of appeal, the respondent cites *Donnelly v Timber Factors* [1991] 1 IR 553 wherein McCarthy J. stated:

> *"The role of the judge of trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own - the purpose being to clarify the unclear, to complete the incomplete, to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasise or, save rarely, to criticise."*

18. It is accepted that excessive interventions may result in an unfair trial, however, it is submitted that the interventions of the trial judge in this case did not amount to excessive interventions. Furthermore, it is submitted that all questions put by the trial judge during the examination and cross-examination of the appellant sought to clarify matters, and in no way did they involve any unfairness to the appellant or any adverse comment.

19. *McGrath on Evidence* is cited to the effect that it is open to a trial judge to intervene during the cross-examination of a witness to ensure that a witness is given an adequate opportunity to give an answer to a question or to ask questions. Reliance is also placed on *The People (DPP) v McGuiness (ibid)* wherein this Court approved a passage of the judgment of Denning LJ in *Jones v National Coal Board (ibid)* as follows:

> *"Now it cannot of course be doubted that a judge is not only entitled but is indeed, bound to intervene at any stage of a witness' s evidence if he feels that, by reason of the technical nature of the evidence or otherwise it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying."*

20. It is submitted that the trial judge only intervened in the examination and cross-examination of the appellant to clarify certain matters which were unclear to the judge and therefore may have been unclear to the jury.

21. It is also noted that in charging the jury in relation to the evidence of the case, and in relation to any questions that may have been asked or put by the trial judge himself, he emphasised that questions asked are not evidence.

22. The Director submits that the assertion by the appellant that the trial judge adversely interfered in the examination and cross-examination of the appellant is incorrect and that the judge only intervened when it was just and necessary and in the interests of a fair trial.

Discussion

23. We have carefully read the transcript of the appellant's evidence and it is apparent that the trial judge intervened on many occasions, however, whilst excessive intervention by a trial judge is to be deprecated, on occasion, intervention may well be necessary in order to clarify issues, or to clarify questions asked. A judge is also entitled to ask questions for the same reason. As stated by Denning L.J. in his judgment in *Jones v National Coal Board*;

> *"..[i]t cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence […] it is only by putting*

questions of his own that he can properly follow and appreciate what the witness is saying."

24. A judge may question or intervene in a wider range of circumstances than mere clarification; take for example, where the question asked is unfair, where it is asked on a false or inaccurate premise, or where the question seeks to elicit inadmissible evidence. It is the experience of this Court that on occasion, counsel may ask a question which incorporates sub questions and so it becomes almost impossible for a witness to answer the question, and indeed for a jury to know which question is in fact being answered. In those circumstances, or where the question is posed in such a manner that it may not be properly understood, the judge may well have to intervene, always with circumspection and with regard to the fairness of the trial. Care must also be taken to ensure that any intervention does not give the impression of partiality.

25. Whilst it does not arise in this case, it is well established that a judge may also intervene and, indeed, in the view of this Court, *should* intervene if cross-examination is unduly lengthy or repetitive.

26. The real issue, however, in the present case is whether the interventions of the judge in the examination and cross-examination of the appellant went beyond what may be considered permissible and in effect disrupted the appellant's evidence, rendering the trial unfair. We observe at this point that we deprecate the over-simplification implicit in simply computing the number of interventions and using that as a basis for criticism in and of itself.

27. Usually, this type of issue may arise in the context of cross-examination of a complainant, but in the present case, the complaint rests with the examination-in-chief and the cross-examination of the appellant, giving rise to an unfair trial, as contended for on behalf of the appellant. The appellant refers to *R v Clewer (ibid* at p. 39), where Goddard L.J. said:-

> *"At the same time, the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross-examination and examination-in-chief, and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible."*

28. We find the above quotation to be persuasive. As we have said, intervention may well be necessary in certain well established instances, but where the interventions of the judge may be directed not only towards the issue of credibility, where greater latitude is permitted (*The People (DPP) v Piotrowski* [2014] IECCA 17) but also directed towards factual issues, concerns may arise.

29. Ms. Lankford SC draws our attention to the interventions as a whole, but places significant emphasis on the following exchange:

"Q. JUDGE: Do you mind if I ask you a question I'm just wondering about something. When you were in the bedroom, did you give any thought to whether she was too drunk to have sex or not?

A. She was we were only talking to her ten minutes before this. She was up and lively.

Q. JUDGE: No, no, I'm asking just when you were in the bedroom, did you give any thought to whether she was too drunk to have sex or not?

A. As in I would have been alarmed if I thought she was too drunk to have sex, and I wasn't.

Q. JUDGE: So you are saying that you didn't give any thought to that?

MS LANKFORD: I think, Judge, you are putting words in his mouth. I object to that question.

JUDGE: I am just trying to ask a question that I think the jury would be interested in knowing the answer.

MS LANKFORD: That may be so but I think it's unfairly put.

Q. JUDGE: Maybe you could answer the question?

A. If I thought she was too drunk it would have

Q. JUDGE: I see. So you didn't actually that didn't enter your thinking at that stage is what you are saying?

A. Because she wasn't too drunk.

Q. JUDGE: I see. Because I am just asking it because you were asked, I see, by the Gardaí, "How drunk was [the complainant]?" And your response was that, "She was drunk because she could walk and speak." Do you recall telling them that?

A. I said she was drunk but she could still walk and talk.

Q. JUDGE: I see. And how did you draw those two conclusions in relation to it? What were you referring to there?

A. I said she was drunk because she was hyper, she was in good spirits. And I said she could walk and speak

Q. JUDGE: I see?

A. because I seen her walk up from town and I spoke to her.

Q. JUDGE: This is the question really at the time that you are having sex with her, do you understand?

A. Yes.

Q. JUDGE: You are giving the explanation of how she was at that stage?

A. Well, I was still speaking to her ten minutes before that and I watched her walk up and down the stairs ten minutes before that.

Q. JUDGE: So just in relation to that, that's not a reference to her going to the toilet?

A. I'm sorry?

Q. JUDGE: In other words, when you said she could walk and speak, you are not referring to that she could go to the toilet after she had sex with you?

A. No, no, I am referring to beforehand.

Q. JUDGE: I see.

A. Ten minutes beforehand I was speaking to her and watching her come up and down the stairs. "

30. The above exchange took place in the course of the appellant's cross-examination on behalf of the Director. We do not find it necessary to elaborate to any great extent on the transcript references, save to say there were many interventions during the appellant's direct examination and cross-examination. One example of the judge's questions in the course of direct testimony related to when he became aware of the allegation. This gave rise to eight questions by the judge, a portion of which is set out hereunder:-

"Q. JUDGE: What information did they give you?

A. They told me that [the complainant]—

Q. JUDGE: You got to know what the allegation was; is that right?

A. Yes, they told me that [the complainant] is going to the guards saying that I raped [the complainant].

JUDGE: I just wasn't to be clear about it. M told you that there was an allegation. You have given evidence that you wanted them up so that you could hear what the information was, as I understand, in relation to it. What information did they give to you?

A. They told me that A, B and the complainant were going to the guards.

JUDGE: I see. That's all, is it?

A. Going to the guards because [the complainant] said that I raped her.*"*

31. Counsel for the appellant then resumed her direct examination. We do not intend to set out any further portions from the transcript, the above extracts are sufficiently illustrative for the purposes of this judgment.

32. We also have regard to the decision of Edwards J. in *The People (DPP) v DC (ibid)* where he quoted with approval from *R v Inns*. A trial judge must act as a "neutral umpire", this of course impacts on the fairness of the trial process. There is of course, no difficulty whatsoever in a judge intervening during evidence if such intervention is necessary to ensure that the jury may fully understand the evidence being adduced. This may arise in the context of the direct testimony of an expert witness, but is not limited to such category of evidence. A judge may also intervene for the reasons already stated, but a judge may not enter the arena and act as defender or prosecutor.

33. We consider the following view as per Singh L.J. in *R v Inns (ibid)* to be particularly apposite, where it was stated:-

> "36. Fourthly, since ours is an adversarial system it is for the prosecution to prove its case and it will have the opportunity to cross-examine the defendant if he or she chooses to give evidence. It will often be unnecessary for the judge to ask any questions during the defendant's evidence-in-chief because it should be for the prosecution to cross-examine the defendant. It is certainly not the role of the judge to cross-examine the defendant.
>
> 37. Fifthly, it is particularly important that the defendant should have the opportunity to give his or her account to the jury in the way that he or she would like that evidence to come out, elicited through questions from their own advocate. If there were constant interruptions of the evidence-in-chief there is a risk that a defendant will not be able to give his or her account fully and in the manner they would wish to put before the jury."

Conclusion

34. In conclusion, this Court does not consider that prolonged and frequent interventions by a judge, in and of themselves, render a trial unfair, each case must be carefully considered on its own merits and the purpose and nature of the interventions is, in our view of paramount importance. This is because, the rationale underpinning the intervention may inform the fairness or otherwise of the trial. Many of the judge's interventions in the present case were for the purpose of ensuring clarity and did not constitute interventions of a substantial nature. Indeed, such interventions are entirely justified. Certain interventions were simply for the witness to re-state his evidence; for example, and it is apparent from the transcript that the appellant could not always readily be heard.

35. There is no doubt but that this most experienced trial judge asked incisive and probing questions, and that some of those questions were directed towards the factual issues as highlighted in the extract of the exchanges above. He was acutely alert to the evidence

given and his questions were highly relevant. The first quoted exchange arose in cross-examination and were questions which a skilled prosecutor would ask. There is equally no doubt, but that the judge was acting with the very best of motives; however, this Court is concerned that the nature of the interventions, in particular, those we have cited, taken in conjunction with the prolonged and frequent occurrence of the interventions were likely to render the trial unfair and thus render the verdict unsafe.

36. We are most reluctant to interfere with the discretion of a trial judge who is best placed to assess the evidence as it unfolds at trial, but we believe that the judge entered the arena to too great a degree, notwithstanding that he did so with the best of motives, such interventions may have given the impression that the judge was, in effect, cross-examining the appellant. We reiterate that frequent or prolonged interventions would not necessarily give rise to an unfair trial, the nature and character of the interventions is that which is the significant issue.

37. Accordingly, we will quash the conviction and hear submissions on a re-trial.