



THE COURT OF APPEAL

Record Number: 61/2020

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

F.B.

APPELLANT

JUDGMENT of the Court delivered on the 11th day of July 2022 by Ms. Justice Kennedy.

1. This is an appeal against conviction. The appellant was convicted of five counts on the indictment: two counts of rape contrary to section 2 of the Criminal Law (Rape) Act, 1981, as amended by section 21 of the Criminal Law (Rape) (Amendment) Act, 1990, one count of rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act, 1990, and two counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990. These offences were perpetrated against the appellant's daughter. The appellant was sentenced to 10 years in respect of the rape counts, 12 years in respect of the count of rape contrary to s. 4, 6 years in respect of one count of sexual assault and 8 years in respect of the other count of sexual assault. All sentences to run concurrently with the final year suspended. This judgment addresses conviction only.

Background

2. The incidents giving rise to the prosecution occurred at the family home. The relevant counts refer to two separate incidents, one occurring when the complainant was between thirteen and fourteen years of age, on a date unknown in 2004 and another occurring on a specific date in January 2011 when the complainant was twenty-one years old.

3. The first allegations in time were committed while the complainant shared a bed with her young friend, JW, who was sleeping over in the family home. The appellant asked the complainant to spread her legs and he sexually assaulted her by touching her vagina. He also grabbed her head with both hands and pushed her head towards his penis and pushed his penis in her mouth. This incident lasted for 15 to 20 minutes. This incident is the subject of counts 9 and 10 on the indictment; sexual assault and s.4 rape, alleged to have occurred in 2004.
4. On the morning of the 12th January 2011, the appellant entered the childhood bedroom of the complainant and sat on her bed, smoking a cigarette. He took off his clothes and joined her under her duvet. The appellant sexually assaulted the complainant by touching her breasts and her vagina. He then proceeded to rape her. This incident is the subject of counts 1, 2 and 3 on the indictment; sexual assault and two counts of rape.

Grounds of Appeal

5. Whilst the appellant filed 8 grounds of appeal against conviction, it transpired at oral hearing that only three grounds were being advanced, namely; grounds 4, 5 and 8 as follows:-

“4. In directing the jury that evidence given by CB was capable, if accepted, of constituting corroboration, the Court erred in not referring to the frailties and inconsistencies in that evidence and/or in failing, in that part of the charge, to incorporate a warning as to the reliability of the evidence of CB.

5. Alternatively, the Court erred in directing the jury that the evidence of CB was capable of constituting corroboration.

8. The Court erred in directing the jury in relation to consistency in the part of the charge dealing with recent complaint.”

Corroboration

6. Grounds 4 and 5 are taken together. We will address the grounds in reverse order.

Was the evidence capable of amounting to corroboration?

7. By way of background, the prosecution relied on the evidence of CB, the complainant's mother, where she gave evidence that the appellant informed her that he had raped the complainant. The trial judge directed the jury that this evidence, if accepted by the jury, was capable of corroborating the complainant's testimony regarding counts 1, 2, and 3 on the indictment, which counts concern the 2011 incident.
8. It is contended on behalf of the appellant that this witness, CB, was inconsistent in her account, that there was no evidence adduced linking the alleged admission to the relevant counts and that she was, in some respects, an unreliable witness. It is pointed out that CB failed to elaborate upon her evidence; she could not recall where or when the conversation took place or anything further about the conversation.
9. Therefore, the appellant argues that this evidence was not potentially corroborative.

10. It is said that CB was inconsistent and unreliable in her evidence with reference, in particular, to the following:-
- a) That in direct examination, CB gave evidence that the appellant said to the complainant that "he didn't do anything to her."
 - b) In cross-examination, CB gave evidence that the appellant told her that he had touched the complainant, but he didn't know what came over him and that she said; "I probably got mixed up, because when I said it that he did say that he did touch her and he said to me that he didn't know what came over him."
 - c) That after the complainant first made allegations to Gardaí, there was period when CB moved away from the family home and left the appellant there with the other children.
 - d) That the appellant had to leave the family home and live elsewhere because he was "supposed" to have raped the complainant.
11. Whilst it is argued that this evidence is inconsistent with the appellant having made an admission of rape, it is accepted that later in her cross-examination, CB appeared to confirm her earlier evidence of an admission of rape by the appellant.

Should the Judge have referred to the asserted unreliability of the evidence?

12. It is said that the judge should have drawn attention to the unsatisfactory nature of this witness's evidence in general and in particular insofar as the admission was concerned.
13. In response to these grounds, the respondent says that no error in law has been established and that the judge correctly considered the evidence of an admission as potentially corroborative. The evidence was independent of the complaint and implicated the appellant in the commission of the offences.
14. It is said that it was for the jury to determine whether CB's evidence corroborated the complainant's version of events and that the jury were correctly and appropriately charged in this regard.

Discussion

15. Issue is taken with the categorisation of the evidence given by CB as evidence capable of corroborating the complainant's testimony. The impugned evidence concerns an admission to rape by the appellant to his wife, the complainant's mother. The foundation for the criticism rests in substance with the cross-examination of the witness. Firstly, it is clear in her direct testimony that CB gave evidence of the admission in the following terms:-

"A. That [the appellant] told me he had raped [the complainant] and all I was told was if—if I tell anyone he was going to kill me stone dead."

16. When asked as to when he imparted this information, she said that it was just before she left home which was about five years ago. Therefore, we may place this in time as

sometime in and around 2014. The witness went on to say that she went to the Gardaí in 2014.

17. Reliance is placed on her cross-examination in that when it was suggested to the witness that the admission was never made, the witness responded:-

“A. Yes, but he did say that he did—he did touch her, but he didn’t know what came over him, maybe I got mixed up there, Judge.”

18. However, when the question was repeated shortly thereafter, the witness confirmed that her husband had made the admission to her when she stated:-

“A. Yes, well its going back a while now, so I’m sure he did say it to me.

Q. Okay, so you’re saying he did say it to you?

A. Yes.

Q. Okay. Now, this morning you said when I started asking you questions about that, then what you said to the jury is that your husband [the appellant] said he touched [the complainant] and he didn’t know what came over him?

A. Came over him, yes.

Q. Okay. Now, taking those two things, I’m going to say to you that your husband [the appellant] never said he touched [the complainant], never told you that he touched [the complainant], okay?

A. He did.”

19. In addition, it is argued on behalf of the appellant that further evidence to support the contention of unreliability is to be found in the evidence concerning the appellant’s move to another town where CB said that he was not allowed to live in the family home after the allegations that her husband “was supposed” to have raped the complainant.
20. Prior to the judge’s charge, Mr. Cody SC for the appellant argued that CB’s evidence was entirely unsatisfactory, contradictory and could not be advanced as potentially corroborative.
21. In *The People (DPP) v Gilligan* [2005] IESC 78 corroboration was found to have three qualities. Firstly, it must tend to implicate the accused, secondly, it must be independent and thirdly, the corroborating evidence must be credible as should the evidence to be corroborated. It is well-settled that an admission by an accused person is capable of constituting corroboration. It is evidence independent of that evidence which is to be corroborated.

22. In *The People (DPP) v Farrell* [2010] IECCA 94, the complainant's mother gave evidence of an admission which occurred when she confronted the accused. This evidence was found to be potentially corroborative.
23. It seems to us that the issue being canvassed here, is in effect, whether the evidence of CB was so frail that it lacked sufficient credibility and therefore should not be proffered as potentially corroborative.
24. Having considered the entirety of her evidence, we are not at all persuaded that the judge erred in finding the evidence capable in law of amounting to corroboration. The evidence was clearly independent of the evidence to be corroborated, it tended to implicate the accused in the offending. The witness did not resile from her contention that the appellant made the admission to her. In fact, she was steadfast in her view in this regard. It is also the position that evidence capable of constituting corroboration is not required to corroborate all of the evidence of the complainant.
25. Insofar as the complaint is made that the judge did not address the alleged unreliability and weaknesses in CB's testimony in her charge, we have examined the requisitions raised on behalf of the appellant. The requisition concerning corroboration related to the contention that the judge had insufficiently emphasised that it was for the jury to determine whether as a matter of fact the evidence was capable of amounting to corroboration. The judge declined to re-charge the jury.
26. Again, we have examined the charge. The judge properly directed the jury as to the meaning of corroboration and then moved to address the evidence of JW regarding the first incident in time. Turning to counts 1, 2 and 3 she informed the jury as follows:-
- "If you accept---if you the jury accept the evidence of CB that FB told her that he had raped [the complainant], that evidence is capable of corroborating charges at 1, 2 and 3 of the indictment..."
27. It is apparent from the above extract that the judge did not direct the jury that the evidence was in fact corroborative, simply that it had the potential to be so.
- In any event, the judge directed the jury that it was necessary to give very careful consideration to the evidence of CB when considering the charges and that, in particular, they had to decide if they accepted her evidence concerning the admission.
28. We are not at all persuaded that the judge erred in finding that the evidence was potentially corroborative or that the charge was inadequate in how she approached the evidence of CB.
29. Accordingly, we reject grounds 4 and 5.

The Charge on Recent Complaint Evidence

30. Ground 8 concerns the trial judge's directions to the jury on how to treat recent complaint evidence. The complainant complained to her friend JW, the day following the incident

which is the subject of counts 9 and 10. The appellant says that the judge's charge was inadequate in terms of *The People (DPP) v MA* [2002] 2 IR 601.

31. It is argued that she did not state that complaint evidence is not evidence of the facts on which the complaint is based and that she did not fully explain the meaning of consistency in this context. It is also submitted that JW's evidence of the complaint was that the complainant had stated to her that "her dad always makes her have sex" and that this was not consistent with the evidence given by the complainant as to what her father had done to her over the years prior.
32. Further, the appellant submits that it was a deficiency of the judge's charge that she did not emphasise that the jury had to be satisfied first that the evidence of the complaint was reliable.
33. In response to ground 8, the respondent says that no error in law has been established as required by law and *MA*. It is submitted that the judge clearly and unequivocally informed the jury that this evidence concerned consistency and not corroboration.

Discussion

34. In *MA* Murray J. stated as follows:-

"Where evidence of a complaint made by a complainant to third parties in the absence of the accused is admitted in a trial of a sexual offence to establish the consistency of the complaint with the evidence of the complainant, the purpose of the evidence should be explained to the jury in all cases and it should be made clear to it that such evidence was not evidence of the facts on which the complaint is based but could be considered by them as showing that the victim's conduct in so complaining was consistent with her testimony. That it should also be explained to the jury that such evidence did not constitute corroboration, in the legal sense of that term, of the evidence of the complainant."

35. In terms of the legal directions specific to the present case, the judge directed the jury firstly on delay, secondly, on corroboration, and gave the jury a corroboration warning. She then turned her attention to recent complaint saying:-

"If a complaint is made of a sexual offence at a time which was proximate to the commission of the alleged offence and if it is made in a reliable way, in other words, not in response to being dragged out of that person by suggestive questioning, then you're entitled to use that complaint as evidence of the consistency of the allegation. However, it does not constitute corroboration. Here the evidence of consistency is the evidence of JW as to what the complainant, [the complainant], told her in their conversation on the day after JW slept over at [the complainant's address]. This evidence can be read over to you again if you wish and I repeat that this evidence of the conversation, if you accept it, is evidence of consistency only and does not amount to corroboration."

36. It is necessary that a judge instruct a jury as to the limitations of evidence of recent complaint. It is well established that evidence of complaint may only be used by a jury as evidence of consistency of conduct on the part of the complainant. It is not evidence of the truth of the facts alleged and nor does it provide corroboration.
37. The judge in the present case made it quite clear to the jury that the evidence of recent complaint could only be used by them for a limited purpose; that being to show consistency with the complainant's evidence. She made it clear that the recent complaint evidence was not corroboration. She did so having already explained the meaning of the term corroboration to the jury and having pointed out to them the evidence capable in law of amounting to corroboration. Whilst the judge did not expressly inform the jury that the recent complaint evidence was not evidence of the facts complained of by the complainant, she made quite clear the limited purpose for which the evidence could be used and, in consequence, the jury were aware that it was not evidence of the truth of the allegations.
38. We reject this ground of appeal.

Decision

39. Accordingly, the appeal against conviction is dismissed.