



THE COURT OF APPEAL

Neutral Citation: [2024] IECA 314

Record Number: 188/22

Edwards J.

McCarthy J.

Burns J.

BETWEEN/

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

RESPONDENT

-AND-

OM

APPELLANT

**JUDGMENT of the Court delivered on the 12th day of December,
2024 by Ms. Justice Tara Burns.**

1. This is an appeal against conviction. On 27 July 2022, the appellant was found guilty by majority verdict of two counts of rape contrary to s. 2 of the Criminal Law Rape Act 1981, as amended; two counts of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990, as amended ("the 1990 Act"); two counts of sexual assault contrary to s. 2 of the 1990 Act; and one count of threatening to kill or cause serious harm contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997, as amended ("the 1997 Act"). He was also found guilty, by unanimous verdict,

of one further count of threatening to kill or cause serious harm contrary to s. 5 of the 1997 Act.

2. On 17 October 2022, the trial judge sentenced the appellant to an effective sentence of 9 years' imprisonment, which was backdated to 27 July 2022, to reflect when the appellant entered custody.

Background

3. The victim is the former partner of the appellant with whom she has two adult sons. Whilst the couple separated in April 2019, they continued to cohabit, although sleeping in separate bedrooms.

4. On 2 August 2019, the victim was confronted by the appellant, who was holding a pair of secateurs. The appellant threatened to cut off the victim's fingers before ordering her upstairs. Once upstairs, he pushed the victim into a bedroom, where he raped and sexually assaulted her. The appellant thereafter threatened to kill the victim should she tell anyone about what had transpired.

5. When the parties' son arrived home, the victim disclosed the events of the evening to him. This evidence was admitted into the trial under the doctrine of recent complaint. The victim also met and spoke with a friend about what had occurred later the same night.

6. The appellant was arrested by appointment and detained for questioning by the investigating guards on 2 September 2019. In the course of his interviews, he accepted that sexual intercourse, together with other sexual acts, occurred but outlined that the victim had consented to this, or that he genuinely thought that she had consented.

7. The appellant called his sons to give evidence on his behalf. While one of the sons had given evidence on behalf of the prosecution in relation to

the victim's complaint to him about what had occurred that evening, including the peripheral matter of the presence of an empty bottle of wine in the kitchen, both sons gave evidence relating to further peripheral issues, to include the presence of locks on their mother's bedroom door and her drinking habits. The victim had given evidence which differed from her sons' evidence in these respects. The evidence of the sons went to the victim's credibility.

Grounds of Appeal

8. Two grounds of appeal were lodged by the appellant in his appeal against conviction, as follows:-

“(a) The learned trial judge erred in failing to adequately charge the jury regarding the doctrine of recent complaint, having regards to the particular facts of the case and the demeanour of the complainant

(b) The learned trial judge erred in refusing to adequately explain the defence case, including that portion which related to the evidence of the appellant's sons”.

Recent Complaint and Demeanour

9. In his charge to the jury, the trial judge directed the jury in relation to the doctrine of recent complaint, in respect of which no issue was taken. However, in the course of this direction, he also referred to evidence regarding the demeanour of the complainant when she made her complaint to her son. In referring to this, the trial judge informed the jury that the victim's demeanour was not probative of her allegations, but rather related solely to her consistency and credibility. This was an incorrect direction for the trial judge to give as the demeanour of a complainant can be probative of the complaint which is made. After this error was brought to the trial

judge's attention by counsel for the respondent, the trial judge re-charged the jury in this regard.

10. The trial judge's re-charge is the subject of this ground of appeal with the appellant asserting that by re-charging the jury on this issue, too much significance was given to the issue of recent complaint and demeanour.

11. The trial judge re-charged the jury in the following manner:-

"Recent complaint, the evidence covered by recent complaint and the limitation of the relevance of that evidence as I explained to you to being to consistency of the conduct of the complainant with the story told by her in the witness box and that being inconsistent with her consent to that which of she complains, that's limited to the evidence that she complained.

In other words, the complaint she made to [her son] afterwards. I slipped in something about demeanour. Demeanour is not part of a complaint. Demeanour is the observations made by [her son] and you're going to have to consider his evidence, good, bad or indifferent, whatever it may be. That's an observation made by him, that's part of the factual matrix of the case. I don't want to abstract it out of the overall. I told you consider everything, the fact that I'm having to issue a clarification shouldn't mean that this particular issue of what [the complainant's son] says he saw in the immediate aftermath should be taken out of all context, simply because I'm bringing you back. I wrongly put it in as being part of recent complaint.

Complaint comes from the complainant, complaint is not the observation of somebody of the complainant in the immediate

aftermath, that's simply witness evidence that you're going to have to consider when you come to, as you will, consider the evidence of each individual witness [...] It's one part of the overall evidence that you're going to have to consider and I'm only referring back to it, because of an error on my part. So, the complaint evidence is what comes from the complainant in the immediate aftermath, what she said. That goes to consistency. The other evidence, what other people saw is not obviously part of a complaint, it's part of their witness testimony and you have to judge that by reference to all of the things that I spoke to you about in giving my directions to you. But the one thing I don't want you to do is to go away thinking that has assumed some sort of huge importance over and above everything else. It hasn't. It's simply because of a slip on my part and I have to refer to it in correcting the slip. But you simply put that in context with everything else [...]."

Submissions of the Parties

12. The appellant submitted that, in circumstances where neither side had requisitioned the trial judge in respect of recent complaint and the initial charge was clear, the trial judge erred in recharging the jury in relation to that matter. He contended that the trial judge brought "*unnecessary significance and attention*" to the issues of recent complaint and demeanour, and potentially caused confusion at a critical stage in the trial process.

13. The respondent submitted that as the direction of the trial judge was correct in law, an issue did not arise with respect to the direction given.

Discussion and Determination

14. This ground of appeal can be dealt with in short order. The trial judge made a slight error in terms of how he directed the jury to consider the

issue of demeanour at the time the victim complained to her son. Once brought to his attention, he correctly determined to correct this. Nothing he said when he re-directed the jury in relation to demeanour and recent complaint was incorrect in law. While he was not asked to redirect the jury in relation to the doctrine of recent complaint, it is completely understandable why he decided to adopt this approach as the issue of demeanour had been dealt with by him in the course of directing the jury regarding recent complaint. Dealing with the requisition in the manner he did was not improper or unfair.

15. The trial judge did not err in this regard and this ground of appeal fails.

The Explanation by the Trial Judge of the Defence Case

16. The defence case was that the appellant accepted that the sexual acts at issue (bar one) occurred but asserted that the victim consented to the sexual acts, or that if she had not consented the appellant made an honest mistake and thought that she had consented.

17. The defence case was contained in the memoranda of the interviews conducted with the appellant by the investigating guards when he was detained for questioning in relation to these matters. The defence case was also put to the victim in the course of cross examination.

18. The appellant also called his sons to give evidence on his behalf. Their evidence was relevant to the credibility of the victim.

19. Of note, the entire evidence in the case was heard over two days (Wednesday and Thursday), and counsels' speeches and the trial judge's charge took place the following Monday.

20. In his charge to the jury, the trial judge did not summarise the evidence given by any of the witnesses in the case, to include the victim and her sons. He explained to the jury that he was taking this approach as this was a short case where they had recently heard the evidence. However he added:-

"I'm not going to waste any more of your time by going back over what you already know. But, members of the jury, can I emphasise this at the outset and I'll say it at the end, I'm not going to waste time now going over the evidence, but if there's any defect in recollection on your part, I mean you're being asked to reach a very important and significant decision. It's important to everybody, but I suppose it's most important of all for the accused man, who has most at stake here. It's very important therefore that your decision is sound in the sense that it's based on a clear understanding of the evidence or of the arguments or of the law. So if there's any doubt in your mind about anything that was said, please come back to me. I have the means of reminding you -- I know you have been carefully taking notes and listening, so that's the reason why I don't want you sitting there rolling your eyes saying, "Why is this man going back over this? I already know that." It's what you don't know or have a sound recollection of is important. So, please come back if there's any problem. I'm going to trust you to do that..."

21. In relation to the issues in the case, the trial judge explained that the sexual acts (bar one) were not in dispute and that the question which the jury were required to consider with respect to the sexual acts which were not in dispute in reality was whether *"the prosecution proved beyond reasonable doubt that the sexual behaviour concerned was done without consent"*. Later, he specifically stated that the prosecution had to prove beyond reasonable doubt that *"[the named victim] was not consenting"*.

Having given further specific directions in relation to the legal question of consent, he proceeded to give the jury specific directions in relation to the *mens rea* element of a rape offence. Having explained the legal meaning of both knowledge and recklessness, he added:-

"Now, the prosecution must prove either knowledge or recklessness beyond reasonable doubt and the state of mind direction I need to augment in this particular case, members of the jury. It is a case where the -- there is a claim that to have a mistaken belief that [the named victim] was consenting, in those circumstances, and again in relatively recent times the Supreme Court have considered this issue, so I'm going to quote from them in a modified way, which is the safest thing for me to do. And the law is as follows: "Where the accused claims to have mistakenly believed that a woman was consenting then the jury should examine all of the facts which may support or which may undermine that claimed belief. They should consider all of the circumstances and focus on whether there are or there are not reasonable grounds for that belief. Section 2(2) of the Criminal Law (Rape) Act 1981 states, 'The presence or absence of reasonable ground for such a belief is a matter to which the jury is to have regard in conjunction with any other relevant matters in considering whether he so believed.' That means that where the accused believed genuinely, albeit unreasonably, that the woman was consenting, on this statutory definition he must, even though she did not consent, be acquitted. However, it needs also to be stated by trial judges ... "-- and I want to state this to you -- " ... no jury is under any obligation to believe an obviously false story. A jury is entitled to accept or reject any prosecution or defence evidence. In these cases every jury is entrusting using shrewdness and common sense to judge what the accused claims as to his mistaken belief against their view of what an ordinary or

reasonable man would have realised in the circumstances. This defence requires genuine belief." So it's subjective in the sense that it's his belief, but his belief has to be judged against what is reasonable in terms of the existence of that belief. It has to be a genuine belief based on reasonable grounds. This is what the Supreme Court has said. So I'll repeat again, you examine all the facts, which may support or undermine the claimed belief. I've quoted the law to you. It's the presence or absence of reasonable grounds for such a belief is a matter to which you are to have regard in conjunction with all relevant matters in considering whether he so believed. And if you think that it's reasonably possible that he so believed, he's entitled to an acquittal, or if he did so believe, members of the jury. But you must analyse it shrewdly and with common sense and the law is saying no more than this: Accept nothing glibly on any side of the case, members of the jury. But if you are left with a sense at the end of the day that either he did or it was reasonably possible that he had a mistaken belief in consent, members of the jury, well then he would not have the necessary mens rea as the lawyers call it, the mental requirement would not be met, and you would, in those circumstances, be obliged to acquit. But if all three are made out, members of the jury, if you are satisfied that there was penetration, that there was no consent and that there was either knowledge or recklessness and you have set aside any reasonable possibility of a genuine but mistaken belief, well then you will be obliged to convict."

22. Later in his charge, the trial judge also drew the jury's attention to the memoranda of the interviews conducted with the appellant by the investigating guards, indicating "it's a significant part of the case, it contains the defence case, the accused's interviews".

23. Following the charge, Counsel for the appellant sought that the trial judge synopsis the defence case to the jury, with the request that evidence relevant to the issues of consent and mistaken belief be outlined to the jury as well as the evidence of the sons.

24. The trial judge determined as follows:-

"No [...] I'm not going to because as I said it's a short case, I'm entirely happy with the way it was conducted and the way it was put on both sides [...] I don't feel I have to get involved in this case because the advocacy has come very properly from counsel and I don't believe that there's anything to be gained by, in a short case, reminding a jury of one part of it as opposed to another. There are really three witnesses and if I started highlighting the evidence of the sons, I feel I would then by way of balance have to highlight the evidence of the mother. I'm not doing that. I think everybody has done their job, well, [...] in the proper way which leaves me free and clear to concentrate on what I have to concentrate on.

So, no, [...] I mean nobody can be in any doubt in terms of advocacy as to where the defence lies. They've been directed about the issue that you raise in terms of mistaken belief in consent, and I give the jury credit for listening."

Submissions of the Parties

25. The appellant accepted that the manner in which the evidence given in a trial is addressed by a trial judge in his charge to the jury, is a matter for the judge and depends on the circumstances of the case. However, it was submitted that it is necessary for the defence case to be addressed by the trial judge, to include drawing the attention of the jury to the evidence

relevant to the defence case, which encompassed evidence relating to the credibility of the victim.

26. The respondent submitted that the trial judge did address the defence case in his charge to the jury and that a necessity did not arise, in the circumstances of this case, to summarise the evidence relevant to the defence case, having regard to how short the case was and how recent the evidence had been.

Discussion and Determination

27. Having regard to the extracts from the transcripts set out earlier, it is clear that the defence case to the effect that the victim consented, or if she had not, the appellant made an honest mistake with respect to her not consenting, was squarely brought to the jury's attention by the trial judge.

28. The issue which the appellant complains of appears to be that the evidence relevant to these issues was not addressed by the trial judge.

29. The appellant also complained that the evidence of the two sons, which contradicted the victim in relation to peripheral matters rather than the sexual events themselves, and therefore was relevant with respect to the victim's credibility, should also have been addressed by the trial judge.

30. A trial judge has a discretion as to how he approaches the evidence in his charge to the jury. In a long or complicated case, it may be necessary to provide a detailed summary of the important evidence in a case; in a short case, no such necessity may arise.

31. In the instant matter, it is clear that the trial judge, very specifically and in a detailed manner, referred to the defence case in the matter. It is also clear that the trial judge had paid particular attention to the jury,

observing that they had taken notes and had paid attention to the evidence. For this reason, and because this had been a short case where the evidence had only recently been given, he was of the opinion that the necessity to summarise the evidence did not arise. However, he cautioned the jury that it was important that they had a clear recollection of the evidence and indicated to them that they should come back to him to obtain a refresher of the evidence if that proved necessary.

32. On the particular facts of this case, we are of the view that dealing with the evidence in this manner, both in relation to the specifics of the defence case and in relation to issues regarding the victim's credibility, was completely appropriate in the circumstances arising.

Conclusion

33. In circumstances where we have not upheld any of the grounds of appeal, the appellant's appeal against conviction is dismissed.

APPROVED

NO REDACTION NEEDED