THE COURT OF APPEAL

Record Number: 287/18
Neutral Citation: [2021] IECA 202

Birmingham P.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M.Q.

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 19th day of July 2021 by Ms. Isobel Justice Kennedy.

1. This is an appeal against conviction. On the 19th July 2018 the appellant was found guilty of a count of rape contrary to s. 48 of the Offences Against the Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990.

2. In order to preserve the complainant's anonymity we have not referred to a witness by her actual initials, but as AB.

Background

3. The appellant was charged with two counts of rape alleged to have occurred in the early hours of the 2nd of August 2015 at a location in a campervan. The events leading up

to the alleged offences are said to be that as an employee of the appellant, the complainant travelled with him for the weekend from Friday 31st July to Sunday 2nd August to work with him in the selling of toys and other items at fairs or events around the country. She had become involved in this employment through her friend, AB and it was the practice that when attending fairs overnight the complainant and AB would sleep in a tent and the appellant would sleep in the campervan. However on the weekend in question AB was not present and the complainant stayed in the campervan with the appellant as there was nowhere to erect a tent and it was agreed that they would sleep in the campervan.

4. Over the course of the weekend text messages were exchanged between the appellant and AB and AB and the complainant. These messages include comments of a sexual nature made by the appellant. The complainant gave evidence that on the night of the 1st August 2015 the appellant asked the complainant for sexual intercourse, which the complainant refused and the appellant subsequently pinned her down and raped her. This forms the subject matter of Count 1.

5. The complainant described waking up in the early hours of the 2nd August 2015 to find the appellant touching her, he then proceeded to get on top of her and rape her. This forms the subject matter of Count 2.

6. Later on in the day the complainant outlined her allegations by text to AB and that evening the complainant contacted the gardaí and attended the Sexual Assault Treatment Unit. The appellant was subsequently arrested and interviewed.

7. The trial commenced in July 2018 and the jury returned a verdict of guilty in respect of Count 2. A disagreement was recorded in respect of Count 1 and a *nolle prosequi* was subsequently entered in respect of this count.

Grounds of appeal

8. The appellant puts forward the following grounds of appeal as outlined in his notice of appeal:-

(1) That the learned judge erred in law in ruling that text messages between the appellant, the complainant and a third party, [AB], were admissible.

(2) That the decision of the jury was perverse having regard to their failure to reach a verdict on the first count on the indictment.

(3) The learned trial judge's charge was inadequate and rendered insufficient assistance to the jury.

Ground One

9. On the second day of the trial, counsel for the appellant made an application to exclude evidence which the prosecution sought to introduce in respect of mobile phone communications between the complainant, the witness AB and the appellant.

10. Over the course of the weekend there were messages exchanged between the complainant and AB and between AB and the appellant. The first tranche of messages took place on the evening of the 31st July 2015 into the early morning of 1st August 2015. Further messages took place between the complainant and AB on the morning of the 2nd August and this involved a discussion of the appellant's behaviour towards the complainant.

Messages of the 31st July 2015

11. On the evening of the 31st July there were messages between the appellant and AB regarding the complainant. The text conversation refers to the complainant in a sexual manner. We do not intend to refer to the content of the messages save to say that the messages from the appellant referenced a desire for sexual contact with the complainant and he raised questions regarding her sexual preferences.

12. In parallel to this conversation is the conversation between AB and the complainant which references the messages being sent between AB and the appellant and comments in respect of those messages.

13. As regards the messages of the 31st July, counsel for the appellant argued that the admission of the messages between the complainant and AB offended the rule against hearsay as the appellant was not a party to the conversation.

14. It was further argued that the messages between AB and the appellant were not relevant to the charges before the Court. These messages were neither part of the res gestae, nor relevant background, and the jury could comprehend the events in issue without regard to such conversations

15. In allowing the messages to be admitted, the trial judge held that they did not form part of the res gestae but they were admissible as background evidence that showed the dynamic between the parties.

Submissions of the appellant

16. In relation to the principles governing background evidence the appellant submits that a trial judge must be vigilant to ensure that the admission of background evidence is really necessary for the determination of the issues in the case. In that regard, it is said that the trial judge erred in law in admitting the text messages in this case. They did not constitute "a continuum of events." The real issue in this case was whether or not the appellant believed that the complainant was consenting to the sexual intercourse that occurred on the 2nd August, and in that regard, it is difficult to credibly sustain the argument that third-party texts the previous day met the threshold.

17. The appellant contended that the text messages on 31st July were part of a "wind-up" or banter and did not form part of the background to the offences before the Court. Nothing

untoward happened the night that the text messages were exchanged and they were not a necessary part of the background and they were unfairly prejudicial to his case.

Submissions of the respondent

18. In relation to the background evidence argument, the respondent submits that the trial judge conducted a careful analysis of the principles relating to background evidence and he applied *The People (DPP) v. McNeill* [2011] 2 IR 669 in determining that the evidence was relevant and necessary. The messages were closely linked to the alleged offences and they showed the dynamic of the parties.

Discussion

19. It is of course acknowledged by Mr Bowman SC for the appellant as it was at trial that there can be no objection to messages sent by the appellant to the complainant or to AB. The issue resides with messages between the complainant and AB as it is said that the content of such constitutes hearsay and is therefore inadmissible.

20. The impugned messages under this heading commenced on the 31st July 2015 at 18.24 (which message was from AB to the complainant) and continued into the early hours of the 1st August 2015, approximately 17 minutes after midnight.

21. The argument advanced at trial on the part of the appellant was that such messages did not form part of the res gestae being at a remove in time and did not constitute background evidence.

22. The trial judge ruled that the messages did not come within the res gestae but did constitute background evidence.

23. The circumstances of the text communications are succinctly expressed by the trial judge:-

> "It's sought to have the material introduced on the basis that the three-parties, that's to say the complainant, [AB] and [the appellant] were engaged in a tripartite

communication during this period. It was conducted within a confined space in the caravan. There's a suggestion in [the complainant's] statement that she was aware to some degree of what [the appellant] was communicating to [AB], [AB] was communicating to her about what [the appellant] was seeking, she was communicating to [AB] in relation to those matters. And that the reality of the case is that in essence this was a conversation being conducted between the three of them."

24. As we have stated, the objection to the messages resided in those between AB and the complainant, it being said that the appellant was not privy to such conversation between them and thus the material offended the rule against hearsay. The respondent submitted at trial that the communications between AB and the complainant supported the proposition that the appellant wished to have sexual intercourse with the complainant, demonstrating his state of mind. The messages demonstrated this intention to have sexual intercourse and what subsequently occurred can only be understood in the context of the entire messages.

25. Ultimately, the trial judge permitted the evidence as background evidence and stated:-

"It seems to me it can and the situation is that the reality of their engagement as employer, employee living in the camper van overnight, having this extensive communication between them during that period is something that is essential to the understanding of what went on in terms of the exchanges between them, sexual references, the two -- the two witnesses, [Complainant] and [AB] can give evidence in relation to the fact that the statements as original statements or communications were made. That's in terms of its real original evidence in that sense. And they can give evidence as to their understanding of those communications, the involvement of [Mr Q] in and about those communications and their evidence is relevant to the question of whether there was as is suggested, a wind up going on to negate that. And that's, the prosecution say it's relevant to that object.

> So in those two respects it seems to me that the evidence is essential to understand the reality of what was going on. This is much more than a connected historical background, this is the immediate engagement between the parties over a very short period, the Saturday into the -- the Saturday into the Sunday and then the events, the events of Saturday evening after the communication and then the events of Sunday the alleged rapes later on. And they are matters which it seems to me are a continuum of events. The interpretation of those events or the significance of those events ultimately would be open to such inferences -- may be open to such inferences as appropriate.*"*

26. This Court has been furnished with the text messages downloaded from AB's device and which were furnished to the jury. Having determined the messages to be admissible in terms of background evidence, the trial judge balanced the probative value with the prejudicial effect and ruled that certain messages should be excluded on the basis of prejudice.

27. It is evident from the sequence of the messages that the appellant was present while the text messages were sent by the parties. At one point the complainant sends a message to AB indicating that she had just seen the message sent by the appellant to AB. Therefore, there is support for the respondent's argument that this was a tripartite conversation. However, leaving that aside for a moment, it is necessary to see what may constitute admissible background evidence.

28. In McGrath on Evidence, 2nd edition at para. 9-43, the concept of background evidence is considered where the author, in terms of what may constitute misconduct evidence, states:-

> "It also extends to evidence of discreditable acts by an accused the disclosure of which could have a prejudicial effect on the tribunal of fact."

The footnote refers *inter alia* to *B v. DPP* [1997] 3 IR 140 at 152 where it was held:-

> "The exclusionary rule also precludes proof of the commission of discreditable acts which are not themselves criminal and of any discreditable propensity which may make the accused appear as more likely to have committed the act charged. The reason for the rule is that such evidence is simply irrelevant, because no number of similar offences in themselves can connect a person with a particular crime. The second reason is that prejudice created by such evidence outweighs any probative value it might have. Evidence is inadmissible if it does no more than to suggest that the accused is the sort of person who might commit the offence charged, but it may be admissible if it goes further and becomes part of the proof that he did commit it."

29. However, since the leading case in this jurisdiction of the Supreme Court in *The People (DPP) v. McNeill* [2011] 2 IR 669, background evidence may be admitted if the admission of such evidence is necessary because it is 'so closely and inextricable linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible" ref p.49. As stated by McGrath on Evidence at para 9.77:-

> "The test to be applied in that regard is whether "the background evidence is relevant and necessary."

30. While *McNeill* was concerned with the admissibility of evidence regarding alleged incidents of sexual assault with which the accused was not charged in order to contextualise those charged, the principle remains the same. Misconduct evidence is admissible if it is relevant and necessary to an issue of fact which the jury is required to determine.

31. The key issue is the purpose for which the evidence is sought to be adduced. The evidential value of the evidence was in order to prove the appellant's state of mind that he intended to have intercourse with the complainant. Certainly, that is something which could

be inferred from the text messages, bearing in mind that sexual intercourse is not an offence unless one party does not consent. The appellant contended in his interviews that the messages were simply sexual banter and that the complainant and the appellant were engaged in 'winding up' AB, which supports the contention that this was a tripartite conversation.

32. In the present case, it would have been difficult, if not impossible for the jury to understand the full import of the messages without having all the messages. The messages were passing between AB, the complainant and the appellant. While the messages did not disclose other alleged offences, the messages were inextricable linked to these offences and, perhaps of greater significance, the messages were relevant and necessary to demonstrate the relationship between the appellant and the complainant, in particular given that the relationship was one of employer/employee.

33. Moreover, the messages were closely allied in time to the actual offending alleged and therefore provided insight for the jury to understand how events unfolded on the relevant dates.

34. In the circumstances, we are not persuaded that the judge erred in admitting certain of the text messages as background evidence relevant and necessary to enable the jury to fully understand the relationship between the parties.

Messages of the 2nd August 2015 – Recent Complaint

35. These messages involve a discussion of the events of the night before and in the early morning of the 2nd August 2015 and were admitted as evidence of recent complaint. It is said that the witness AB exhorted the complainant to tell her what had occurred the previous night and that morning and consequently the complaint was inadmissible as the evidence failed the voluntariness test. In essence the complainant told her friend AB that the appellant

had ‘done everything last night’. She informed AB that she kept saying no but was unable to stop the appellant. She then said:-

“ COMPLAINANT: I've something else to tell you but not over text”

At a later stage the following exchange takes place:-

“AB: Just tell me woman.

COMPLAINANT: Nope, hasn't paid me yet, I'll explain it all when I get down, it's hard over text.

AB: What the fuck went on or what is going on? Xx”

The complainant then replied in somewhat graphic terms setting out the sexual actions on the part of the appellant including saying that she was not strong enough to push him off. Following which this exchange took place:-

“AB: OMG, I really don't know what to say and has he said anything to you since?

COMPLAINANT: Nope, it's like he don't remember, he drank some lot last night, I don't know what to do, I'm in shock”

AB then says:-

“AB: Well, put it this way, I'm gonna be blunt, okay, rape?

COMPLAINANT: Yeah, cause I didn't want any of it, it was disgusting, I've never felt so weak in my life, never, what's everybody gonna say like, please don't tell anyone."

36. As regards the text messages between the complainant and AB on the morning of the 2nd August, it was argued at trial that this exchange was not admissible as evidence of recent complaint as the complaint had been induced by the questions of AB. The trial judge rejected this submission and admitted the evidence, holding that the questions posed by AB were not a form of inducement or exhortation that negatives the admissibility of the complaint within the principles set out in the case law.

37. In relation to the evidence of recent complaint the appellant relies on *The People (DPP) v. Brophy* [1992] ILRM 709 in submitting that the evidence was inadmissible as the question of AB induced the complaint and was a prejudicial comment in itself.

38. The respondent submits that on any objective analysis, the first complaint could not be characterised as being induced and prior to AB's question "Well put it this way, I am going to be blunt, ok, rape?" the complainant had already voluntarily made her disclosure. The respondent relies on *The People (DPP) v. DR* [1998] 2 IR 106 where evidence of complaint was found to be properly admitted in circumstances where the complainant gave an account of her rape after a question from her husband. The Court was satisfied that this was not an interrogation but rather the complainant being assisted in saying something she herself wished to say.

Discussion and Conclusion on messages of the 2nd August 2015

39. Mr Bowman quite properly did not labour this aspect of his argument but rested on the written submissions. The law is well established on the issue of recent complaint as an exception to the hearsay rule and the parameters under which such evidence may be admitted. In summary the seminal decision of *The People (DPP) v. Brophy* [1992] ILRM 709 sets out the principles of admissibility of such complaints and states at para. 39:-

> "The complaint must have been made as speedily as could reasonably be expected and in a voluntary fashion, not as a result of any inducements or exhortations."

40. The trial judge admitted the evidence and in our opinion properly did so. It is clear when one reads the sequence of the text communications between the complainant and AB that the disclosure of inappropriate sexual activity came about incrementally. There was an initial partial complaint, which led to some questions by AB but none of which could be said to amount to an exhortation or an inducement to make a complaint, thus rendering the

complaint involuntary. The complainant clearly wished to say something and felt inhibited in doing so by text, but that does not render the ultimate complaint inadmissible. The complaint made is part of a continuum of complaint. The fact that she did not reveal everything in the first part of her complaint does not render the complaint involuntary.

Ground Two

41. Under this heading the appellant submits that the decision of the jury was perverse in circumstances where they disagreed on Count 1. Both allegations arose from the same set of circumstances and it is difficult to appreciate how the jury might have accepted the complainant's evidence in relation to Count 2 but not in respect of Count 1 such that it was unjust and perverse to return a majority guilty verdict in respect on Count 2.

42. The appellant refers to *The People (DPP) v. Nadwodny* [2015] IECA 307 where the Court applied the principle that there is a high threshold to be crossed in claims of perversity and that an appeal court should only quash a decision as being perverse where serious doubts exist about the credibility of evidence which was central to the charge, or where a guilty verdict, even by a properly instructed jury, was against the weight of the evidence. Moreover, in any assessment of a perversity claim, a court must look at all the evidence which was before the jury and not just selected portions of it. Here, in light of all of the evidence tendered, it is submitted that the Court might find the appellant's conviction to be perverse and/or contrary to the weight of all the evidence.

43. The respondent submits that the disparity between the counts can be explained by the evidence given by the appellant in cross-examination as he effectively admitted that as regards the second incident he initiated sex in the early hours of the morning when the complainant was asleep.

44. The respondent agrees with the appellant's assertion that there is a high threshold to be crossed in claims of perversity. The respondent refers to *The People (DPP) v. Alchimionek* [2019] IECA 49 as an example of the level of exceptionality required to be reached in order for a successful appeal on such grounds. In *Alchimionek* Birmingham P. stressed that a decision to quash a verdict because it is perverse is a very exceptional one.

Discussion

45. Mr Bowman rests on the written submissions in respect of this ground. The law is well established concerning an application premised on perversity, From *The People (DPP) v. Tomkins* [2012] IECCA 82 and *The People (DPP) v. Nadwodny* [2015] IECA 307, through to the more recent decision of Birmingham P. in *The People (DPP) v. Alchimionek* [2019] IECA 49, a decision to quash a verdict on this basis is a most exceptional one. There are reasons for this which include the primacy of the fact finders, moreover, as stated by Birmingham P. in *Alchimionek*:-

> "A further practical reason why such situations are rare and exceptional is that in any given case where the state of the evidence is such that a conviction would be perverse or would give rise to a miscarriage of justice, one would expect to see an application to the trial Judge to withdraw the case from the jury. If, in such a case, the issue is in fact considered by the jury, then usually, it will be because a Judge, having heard the matter argued, has come to the view that it is a case where a properly charged jury could properly return a verdict of guilty."

46. We observe in the present case, that no such application was moved on the part of the appellant on the conclusion of the respondent's case and we can see good reason why this was not done. The respondent's evidence included the complainant who gave evidence in

respect of the two counts preferred on the indictment and AB gave evidence of recent complaint.

47. On the conclusion of the respondent's evidence, the appellant gave evidence and as highlighted by Ms. Fawcett SC in her written submissions, he told the jury that he had sexual intercourse with her as she was waking up.

48. The jury in the present case, having been properly charged, deliberated for over seven hours. In the circumstances, and even absent the appellant's evidence, we are entirely satisfied that the appellant has not met the required threshold to quash the verdict on the basis of perversity.

49. Accordingly, this ground fails.

Ground Three

50. This ground is concerned with alleged deficiencies in the judge's charge. The appellant characterised the charge as an untraditional charge and argues that the trial judge engaged in excessive commentary on the evidence and failed to set out the evidence in a balanced and impartial manner. The appellant refers to *The People (DPP) v. Rattigan* [2017] IESC 72 at para. 72

> "Counsel for the appellant has drawn the attention of this Court to an ex tempore ruling of the Court of Criminal Appeal in DPP v Slattery (delivered on the 4th February 2004) in which Hardiman J., speaking for the Court, described the issue in the following terms:
>
> 'In this case the learned trial judge's deep and strongly felt disbelief of what the defendant said in evidence comes over clearly from the transcript, but the credibility of this evidence was entirely a matter for the jury and not for the judge. A judge can certainly comment in a fashion which may be helpful to the jury in making up its mind but should not present them with his or her own resolution of the facts. We think the

matter is perhaps well put in Oglesby's case, that the learned trial judge is entitled to comment on the evidence but not to disparage or discredit it. He is certainly not entitled to comment on it in such a fashion as suggests that if the jury took a different view to that of the learned trial judge they would be in grave conflict with him. It is true that the learned trial judge here more than once indicated to the jury that they were entitled to take a different view from his, and it is important that that should be done. But even if it is done, that fact does not legitimate every sort of comment, and in particular, does not legitimate gravely disparaging comments on the defence evidence of the sort made here.'"

51. The respondent notes that the appellant has not targeted any specific aspect of the judge's charge which is considered to show partiality. In fact, on a reading of the charge in its totality it is clear that the trial judge took great pains to emphasise that the evidence was a matter for the jury and his role in summing up was simply to give assistance and if he left anything out that the jury thinks is important, they should stick with what is important.

52. The respondent submits that while the charge was not traditional in the sense that it did not in a linear way summarise the evidence witness by witness, the charge still had a coherent structure and the evidence around the core issues was carefully marshalled by the trial judge.

53. The respondent further submits that the appellant's reliance on *Rattigan* is misconceived as there is no suggestion that the defence was not put to the jury. The respondent refers to the following passage from *The People (DPP) v. PR* [2020] IECA 347 where the Court considered what is required by a trial judge in summarising the evidence:-

"In our view, in the present case, where the judge adopted the somewhat unusual approach of reading the entire transcript of the interviews, rather than summarising the evidence, it was less than ideal that he made no mention even of the fact of cross-

examination. We do not consider that it was necessary for the judge to summarise the cross-examination in great detail, but the charge must be a balanced one, by whatever means a judge in any given case, considers appropriate. What is essential is that the judge presents an impartial review of the evidence in a fair and balanced manner. While a judge is under no obligation to remind the jury of all the evidence or all the arguments, nonetheless, the jury must be reminded of the salient features in the trial in order to assist the jury in its role and to direct them to the issues of fact which require determination. Indeed, the optimum charge is one which identifies the legal and evidential issues for the jury with clarity and concision."

Discussion and Conclusion

54. In oral argument, Mr Bowman contends that where the appellant gave evidence, the risk arose that the jury would simply compare his evidence and that of the complainant and decide on a preference basis rather than reaching the required standard of proof.

55. This is a rather novel argument. However, despite Mr Bowman's eloquent submission, we are not satisfied that it is meritorious. The trial judge's directions to the jury were impeccable, he ensured the jury were fully aware of the fundamental legal principles and advised them in very clear terms as to the onus and standard of proof. In his concluding remarks the judge instructed the jury regarding the appellant's evidence as follows:-

"If you reject his evidence, you still must look at all of the evidence and see if the prosecution prove the case beyond reasonable doubt. But still the onus remains entirely on the prosecution all the way through."

56. This was said in the judge's concluding remarks, but of course, at the outset of his charge, he fully explained the legal principles. In addition, while a requisition was raised concerning imbalanced comments on the judge's part, prior to summarising the evidence,

the judge advised the jury to ignore any comments on the evidence with which they did not agree.

57. We are entirely satisfied that this was a balanced and thoughtful charge which addressed the legal principles and properly summarised the salient evidence.

58. Accordingly, this ground fails.

Decision

59. As we have rejected all grounds of appeal, the appeal against conviction is hereby dismissed.