THE COURT OF APPEAL

Record Number: 90/2022

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

B.F.J

APPELLANT

JUDGMENT of the Court delivered on the 19th day of May 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 28th March 2022, the appellant was convicted of six counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990. Whilst several grounds of appeal were filed, only one of those grounds is being advanced. However, the appellant seeks to add an additional ground and this judgment concerns that motion to amend the Notice of Appeal to include the additional ground of appeal.

Background

2. The counts on the indictment relate to six separate allegations occurring at a number of locations between the 1st September 1998 and the 31st July 1999. The appellant was the school chaplain of the complainant's secondary school. The complainant was in his second year and 13 years of age, turning 14 years in early 1999, at the time of the offending.

3. The complainant gave evidence that he played football for the school. He stated that he did not often attend school and that the appellant would call to the family home and would be sent by his mother up to his bedroom in order to bring him to matches. The complainant recalled that on one occasion, the appellant rubbed him on his penis underneath his pyjama bottoms. He then brought him to a match. The remaining incidents of sexual misconduct concerned similar behaviour and of forcing the complainant to touch the appellant's penis. The locations varied.

4. The complainant gave evidence that he did not make any complaint at the time of the offending because the appellant had told him not to tell anyone. He stated that he thought that it was his fault that the offending had happened.

5. The allegations first became known in January 2017 when the complainant made a disclosure of sexual abuse by the appellant to a Dr. H. Shortly after this hospital visit, he made a disclosure to his mother that he had been assaulted.

6. A Fr. H gave evidence of the complainant having attended two sessions of counselling with him towards the end of 2017. In cross-examination, he stated that during the second session, the complainant made a disclosure of sexual abuse to him.

7. In December 2017, the complainant made two statements to An Garda Síochána and an investigation ensued. In May 2018, the complainant phoned a lifelong friend, Mr. L to tell him that he had contacted the Gardaí in respect of a matter arising from their time in school. The complainant told Mr. L that he had been "*interfered with at home*" by the appellant.

8. No issue was taken with the admission of the recent complaint evidence of Dr. H and the transcript does not disclose any objection to the evidence of disclosure to his mother or to Fr. H. Objection was taken to the admission of the evidence of complaint to the complainant's friend, Mr. L. The trial judge ruled in favour of the Director.

The Motion

9. By way of Notice of Motion dated 22nd March 2023, the appellant sought to advance an additional ground of appeal:-

> *"(5) The Learned Trial Judge's charge to the jury was unsatisfactory by virtue of the fact that the Learned Trial Judge omitted to explain the purpose upon which the complaint evidence was admissible, namely, to show consistency of the account, not for the purpose of proving the fact of the complaint itself and did not constitute corroboration."*

The Appellant

10. The appellant says the jury were not directed on the evidential value of recent complaint evidence. Whilst it is conceded that no requisition was made by counsel for the accused at trial, it is submitted that this is not fatal to the ground put forward by the appellant. Mr. Staines SC argues that while no affidavit has been filed, it is clear that this was an error or oversight which simply was not noted by any party to the trial, but that it is a legal principle of such fundamental importance, that the failure to instruct the jury on the limited use of this evidence amounts to a fundamental deficiency in the trial.

11. Reliance is placed on *People (DPP) v MA* [2002] 2 IR 601 in which case, The Court of Criminal Appeal stated that the giving of a direction on recent complaint evidence was mandatory and further, the failure to raise the issue at the conclusion of the charge was not a bar to the court quashing the conviction.

12. It is noted that the failure to give a direction does not automatically mean that the conviction should be quashed. The case of *People (DPP) v Awode* [2017] IECA 44 is distinguished from the present case on the basis that counsel for the accused in *Awode* not only did not

challenge the admissibility of the complaint evidence but actively sought its admission where the prosecution initially sought not to introduce it.

13. The following from *MA* is relied upon:-

> *"The court does not consider persuasive the submission of counsel for the prosecution that the giving of such a direction to the jury be considered a desirable practice rather than a mandatory one or, at most, one which must be given only where, in the particular circumstances of the case, it is necessary to avoid injustice. Where evidence of complaint to third parties is tendered by the prosecution, as part of its case against an accused, it is admissible only by virtue of the fact that it may demonstrate consistency of conduct by the complainant with her evidence. If such evidence is incapable of demonstrating such consistency or is not tendered for the purpose of demonstrating consistency, there would appear to be no legitimate basis for the prosecution to call such evidence in a criminal trial. It is the very nature and purpose of the evidence itself which give rise to a need that the jury are properly instructed and not other facts or circumstances. Accordingly, the direction should be given in all cases where such evidence is tendered by the prosecution. A failure to give such a direction would upset the balance which has long been considered necessary to ensure the fairness of the trial."*

The Respondent

14. The respondent objects to the late addition of a ground of appeal, stating that no requisition was raised following the judge's charge, and, moreover, no explanation has been offered for the failure to do so on the part of the previous legal team. The Director relies on *People* (*DPP) v Cronin (No. 2)* [2006] 4 IR 329 with particular reference to para. 46:-

> *"It seems to me that some error or oversight of substance sufficient to ground an apprehension that a real injustice has occurred must be demonstrated before the court should allow a point not taken at trial to be argued on appeal."*

15. It is submitted that the appellant's attempt to introduce a new ground of appeal, a year to the day from the start of the trial falls squarely within the realm of "*drip feed"* litigation.

16. It is further submitted that nothing arises to raise an apprehension that a fundamental injustice has occurred. It is noted that, in quashing the conviction in *MA,* the Court of Criminal Appeal applied the following criteria set out in *People (DPP) v Sweetman* (Unreported, Court of Criminal Appeal, 23rd October 2000):-

> *"There are also cases in which in the context of the whole trial and what is at issue being of relative insignificance, this court can overlook a defect in the charge and take into account the failure to raise any requisition. This court is satisfied that this is not such a case, because this was central to the trial, it was a matter of crucial importance, it was the critical evidence against the appellant and consequently this court is satisfied that that ground of appeal has been satisfied."*

17. The Court of Criminal Appeal in *MA* held:-

> *"In this particular case the court is satisfied that the evidence of complaint was a central and critical part of the prosecution case. Accordingly, it is satisfied that the failure of the defence to raise the issue at the conclusion of the learned trial judge's charge is not a bar to this application."*

18. It is argued that the recent complaint evidence of Mr. L was not a central and critical part of the case against the appellant and was certainly not *"the critical evidence against the appellant."*

19. It is thus submitted on behalf of the respondent that each of the issues, namely:

(a) the delay in advancing Ground 5,

(b) Counsel for the appellant's failure to raise a requisition at trial in respect of the recent complaint evidence, and

(c) the fact that the recent complaint evidence was not an indispensable part of the facts underpinning the appellant's conviction,

are each in themselves sufficient to dispose of Ground 5, while also being mutually reinforcing.

20. Reliance is placed on *Awode,* in which case this Court held that the failure to give a direction to the jury relating to recent complaint evidence was not one which would necessarily have rendered the trial unsatisfactory.

21. It is submitted that in the present case the appellant cannot point to any real risk of fundamental injustice occurring due to the absence of a suitable direction to the jury concerning recent complaint evidence. Further, it is submitted that he cannot point to any explanation for the failure to raise the issue now sought to be relied upon during the trial when the opportunity arose.

The Purpose of Evidence of Recent Complaint

22. We make the observation at this point concerning the respondent's submissions with reference to para. 18 and subpara.19 (c) of this judgment. It must be recalled that evidence of complaint is not evidence of the truth of the allegation made and nor is such evidence capable of constituting corroboration of the complainant's testimony. Murray J. (as he then was) in *MA* did not refer to facts underpinning a conviction but questioned as to whether the evidence of complaint played a central or critical part of the prosecution's case. Evidence of complaint may be relied upon by the prosecution for the limited purpose of seeking to show consistency on the part of the complainant, which may amount to a central or critical part of the prosecution's case. In the unlikely event that the submissions suggest an interpretation that complaint evidence could corroborate or act as evidence as to fact, this, of course is not the legal position for the reasons stated above.

23. The decision in *Sweetman* concerned a murder conviction where there was an absence of requisition regarding the failure of the trial judge to advise the jury on how to treat the confession of a co-accused, that the confession of the co-accused could not be taken into account in assessing the case against the appellant. It was this to which the court was referring when using the words "*the critical evidence against the appellant*."

24. In the course of the judgment in *MA* at p. 610, reference was made to *People (DPP) v Brophy* [1992] ILRM 709 where O'Flaherty J. cited with approval the principles in *R v Lillyman* [1896] 2 QB 167. Para. (c) is apposite here concerning the purpose of recent complaint evidence:-

> *"(c) It should always be made clear to the jury that such evidence is not evidence of the facts on which the complaint is based but to show that the victim's conduct in so complaining was consistent with her testimony."*

Discussion

25. It is common case that no instruction was given by the trial judge as to the limited purpose of the admission of recent complaint evidence. However, one of the objections to the additional ground on the part of the Director is on the basis that the matter was not raised at trial. The Director relies on the seminal decision of *Cronin* in this respect and there are undoubtedly very good reasons for the reluctance of an appellate court to permit points not raised at trial to be canvassed on appeal. As stated by Edwards J. in *Awode*:-

> *"The reason for this rule or statement of principle is not at all a technical one, or one merely designed to assist in the orderly conduct of trials and appeals. It is to ensure a proper relationship, based in reality, between the conduct of an appeal and the task on which the court is engaged, which is to say whether or not the trial was a safe and satisfactory one."*

26. Moreover, no evidence has been offered to explain the failure to raise a requisition on the omission by the trial judge. It is the position, however, that the absence of a satisfactory explanation for the failure to do so will not necessarily be fatal to an application to add grounds on appeal and this is particularly so if the issue is one which could give rise to a fundamental injustice.

27. Mr. Staines makes the point that it cannot be anything but an oversight on the part of all parties to the trial in failing to bring the omission to the judge's attention. It is evident to us that there can be no conceivable tactical advantage to the failure to raise such a requisition. Why would the defence not want the jury to be properly instructed as to the limited use for which such evidence may be put?

28. Mr. Staines explained that there was a change in legal team after the sentence hearing, that his legal team formulated the grounds on foot of notes from the previous legal team and once the transcript became available, and in preparing the case, it became apparent that the charge did not refer to the instruction regarding the use of recent complaint evidence. This was therefore not a trawl of the transcript to find grounds of appeal, but an examination of the transcript to seek support for the grounds already formulated.

29. The Director further submits that the appellant cannot point to any real risk of an fundamental injustice due to the absence of a direction concerning the purpose of the admission of recent complaint evidence.

30. Evidence was adduced by the prosecution that the complainant attended a Fr. H for counselling, although no evidence of complaint was adduced in direct evidence. There was evidence from his mother that he told her he had been assaulted, evidence from Dr. H and evidence of Mr L. However, it must be said that it seems the most noteworthy evidence of complaint was that given by Dr. H. We do not intend to address the admissibility of the evidence of Mr. L for the purposes of this judgment, as evidence of complaint was clearly given by Dr. H. She gave evidence that the complainant complained to her that he had been sexually abused by a member of the clergy, giving his first name, the name of the school, the age of the complainant and the approximate years. Therefore, the complaint was quite detailed.

31. It is clear from *MA* that where such evidence is admitted at trial as an exception to the rule against hearsay, the jury should be instructed as to the limited use of that evidence. It is not

capable of corroborating a complainant's testimony, still less is it evidence as to the truth of the allegations, it is evidence adduced to seek to show consistency on the part of the complainant; that is that the complainant's conduct in so complaining was consistent with his/her testimony.

32. There is a risk in the absence of an instruction by a trial judge that a jury, unaware of the legal niceties, may consider such evidence to be supportive of the complainant's account or that the evidence confirms the complainant's account. Therefore, an express instruction is required in most circumstances to obviate that risk. Such an instruction was not furnished in this trial.

33. The evidence in this trial was that of the complainant and the evidence of recent complaint, therefore it cannot be said that the evidence was not of significance to the prosecution. The following passage at p. 611/612 of *MA* is apposite:-

> *"The court finds itself in the same position as the court did in The People (Director of Public Prosecutions) v. Sweetman (Unreported, Court of Criminal Appeal, 23rd October, 2000), where Keane C.J., having observed that it was not necessary for the court to consider whether there was an entirely satisfactory explanation for the failure of counsel to raise a requisition on an aspect of the trial judge's charge, went onto say:-*
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> > *'It is sufficient to say that, as this court has said on numerous occasions in the past, of course it is the duty of counsel for the prosecution and the defence to draw the attention of the trial judge to any aspects of his charge which require reconsideration on his part so as to give him an opportunity of putting any matter right before the jury reached their verdict. There are also cases in which in the context of the whole trial and what is at issue being of relative insignificance, this court can overlook a defect in the charge and can take into account a failure to raise any requisition. This court is satisfied that this is not such a case because this was central to the trial, it was a matter of crucial importance, it was the critical evidence against the appellant and consequently the court is satisfied that that ground of appeal has been made out.'*
>
> *In this particular case the court is satisfied that the evidence of complaint was a* ***central and critical*** *part of the prosecution case. Accordingly, it is satisfied that the failure of the defence to raise the issue at the conclusion of the learned trial judge's charge is not a bar to this application.*
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> *In the circumstances of the case and having regard to the conclusions outlined above, the court is satisfied that it would be unsafe to allow the jury's verdict to stand and, accordingly, will allow the appeal, set aside the verdict and order a retrial."* (our emphasis).

34. The facts in this case are distinguishable from those in *Awode*. Whilst it does not seem that there was a challenge to the evidence of Dr. H, it was not the position that the defence actively sought the admission of the evidence of complaint. It is true that cross-examination of Fr. H elicited that the appellant mentioned sexual abuse to him, but by that stage the evidence of complaint had already been given by Dr. H and indeed by Mr. L and the defence were seeking to show that the complainant only referred to sexual abuse in a second counselling session.

35. In *Awode*, the defence persuaded the prosecution to call that evidence in circumstances where it was not the prosecution's intention to do so and then sought to utilise the complaint evidence to undermine the credibility of the complainant.

36. In the present case, the respondent introduced the evidence of complaint and relied on their evidence in closing the case. Therefore, the evidence was clearly of importance and warranted the appropriate direction from the trial judge. This was so on Dr. H's evidence alone.

Conclusion

37. We are persuaded that the appellant should be permitted to add this ground of appeal notwithstanding the failure to raise a requisition at trial and the failure to offer an explanation as to why a requisition was not raised. We believe there was an oversight or error of substance giving rise to the apprehension of a real injustice. The complaint evidence, particularly that of Dr. H was critical to the prosecution's evidence against the appellant and the absence of the appropriate direction as to the specific use of that evidence in those circumstances renders the conviction unsafe.

38. Accordingly, we quash the conviction.