THE COURT OF APPEAL

[2021] IECA 144
[212/18]

Birmingham P.
Edwards J.
McCarthy J.

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

G.P

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 12th day of April 2021 by Mr Justice McCarthy

1. This is an appeal against conviction. On the 18th of April 2018 the appellant was convicted of the rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 of R.B and on the 14th of July 2018 the appellant was sentenced to six years imprisonment, the sentence to begin on that date.

2. The injured party, R.B, was born in 1995 and was approximately 20 years old at the time of the offence and a student. The appellant was born on the 24th of July 1971 and was approximately 44 years old at the time of the offence.

3. On the evening of the 4th of November 2015, the injured party attended a GAA team meeting and afterwards went to a friend's house with most of the members of her team where she had some drinks. Later on, with a number of friends, she visited two nightclubs and left the second on her own, around 1.00a.m on the morning of the 5th of November. She was feeling upset and at a given stage she sat on a bench and attempted to ring some friends but wasn't successful in contacting them. The appellant was walking a dog and he approached her and sat down with her. He offered her a lift home in his van and she accepted it. As he was driving he asked her if she'd ever seen an overview of the city lights and she said she had not. The complainant fell asleep awakening to find that the appellant was no longer in the driver seat, but was standing over her on the passenger side and had put his penis into her mouth. She reacted strongly and started shouting. He took his jacket from her - he had previously given it to her - she got her phone, ran around to the back of the van and memorised the registration number. She then ran to a nearby house and knocked and rang on the door. The occupants let her in and they found her to be in an extremely distressed state. She repeatedly called out the registration number and one of

the occupants of the house wrote it down. She told them that she had been assaulted. They asked her whether they should contact the Gardaí and she agreed. The Gardaí then took her to the garda station where she outlined what had occurred and then to a Sexual Assault Treatment Unit. Later that day she made a formal statement.

4. The Gardaí were able to trace the driver of vehicle - the appellant. Gardaí contacted him and he agreed to attend the garda station later that evening and when there made a statement under caution. He admitted meeting the injured party and giving her a lift, but he maintained that all activity between them, and in particular, putting his penis in her mouth, had been consensual.

5. The complainant provided a Victim Impact Statement in which she outlined the devastating impact the offence has had on her. She described how well she was getting on in university, enjoyed socialising and playing Gaelic football. Following the event, she struggled to keep up her studies and ultimately was unable to proceed with her university education. She attended weekly counselling and was prescribed anti-depressants. She later moved home to her family and has felt isolated. She lost interest in playing sport. She described the difficulty of the trial process and giving evidence. She expressed disappointment that she would not be graduating with her classmates.

Grounds of Appeal

6. The sole ground of appeal now being pursued having regard to an amendment of the grounds permitted by this Court is as follows:-

   (i) The Trial Judge erred in law in refusing to allow the appellant to cross-examine the complainant on her prior sexual history pursuant to the provisions contained in section 3 of the Criminal Law (Rape) Act, 1981.

7. Evidence in chief was given on the first day of the trial and cross-examination commenced. Prior to continuing cross-examination on the second day, an application was made by counsel for leave to cross-examine the complainant in relation to her previous sexual history. Counsel on behalf of the appellant indicated that the appellant had instructed that the sexual acts occurred consensually and this was the *relevance* of the material.

8. The application was made by virtue of, and pursuant to, section 3 Criminal Law (Rape) Act, 1981, as substituted by section 13 of the Criminal Law (Rape) (Amendment) Act, 1990. It provides:-

   "*3(1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person*.

   (2)(a)The judge shall not give leave ….except on application made to him, in the absence of the jury by or on behalf of the accused person.

(b) The judge shall give the if, and only if, he is satisfied that would be unfair to the accused person to refuse to allow the evidence to be adduced by the question to be asked, that is to say, if he is satisfied that, on the assumption that if the question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.

(3) …[not relevant].."

9. The appellant says that the delay in bringing the application was partially as a result of counsel for the appellant only appreciating the significance of a particular portion of the Book of Evidence, which was a reference in the complainants statement to oral sex with her boyfriend the previous weekend, in the light of material the appellant had downloaded from the internet and provided to his legal team at the trial; this, one infers, had, in defence counsel's contention, sexual connotations.

10. The learned trial judge ruled on the matter as follows:-

"*The defence have made an application under section 3 of the Criminal Law (Rape) Act 1981. This application comes* ***halfway through the plaintiff's cross examination****. Counsel for the defence in making this application, 1) refer the Court to a particular paragraph of the complainant's statement of evidence contained in the book of evidence where she made reference to having had oral sex on the previous weekend with a male from [redacted] who she says she was seeing regularly. 2) made reference to material that counsel for the accused said that only come to light yesterday, that this was material which had been downloaded from the internet by the accused yesterday and that this material consisted of 1) a profile photograph up loaded by the complainant on the 13th of November 2015 some eight days after the events complained of in this trial. 2) some comments exchanged between the complainant and another person on social media, which the defence says contains sexual innuendo.*

The defence indicated that they would not be opening this material but are relying on it to meet the test set out in the legislation so as to allow them to cross examine the complainant on the particular paragraph referenced in her statement. The defence go on to say that the posting of a new profile picture some eight days after the event goes to the complainant's state of mind, and is inconsistent with somebody who was raped on the 5th of November 2015. The defence further say that the jury may well take the view that people don't normally engage in oral sex and that the jury knew that the complainant was willing to engage in consensual oral sex that this would be relevant to their consideration of whether the accused is guilty or not of the charge.

The prosecution objected to this application on the grounds of lateness, coming after the complainant's conclusion of direct evidence and also on the basis that the complainant's statement had been contained in the original book of evidence. They

also objected on the basis that the evidence upon which the defence wish to cross examine her does not reach the test as laid down in the legislation. The prosecution opened Thomas O'Malley's book on Sexual Offences and in particular paragraphs 8.06 and 8.08 [sic]. The prosecution also opened section 3 of the Criminal Law (Rape) Act 1981 and section 21 of the Criminal Justice (Victims of Crime) Act 2017.

The prosecution also opened the case of DPP v. K(G) and also The People (DPP) v. Walsh. In the case of People (DPP) v. Walsh the Court of Appeal has held that an application to cross examine a complainant under section 3 should be made as early as possible in the trial, preferably at the outset wherever there is material in the book of evidence to suggest that such an application may properly be made. But in any event no later than the end of the complainant's direct evidence. Postponing an application beyond that point and particularly until after the other witnesses have testified has been declared unacceptable.

Although the Court of Appeal has acknowledged that a late application may still be entertained where the interests of justice may so require. The facts of the People (DPP) v. K(G) are distinguishably from the present case on their facts. It was opened by the prosecution as being instructive as to what is required to meet the test of relevance, and confirmed again that cross examination of complainants in these circumstances should never be used as a form of character assassination and that young complainants should where possible be spared such cross examination.

The law, the test that the Court has to consider is set out in section 3(2)(b) of the Criminal Law (Rape) Act 1981. The statutory criterion for the granting of leave is grounded on fairness to the accused and this means that the judge must ask if in the event that the evidence or question was disallowed, the jury might reasonably be satisfied beyond a reasonable doubt that the accused is guilty while the effect of allowing it might reasonably be that the jury would not be so satisfied. Any evidence sought to be adduced under this or any other provision must first of all pass the test of relevance, unless relevant it is automatically inadmissible. And in that case, it's a reference to People (DPP) v. McDonagh and Cawley.

Quoting from O'Malley's test and I quote, "Few firm principles exist except that permission should not ordinarily be granted when the proposed questions go to credibility, whereas it may be properly granted where they relate to a fact in issue." Quoting from O'Malley's text in paragraph 8.11 he says, "While it is impossible to be prescriptive about the circumstances in which sexual history evidence should be allowed, the primary question must surely be whether in the particular circumstances the evidence has real and genuine relevance either to credibility or to an issue such as consent. It will not have such relevance if its sole purpose is to convey an unfavourable impression of the complainant to the jury.

The Court's decision, this application comes late after the conclusion of the complainant's direct evidence contrary to what was set down in DPP v. Walsh. In addition it is grounded on part statement of the complainant contained in the original

book of evidence, and which has been known to the defence since the service of the book of evidence. The Court is of the view that the updated profile photograph and the commentary between the complainant and an unknown third party does not assist the defence in any way in meeting the test set out in the legislation, so as to allow them to cross examine the complainant on the particular paragraph in her statement.

Further the defence contention that people do not usually or normally engage in oral sex or that it is of such an unusual character that it is of relevance to the jury's consideration of whether or not the complainant consented does not in the Court's view meet the test set out in the legislation, and for that reason, the Court refuses the application."

Thus the judge rejected the application for two reasons.

11. In submissions, the appellant, at the outset, accepted that the onus was on the appellant to satisfy the Trial Judge that leave should be given. It is further accepted that leave should not be given if the questioning only went to show that the principal witness in a rape trial was promiscuous or fond of sex - this sort of evidence/questioning involves an attack on the character which is not related to the veracity of the witness or likelihood that a non-consensual sexual act occurred. The appellant submits that this was not the objective of the appellant: the appellant sought to question the complainant about a similar sexual act in which she partook proximate (the previous weekend) to her 'interaction' with the appellant.

12. It is further submitted that the leave of the Trial Judge was sought in order to question the complainant on a specific issue and this could have been done in a very focused and concise manner. Furthermore, the questioning could have been confined to the contents of the book of evidence. It is submitted that the very fact that the reference to oral sex with another male the weekend before was contained in the book of evidence, in the complainant's statement, meant that that complainant was expecting to be questioned about it and would have been sufficiently prepared to deal with a limited cross-examination on the point; we think this cannot be right as the fact that the victim referred to the relevant sexual experience is not *per se* relevant to admissibility. It may have been, it was further contended, possible to agree the formulation of the questions to be posed and thus reducing any unnecessary impact on the complainant while at the same time allowing the jury consider all of the relevant facts. The core reason advanced at trial was that the fact that victim had previously engaged in a supposedly unusual type of sexual act (we make no comment on this proposition) undermined the contention that she did not consent or was willing to engage in this type of conduct, though on appeal any such basis is abandoned and here the bald proposition is that the evidence or questioning contemplated is admissible or permissible solely because of the type of activity and its proximity to the crime.

13. The appellant refers to *R v. Viola* [1982] 1 WLR 1138, which deals with the analogous (though not precisely the same) English Act, where there was evidence that the complainant had engaged in consensual sex with others in the period proximate to the time when the

alleged rape was to have occurred. In *Viola*, the Court found that the fact that two men were in the complainant's maisonette shortly before the alleged rape and another shortly after it meant that the appellant should have been allowed to cross-examine the complainant on these issues. This type of evidence was held to have a relevance on the facts. It is accepted that the temporal gap in this case is greater than in *Viola*, but the reasoning equally applies. In *Viola*, the Court held that the question in debate there were not "*mere questions as to credit.*"

14. The questions contemplated here, it is also said on behalf of the appellant, went to the issue of consent and not solely to credit. It is therefore submitted that the Trial Judge erred in law in refusing to permit the appellant to ask those questions. The Trial Judge's ruling was unfair to the appellant as had the appellant been permitted to question the complainant on the issue, then, it is submitted that a jury would not have been satisfied to the requisite standard.

15. The respondent submits that the timing of the application was a consideration and the Trial Judge correctly interpreted the law in relation to this point. It is submitted that the Trial Judge rightly determined that the proposed cross examination was not relevant, and that even if it was relevant, it did not satisfy the statutory test set down in section 3(2) of the 1981 Act. The Trial Judge's assessment of the timing was consistent with the case law on this point, and the decision of the Court of Criminal Appeal in *The People (DPP) v Walsh* [2008] IECCA 111. The Court of Criminal Appeal found that there was an obligation on the defence to move in a timely manner any application to cross-examine a complainant as to prior sexual history.

16. The Trial Judge, the respondent contends, correctly noted that the postponement of an application beyond the end of the direct evidence of the complainant, and particularly until after other witnesses had testified, as was the case in *Walsh* but not in this case (save witnesses proving the maps and photos of the relevant scenes/locations), was unacceptable. The Judge equally noted that a late application may still be entertained where the interests of justice may so require. It must be recognised, the respondent continues, that the application was grounded on a paragraph in the Book of Evidence, which had been in the possession of the appellant and his legal team for a long period of time. The appellant did not satisfactorily explain the delay in making the application. We agree with this: the Trial Judge correctly considered and applied the law on this point.

17. The respondent further submits that the Trial Judge's refusal of the application was correct on the basis that the material submitted was not relevant to the case and the fact that the appellant could not ask the questions did not result in any unfairness to the appellant or result in his conviction for the offence.

18. The respondent also submits that that the decision of the English Court of Appeal in *Viola* was grounded on the specific circumstances of that case; this is so and we repeat here what has been said many times that every case depends on the facts. We are referred by the respondent to *(The People) DPP v DD* [2018] IECA 192 and *(The People) DPP v GK* [2007]

2 IR 92 where the application of the statutory provisions was addressed. These decisions are not of assistance to us – they are decisions on their own facts.

19. We cannot see how the topic in question could have the slightest relevance on the facts in this case: the victim of the crime engaged in sexual activity with her boyfriend. That is all. The first question to be answered when admissibility is in debate is whether or not the evidence is relevant - evidence is admissible only if relevant and the Act does not come into play, so to speak, unless that first test is passed. Thus, even if the basic, ordinary, test of admissibility is passed, thereafter such evidence or questioning is admissible or permissible only if the criterion set out in the section is fulfilled, but the necessity for consideration of that issue does not arise here.

20. We therefore dismiss this appeal.