THE COURT OF APPEAL

[33/19]

Neutral Citation Number: [2021] IECA 66

Edwards J.

McCarthy J.

Donnelly J.

BETWEEN

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

RESPONDENT

AND

A.D

APPELLANT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 11th day of March 2021:

1. This is an appeal against conviction and sentence: this judgment addresses conviction only. On the 19th of November 2018, the appellant was convicted of a count of sexual assault. The appellant was sentenced on the 5th of February 2019, to two and a half years imprisonment with the final eighteen months suspended. The appellant had no previous convictions. He was 32 years of age at the time of sentencing. He is married.

2. The offence took place on the 21st of June 2015, at a location in a Dublin suburb, his home. We think it necessary to refer to the evidence with a degree of detail having regard to the issues raised on appeal but out of necessity we cannot do so in full.

3. The complainant Ms P went to the engagement party of Ms L. B and the appellant. She had known them for years and she had lived with them for a while - she described them in evidence as being very close to her and good to her. She was to stay with them overnight. At the party at a licensed premises in she had approximately ten whiskies and a "couple of shots". In the early hours of the morning of the 21st of June, when the bar closed, a group including the appellant, Ms B and the complainant went back to Ms B's family home where the party continued but it seems she had no recollection of who accompanied her and thought the house was that of Ms B's sister. She did not recall what occurred at the latter party but presumed she had more alcohol there. She returned the house in a taxi '*around '7-ish'* with the appellant and his fiancée.

4. The complainant was tired and said in evidence; *'you know I wasn't like alert or just—you know, oh, I don't know'* (she said), and, later, '*I was up for literally two days at that stage, and the tiredness. I'd went to their house to go asleep'.* The complainant had stayed in the house previously in a spare room with a single bed. On this occasion she went to a spare room which had a double bed: "*I don't know why I went to the one with the double bed…I said goodnight to [L] and I am sure that we gave each other a kiss goodnight and then I went up to bed.'*

5. She described the immediate event as follows:-

> "[she was] *going to sleep and he lifted the duvet and I opened my eyes but I wasn't alarmed at all. … he put his hand up my skirt and he started touching me and he put like the tip of his finger in and he whispered at me 'show me your clit, show me your clit' twice. And I couldn't move…and then, like I tried to wiggle my legs like, a little it*

and I don't know how but I did eventually turn- rolled over to face the wall and he was grinding up against me like, as in, like having sex with the back of me, but my clothes were all still on and everything. And I can't really remember if I did say it but I'm guessing I said it 'get the fuck away from me' at that stage. I think I must have said it because he did go away then.' She accepted she had said in her statement: *'I don't recall saying one word to him…presuming I said it.. I don't .. you know, If I didn't say it, maybe he wouldn't have went away. I said it either in my head or out loud, but I'm guessing it must have been out loud because he went away."*"

6. When she got out of the bed she got her shoes and went straight downstairs and was going to walk home. This was around 7a.m and she was accidentally locked in the porch as she tried to leave. She said that she started to panic and knocked on the door. The appellant then came down and opened the door after the complainant banged on the door more loudly. He asked her '*why are you going home*' and she answered '*because I can't sleep*'. He phoned a taxi for her and she said that she feared he was going to get her by the throat and say '*shut your mouth , don't tell anyone*'. The complainant had always previously had a good relationship with the appellant and his fiancée and they were protective of her. She said '*see you later'* and left. She indicated the appellant was wearing boxer shorts at that stage.

7. On that night complainant was not wearing underwear as there would have been a visible line given that her skirt was so tight. It extended below the knee. She said that the appellant had not pulled up her skirt nor had he been aggressive or violent. However, in cross-examination she said that '*when his hand was going up the skirt would have just automatically went with his hand'* and in response to the question *"in order to try to put his penis in your vagina it would have been the same, he would have had to take your skirt up; wouldn't he?"* answered *"yes."*

8. The complainant was taken to a Sexual Assault Treatment Unit where she was forensically examined by a Dr Columb whose report was read into evidence. According to the doctor she told her that '*she drank a large amount of alcohol between 9pm and 2.30 am on the 21st June 2015. Then she went to -- a house of her friend's mother where she stayed for approximately two to three hours and then went to [-- house in] [S] went to sleep in in the spare bed and next she found [the appellant] in her bed and he started touching her in the lower body. He inserted, she thinks, his penis in her vagina and had penile/vaginal sex with her after a few attempts. She was wriggling away from him and resisting, so he gave up and left the room."*

9. Dr Columb said that the complainant was composed during the examination. She was asked a series of questions by Dr Columb. In reply, she said that she was unsure if there had been any kissing, licking or biting. There was penile vaginal penetration. She was unsure whether there had been digital penetration or whether the appellant ejaculated onto her skin or her hair or her clothes. She was also unsure as to whether the appellant had kissed, licked, or bit her. In cross examination on the issue of penile penetration the following exchange took place:-

> "*Q Are you telling the jury that [the appellant] tried to put his penis in your vagina?*
> *A I don't know.*
> *Q You're not making that case now, sure you're not. That's not your recollection is it?*
> *A My initial thing that I said was he tried to rape me, so , I know what he done.*
> *Q Did he try to put his penis in your vagina?*
> *A His finger went in. I don't know..*
> *Q did he try to put his penis in your vagina?*
> *A I don't know.*
> *Q You don't know?*
> *A like , at the start I wasn't sure if it was his finger or his penis, but it had to have been his finger."*

The complainant agreed under cross-examination that shortly after arriving home she had phoned the Gardaí and told Garda Keogh that she was reporting an attempted rape: "*I said he tried to rape me"*. Shortly afterwards she had told Garda Stears "*he attempted to put his penis in my vagina"*.

Furthermore, the complainant said she was not still unsure regarding all of the above:-

> "*Q If you told her (Dr. Columb) you had penile sex, were you mistaken?*
>
> *A Yes*
>
> *Q If you told her you didn't know if you were licked, bitten or kissed, you were mistaken, you were wrong about that, weren't you?*
>
> *A Yes.*
>
> *Q Or was that that was what was in your mind at the time?*
>
> *A That wasn't in my mind…*
>
> *Q I'm suggesting to you that at the time what your mind had built up in your mind was this picture of sex. Sexual penetration, attempted sex and that [the appellant] and had full sex with you. I suggest to you--?*
>
> *A I'm not accusing him of having full*"

10. When the complainant returned to the garda station on the 23rd of June to make a detailed statement she brought a five page handwritten document with her. Written on the back was "*Why would he not have told her if he got into bed by accident with me. Then I walked downstairs and I said I was asleep because I was afraid."*

11. In cross-examination she said that she was referring to the fact, as she understood it, that the appellant had not told Ms B that he got into the bed by accident. She admitted that she did not know what she meant when she wrote "*I said that I was asleep because I was afraid"*. In the handwritten notes she said "*I remember me wriggling to try and move away.*

He had his hand on my…" but written above it was "*or willy"* with the word 'willy' subsequently crossed out.

12. The complainant went out to the taxi and said that when she was in the taxi that she became very upset and she asked the driver to take her to her car; she said in evidence that she told him what had occurred. In any event she went back to her own house at that stage. Shortly after that a complaint was made to the Gardaí, and she was taken to the Sexual Assault Treatment Unit in the Rotunda Hospital as aforesaid.

13. Mr McCloskey, the taxi driver, said that the complainant got into his car, she was "*crying, roaring and crying*" and "*basically broke down*". When he asked her whether or not everything was all right she repeatedly said "*I can't believe he'd done it*". He asked whether or not she wished to go to a Garda station but she said no and she wished to be brought to her home. She borrowed the driver's phone (she had left her own at the party earlier) but when she arrived at the address he she told him she desired that he take her to the [licenced premises] but he advised her against it. He then brought her back to her home. He asked her what had occurred but she simply said she could not believe that "he" had done it. She did not go into any detail about what she alleged had occurred.

14. When he was cross examined he said that he recalled telling the Gardaí in his statement that when he was asked what the complainant said, in response to an enquiry by him she said "*… She woke up and he had his hands all over her. She didn't know if anything had happened, she just freaked out*" was his recollection at the time – some hours after the event. He confirmed that he had told her that she should not drive her car because she had had consumed alcohol. He further agreed that he had told the Gardaí that he had told her that if what he thought had happened (actually) had happened she should go to a Garda station to which she had responded "*I don't know if anything happened, I just freaked out".*

15. When the Gardaí began investigating the appellant indicated he would come to a Garda station and make a statement. The bedroom in which the offence took place is immediately next to the bathroom. The next room along was his partner's room. The appellant said he had come out of the bathroom, gone into the room where the injured party was. Counsel for the appellant argues that there were serious inconsistencies between the complainant's description of events in her evidence in chief and the descriptions of events which she had given previously to the taxi driver who drove her home shortly after the alleged offence to the Garda to whom she made her initial complaint shortly after arriving home, to Dr Columb who examined her at the Sexual Assault Treatment Unit at the Rotunda Hospital, and, a few hours later to the investigating Garda who interviewed her on the 21st and 23rd of June.

16. The complainant accepted that there had been no attempted rape:-

"A At the start I didn't know what it was, If it was his finger or his penis, but obviously he would have had to been on top of me if it was his penis and he wasn't.

Q So when did you decide it wasn't his penis?

A I realised after it was registering a bit more what had happened. I was in serious shock after it.

Q See I suggest to you when you went to the guards you told them.. it was attempted rape. That was over the phone 'he attempted to put his penis in my vagina and I pushed him away' isn't that right. You said that to Garda Stears

A I can't remember sorry.

Q Did he put his penis? Did he try? You know he didn't?

A. No No.

Q You know he didn't put his penis in.

A Yes he didn't put his penis in."

17. When interviewed by Gardaí, the appellant said that he had left his bedroom to go to the bathroom and afterwards went by mistake into the bedroom where the complainant was sleeping. He got into the bed and put his arm around her, thinking he was in bed with his girlfriend. After about a minute, he realised his mistake and left the room.

18. The grounds of appeal are as follows:-

ii) The learned trial judge erred in law in refusing the application for a direction;

iii) The verdict of the jury was in all the circumstances perverse.

Ground i)

The learned trial judge erred in law in refusing the application for a direction.

19. An application for a direction was made and refused by the trial judge after the conclusion of the prosecution evidence. The application for a direction to acquit was therefore based on what is commonly known as the "second limb" of the principles elaborated in *R. v. Galbraith* [1981] 1 WLR 1039, approved in this jurisdiction. That decision and those principles have been dealt with many times by this Court.

20. The test as to whether or not there is a sufficient case to leave to the jury is that set out there by Lord Lane CJ as follows:-

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the

view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

21. The rule here was stated thus by this Court in *DPP v M* (Unreported, Court of Criminal Appeal, February 15th 2001) (per Denham J.):-

"*If there was no evidence that an element of the crime alleged had been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the situation here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, this is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge therefore was correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, this is not the situation here. On the facts and law the learned trial judge did not err in refusing to withdraw the count of sexual assault from the jury at the conclusion of the prosecution case.*"

22. The leading authority of this Court which deals with the principle is *DPP v M* [2015] IECA 65 where this Court said (per Edwards J.):-

"*47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn*

from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.

48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

23. The learned trial judge dealt with the application in the following terms:-

"*Okay, thank you counsel. I suppose what I have to say is that I'm struck by what Ms Rowland has laid out before the Court in the sense that obviously the difficulties with the prosecution case, you have clearly laid out to the Court. What struck me in the context of the evidence was that while there had been inconsistencies in [the complainant's] evidence,* ***she had been somewhat consistent in the explanation of those inconsistencies in the witness box (our emphasis).*** *She constantly referred to the fact that she was unsure what it was, that she was shocked at the time, that she didn't know what had happened, she couldn't believe what had happened and it's in the hours afterwards, that it's in a short period of time afterwards that there is evidence of distress. I appreciate what you say about the taxi driver, that she said she had told him something, the taxi driver gave a different version. But there is*

evidence that there was -- of her distress and that there was a complaint of sorts made, that she went to the Gardaí and then subsequently to the Rotunda and I hear you, Ms Rowland, in relation to the points that you make. I have to consider whether the evidence is so weak that no reasonable jury properly directed, could convict on the sufficiency of the evidence, as to whether that is a matter to go before the jury."

24. We think that the learned trial judge thoroughly considered all of the relevant evidence when the application was made and correctly applied the relevant principles of law to facts. We are not persuaded that any error arose. Whether or not to accede to an application of the type in question here will, by definition, be dependent upon the evidence in the case and the trial judge will make an assessment on that evidence. We have no doubt but that such infirmities as existed in the evidence, the elements of which we have sought to set out above, were matters to be resolved by the jury. There is nothing exceptional about the present case. We therefore reject this ground of appeal.

Ground ii)

The verdict of the jury in all the circumstances was perverse.

25. The court most recently addressed the issue of perversity in *The People (DPP) v Hearns* [2020] IECA 181 (per Donnelly J.) as follows:-

"*9. The parties to this appeal are in agreement that a finding that the jury verdict was perverse requires exceptional circumstances and a strong basis for so holding. Both parties refer to The People (DPP) v Nadwodny [2015] IECA 307 and The People (DPP) v. Tomkins [2012] IECCA 82 to this effect. In Tomkins, MacMenamin J. stated that "this court has repeatedly emphasised that it has no power to substitute its own subjective view of a case for that of the jury […] A decision that a verdict was perverse is a very exceptional one".*

MacMenamin J. referred to (The People) DPP v. Egan [1990] I.L.R.M. 780 where the Supreme Court held that "[s]ave where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it."

10. The appellant relies on (The People) DPP v. Alchimionek [2019] IECA 49 whereby the Court of Appeal overturned the rejection by the jury of a verdict of not guilty by reason of insanity. The Court of Appeal held that while the verdict of the jury has primacy, in certain rare situations, an appellate court would overturn such a verdict. In Alchimionek, the Court held that the jury's verdict "was not supported by any evidence in the case, was against all of the evidence in the case, and in those circumstances, has to be regarded as perverse." That case is not a perfect analogy with the present case as there was simply no evidence to support the verdict. In the present case, there was undoubtedly evidence upon which a jury could have found him guilty of the offence as charged in the indictment..."

Here, the issue of whether or not the case should be left to the jury was decided by the trial judge on the application to withdraw it: there was sufficient evidence upon which the jury could properly convict, as aforesaid. The circumstances in which a verdict on the merits, as here, might be held to be perverse will be rare, especially when the judge has properly refused a direction. This is not such a case. Examples of perversity will ordinarily involve more than a contention that the evidence was insufficient to found a conviction. This was pointed out by this Court in *The People (DPP) v. Marlowe* [2019] IECA 263 (per Edwards J.) in these terms:-

"*We consider that, in circumstances where we have already ruled that there was sufficient evidence at the conclusion of the prosecution case to allow the case to proceed to the jury, and no other evidence was offered, the appellant cannot maintain that the verdict*

was perverse on grounds of lack of evidence. To succeed based on perversity in such circumstances, he would have to have shown the existence of something else, some extrinsic circumstance (e.g. concrete evidence of jury bias), tending to suggest that the verdict was perverse. He has not done so."

26. In *Alchimionek* for example, the issue was whether or not the rejection of the entirety of the psychiatric evidence called by the prosecution and the defence to the effect that the appellant was not guilty by reason of insanity but rather guilty of the substantive offence (murder) was a perverse verdict as referred to above. Both sides were agreed that evidence was to one effect only, namely, that the appellant was not guilty of the offence in question by reason of insanity. In *Hearns* the issue of possible perversity arose because of the supposed incompatibility on the evidence between a conviction on a charge of robbery but an acquittal on a charge of false imprisonment when the false imprisonment was effectively part of the *actus reus* of the robbery. This is accordingly not a perverse verdict. We therefore reject this ground also.

27. We accordingly dismiss the appeal against conviction.