



THE COURT OF APPEAL

Record Number: 114/2021

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

LIAM O' BRIEN

APPELLANT

JUDGMENT of the Court delivered on the 11th day of November 2022 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 23rd April 2021, the appellant was convicted 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. He stood trial with a co-accused who was charged with rape and attempted s. 4 rape. The appellant's co-accused was acquitted of the rape offence by direction of the trial judge and of attempted s. 4 rape by the jury.
2. Two grounds of appeal are relied on, namely, 1. that the trial judge erred in refusing to direct an acquittal and, 2. that the jury's verdict was perverse in all the circumstances.

Background Circumstances

3. On the evening of the 27th October 2016, the complainant agreed to meet a relative of the appellant, whom she knew. At approximately 5pm, she met with group of people including the appellant and his co-accused.
4. Later in the evening, it appears that most of the group headed home and the complainant remained with the appellant's relative, the appellant and the co-accused. It seems that the appellant's relative also went home and she ended up in a secluded area with the appellant and his co-accused. It appears that the two men decided to go to this area, known as "The Sheds." When there, she gave the appellant her mobile phone to play music.
5. She stated that the appellant and his co-accused were talking amongst themselves, and, at the same time, the co-accused grabbed her hand and pulled her in on top of him. She recalled moving away and that the co-accused said that he would stop, to come back, not

to go anywhere, that he would not do it anymore. However, the co-accused recommenced touching her. She moved back towards the co-accused and he put his hand down her pants and began touching her vagina.

6. The complainant then gave evidence that the appellant smiled, and said that he wanted to join in. She said that, at this point, the appellant reached out towards her and she "nodded no, I don't want to" but that he replied that she was "no fun" and proceeded to put his hand in her pants.
7. Thereafter, the complainant gave evidence that she was in between the appellant and his co-accused and that they both lowered their pants. She stated that the appellant bent her over and put his penis inside her vagina and at the same time, his co-accused attempted to put his penis inside her mouth. The complainant recalled that the appellant said that he was going to ejaculate in her. She said that he pulled up his pants and that before he left the area, he threw her mobile phone against a wall. This was picked up by his co-accused who handed it over to her.
8. After this incident, the complainant re-joined her friends, at which point, she began crying. She walked home and once in her bedroom, she messaged one of her friends about the incident on Facebook messenger. She told one friend who told her mother and then the complainant's parents were called. This resulted in the complaint being made to An Garda Síochána and the complainant's examination at a Sexual Assault Treatment Unit.

The Direction Application

9. At trial, defence counsel applied for a direction on the basis that there was no evidence upon which a jury properly charged could find that the complainant did not consent to the sexual acts in question.
10. The appellant submits that the *actus reus* of the offence of rape has two elements; 1. there must be penetration of the vagina by the penis and 2. this must be done without the consent of the complainant. It is accepted that the first part of the *actus reus* is made out in the instant case, however, the appellant says that the respondent failed to prove the absence of consent. This element must be differentiated from the *mens rea* for the offence, namely, that the accused person knew that the complainant was not consenting or was reckless to this fact. Therefore, it is argued that while physical manifestations of the absence of consent may lend themselves towards establishing the *mens rea*, they do not demonstrate the *actus reus* of an absence of consent.
11. It is the appellant's position that the complainant's evidence of moving away, of nodding "no", or of feeling humiliated are insufficient to establish the absence of consent and that in order to prove that element of the offence, the complainant ought to have given evidence confirming that she was not consenting.
12. The appellant acknowledges that there are circumstances in which this is an unnecessary proof such as where a complainant is incapacitated or where there is deception or use of

physical force. In such cases, this element of the *actus reus* can be inferred from the circumstances. It is argued in the present case that there was no evidence of the absence of consent and therefore, the judge erred in failing to direct the jury to return a verdict of not guilty.

13. The respondent argues that there was ample evidence upon which the jury could base a finding that the complainant *at the time of the commission of the offence*, did not consent to sexual intercourse with the appellant. Reliance is placed on the following excerpt from Prof. O'Malley's text on *Sexual Offences* (2nd ed) at para 3-03.

"Although the giving or withholding of consent is essentially a mental process, the absence of consent is part of the actus reus of rape. In proving this element of the offence, the question is whether the complainant actually, or subjectively, consented. Outward manifestations of consent or its absence will naturally be considered for this purpose but the key question is always whether or not she did consent. This is a point which Canadian courts in particular have stressed in recent years. Historically, a woman was not regarded as a victim of rape unless intercourse took place "forcibly and against her will" and this probably explains why, even in more recent times, textbooks tended to state that consent could be vitiated only by force, fear or fraud. Granted, any these factors will ordinarily be inconsistent with consent, but this is far from saying that their absence must necessarily imply the presence of genuine consent. It would be equally misleading to suggest that the presence or absence of consent is always easy to determine. Theoretically, the question is a simple one—did the complainant consent? but two difficulties remain, one practical and one legal. The practical difficulty is that long after the alleged rape occurred, a jury must place itself in the position of the complainant and try to decide, in light of all the evidence, whether she did consent."

14. Further reliance is placed on the dicta of Charleton J in the case of *The People (DPP) v CO'R* [2016] IESC 64 wherein he stated that:-

"Consent is the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse. In the normal sphere of relations between men and women, consent does not simply exist in the mind of the woman; if there is desire for sexual intercourse then that is communicated. Because insensibility, be it caused by sleep or an intoxicated or drugged state, cannot be any expression of consent, it follows that there should be communication through the senses that intercourse is to be allowed."

15. It is submitted that the dicta of Charleton J together with the commentary of Prof. O'Malley indicate that the presence or absence of consent is to be assessed by reference to "all of the evidence" of "active communication through words or physical gestures that the woman agrees (or does not agree) with or actively seeks (or does not seek) sexual intercourse."

16. The respondent references the complainant's evidence that she "moved away" and submits that this constitutes compelling evidence of active communication, by way of physical gesture, that she did not agree with or actively seek sexual activity of any nature with either of the co-accused or the appellant.
17. It is submitted that there was evidence of the absence of consent in that the complainant stated: "Liam reached out to put his hand down my pants as well and I nodded no, I don't want to and he says that I'm no fun and proceeds to put his hand in my pants."
18. Moreover, it is said that the complainant's evidence that the appellant said that she was "no fun" and that he threw her phone against a wall in the aftermath of the sexual acts in question indicates a recognition on the part of the appellant that the interaction was not consensual.
19. Further, the respondent submits that in assessing the totality of the evidence, the jury were entitled to consider the complainant's account of her emotions in the aftermath of the sexual acts in question. The jury heard evidence of shock, humiliation and disbelief on the part of the complainant, which, it is submitted, also lend themselves to establishing a lack of consent.
20. It is the respondent's position that no particular form of words is required to establish a lack of consent and that this is something that counsel for the appellant acknowledged in his application for a direction, as follows:

"She has not stated in evidence that she did not consent to Liam O'Brien having intercourse with her. Now, there may be many cases in which that would be an unnecessary proof on the part of the prosecution."

21. In response to the appellant's submission that there are no surrounding circumstances in the instant case which would have enabled the jury to infer a lack of consent on the part of the complainant, the respondent points to the complainant's age and lack of familiarity with the appellant, her nodding to indicate that she did not want to engage in sexual activity, her moving away when the co-accused attempted to initiate sexual activity and the appellant's statement that the complainant was "no fun." Further, the respondent also relies on the breaking of the complainant's phone and her evidence of her feelings in the aftermath of the event as circumstances from which the jury could have inferred a lack of consent. These elements were acknowledged by the trial judge when delivering his ruling on the direction application.

The Relevant Evidence

22. It seems that on occasion it was difficult to hear what the complainant was saying due to technical difficulties, consequently, for ease of reading we will set out hereunder only the relevant evidence, omitting questions seeking clarification or a repeat of what had been said and with particularly relevant extracts highlighted.
23. When the parties arrived at the location known as "The Sheds", the positioning of the two men and the complainant was described as follows:

"Q. Okay. Can you remember where either Liam or [co-accused] were?

A. Yes, [co-accused] was on the ledge.

Q. **Where was Liam, can you recollect?**

A. **Standing across him.**

Q. **so standing literally the other side from you.** And now, now that you've positioned those two, can you recollect where you were standing or where you were? This is when you go up first?

A. **Yes, I I was in between them but further closer to the bed to the corner where you leave the area."**

24. The evidence then continued to the critical point:

"Q. MS FAWSITT: Yes, okay. Can you remember what [co-accused] was doing?

A. **They were both talking amongst themselves,** I don't know what about exactly, but at the same time [co-accused] was pulling me in on top of him and –

Q.What's the next thing that happens after he's pulling you in?

A. He wraps his hands around me and

Q. He wraps his hand around you. What does he wrap his hands around? What part of you does he wrap his hands around?

A. My -- my waist and my -- my arm and starts moving closer towards my chest.

A. **And I -- I moved away and he said he'll stop, to go back –**

A. [co-accused] **said that he'll stop, to come back, to not go anywhere. So, I went back and, like, he started doing the same thing and put his hand in my -- my pants.**

Q. MS FAWSITT: So -- and then you said, I'm going to take you, **you said you moved away, okay. And then [co-accused] said something to you. What did he say to you and put your face down, if you wouldn't mind, and say it. What did [co-accused] say to you when you moved away?**

A. **[co-accused] said that he wouldn't do it anymore.**

Q. Okay?

A. **That he'll stop what he was doing, grabbing me and touching me. So, I went back to them and [co-accused] started doing the same thing.**

- A. **Then Liam smiles and he wants to join in.**
- A. **Then Liam reaches out towards me as well and he's trying to put his hand in my pants as well and I'm nodding no and he says –**
- A. **I nodded no and he said I'm no fun and proceeded –**
- A. **Liam reached out to put his hand down my pants as well and I nodded no, I don't want to and he says that I'm no fun and proceeds to put his hand in my pants.**
- Q. *Okay. And does -- how long does it stay -- does he do that, can you recollect, or what is the next thing that happens then after that point?*
- A. **They did that maybe for a minute or two and then Liam picks me up and starts pulling my pants down.**
- A. *He moves back to his original spot. **At the time that it was happening we were all -- I was on top of [co-accused] on the ledge and Liam had moved in closer to be able to reach me. So, when -- when my pants are being pulled down he moved back to where he was standing before roughly.***
- A. **I was on top of [co-accused] and Liam had moved up closer as he was reaching his hand in my pants.**
- Q. *No, I know that that's -- I know that we're talking about that, I'm sorry, I didn't phrase my question properly. In relation to you, when your pants were pulled down, where was Liam?*
- A. **I think he was behind me.**
- Q. **Okay. When they're both lowering their pants, where are you?**
- A. **I'm in between both of them.**
- Q. *Okay, what does Liam do?*
- A. *He puts his -- his -- his --*
- Q. *What does he put and where does he put it?*
- A. *He puts his dick in my vagina."*

Discussion

25. Proof of the absence of consent is an external element of the offence of rape; it is an objective fact which must be proved in evidence by the prosecution. As stated in *Criminal Law and Evidence*, Charleton and McDermott at para. 11-83:

"It is important to focus on the simplicity of this element. Once there is no consent to sexual intercourse the act of intercourse is rape if the accused knew or was reckless as to that absence of consent. Consent to sexual intercourse is something which must be positively given, as per s 9 of the Criminal Law (Sexual Offences) Act 2017. This contrasts with the defence which has sometimes been proffered that nothing was indicated by the complainant to suggest that she was not consenting. It is clear that as an answer by the accused to the charge of rape, this is not a defence."

26. The essential point of the appellant is that the complainant did not give specific evidence that she did not consent, and it is submitted that a person who is in fact consenting may act in a manner which could objectively be seen as indicative of non-consent and so evidence as to consent is necessary.
27. There must be some evidence of the absence of consent before a rape offence may be left for the jury's consideration. The nature of this evidence may vary significantly from case to case depending on the particular circumstances which pertain. A witness may simply state that there was no consent or there may be evidence that the witness was threatened, asleep, or unconscious and so there may be no consent. There are many different circumstances which may arise in any given case.
28. Consent should be given its ordinary and natural meaning and a jury should consider all the relevant circumstances, which will include the circumstances prior and leading up to the sexual act. In order to assess the state of mind of the complainant immediately before the sexual activity, a jury will need to look to those relevant circumstances. This may include a complainant's reaction to the actions of the person accused of a sexual offence. The question for the jury is whether or not the complainant consented to the sexual activity, it may appear to be a simple one, but it is not always so. In some cases, the issue of consent is clearer than in others, for example, if the complainant is drugged, severely intoxicated, or where there is force, intimidation, or threats.
29. In order to obtain a conviction, some evidence of an absence of consent is necessary before a case may safely be left for a jury's consideration. The nature of that evidence will depend on the particular circumstances of the case and that is an issue for determination by the judge on foot of a direction application.

Decision

30. Applying the above to the facts of this case, it is clear that the 15-year-old complainant was in the company of the two older males in a secluded location having been brought there by them. She had not previously met the co-accused, she had met the appellant twice previously and knew his name.
31. The three people were in close proximity to each other prior to the commencement of the sexual activity. The two males were talking amongst themselves and then the co-accused started to touch the complainant in a sexual manner. Whereupon she physically moved

away from him only for him to say to her to come back and that he would stop the activity.

32. The fact that the evidence disclosed that the three were in close proximity leads to the inference that the appellant was aware of the complainant's attitude and reaction to the co-accused's advances. Despite her reaction, the co-accused continued to put his hand down her pants. At this point, the complainant was between the two men, and, notwithstanding her reaction and the comments of the co-accused that he would stop and entreating her to return, the appellant reached towards her and tried to put his hand in the complainant's pants with the response to that being that she "nodded no." At this point, it seems she was facing the co-accused and the appellant was behind her, her pants are pulled down and both men lowered their own pants. These are the circumstances relevant to the issue of consent.
33. The word "nodded" may be considered somewhat peculiar when followed by the word "no", but when one looks to the appellant's response to the words, which was to say that the complainant was "no fun", it is apparent that the import of her actions and the words spoken were matters the jury could assess as evidence relevant to the issue of consent. The cumulative surrounding circumstances were factors for consideration for the jury on the issue.
34. In our view, whilst there was no testimony from the complainant expressly indicating that she did not consent to the sexual act, such may be inferred from the surrounding circumstances, particularly those events prior and leading up to the sexual activity. The activity was entirely initiated by the two men who were, as noted by the trial judge, virtual strangers to the 15-year-old schoolgirl. The men conversed between themselves, following which, the co-accused started to grope and touch the complainant. She expressly signaled that she did not want to be touched; moving away from the co-accused, only to be assured by him that he would stop. He continued with his actions and the appellant then began his touching of the complainant culminating in sexual intercourse.
35. There was a body of evidence in the present case from which the jury could infer the absence of consent as an objective fact, to be inferred from the circumstances surrounding the sexual activity. It was a matter for the jury to determine whether they were satisfied on that evidence that the prosecution had proved this external element to the required standard. We are not at all persuaded that the judge erred in refusing the application for a direction and so this ground fails.

Perversity

36. In essence, the appellant complains that the jury could not logically have acquitted the appellant's co-accused in circumstances where the complainant's evidence was that both men had committed sexual acts on her at the same time and her evidence that she "nodded no", moved away and felt humiliated were not directed towards one accused in particular. In this way, it is said that the jury's verdict was perverse and ought to be set aside.

37. Reliance is placed on *The People (DPP) v Hearn* [2020] IECA 181 in which this Court allowed an appeal against conviction where the jury convicted the appellant of an offence of producing a knife unlawfully to intimidate another in the course of committing an offence of false imprisonment when they, in fact, by their verdict on another count, acquitted him of that offence. It is submitted that the ratio of *Hearn* could be applied to this case *mutatis mutandis*; as the only logical interpretation of the jury's acquittal of the co-accused herein is that they were not satisfied beyond reasonable doubt of the complainant's evidence.
38. It is accepted that the trial judge directed the jury to treat each accused separately and that the co-accused gave evidence at trial whereas the appellant did not, which could serve to distinguish them. In relation to the former, it is outlined that the co-accused gave evidence that he was flirting with the complainant and that they kissed. The co-accused gave evidence that at a later stage he "*could see [complainant] leant or hunched forward and it looked like Liam was behind her and there was some kind of movement but I didn't get a good look.*"
39. It is submitted that as he stated that he "didn't get a good look" at the position of the appellant and the complainant, the co-accused's evidence could not itself constitute a sufficient basis upon which the jury could convict the appellant. Further, it is said that if the co-accused's evidence led the jury to doubt the complainant's evidence in relation to the co-accused, they must also have had a doubt in respect of the complainant's evidence regarding the appellant, as the two are inextricably linked.
40. In essence, the appellant seeks to make the point that as the sexual conduct alleged against each of the accused was inseparable, it was perverse to convict one and acquit the other.
41. The respondent accepts that it is possible for an appellate court to set aside a jury verdict on the grounds of perversity but emphasises that this is clearly intended to be an exceptional measure.
42. It is submitted that compelling evidence in respect of each element of the offence of rape was adduced by the prosecution and that this evidence was such that a properly charged jury could comfortably convict upon it.
43. Further, the respondent submits that each charge and each of the two co-accused were properly to be treated separately and it is unsustainable to suggest that where a jury finds the evidence in respect of one of two co-accused insufficient to ground a conviction, a jury must inexorably acquit that person's co-accused, particularly where one of the co-accused gave evidence which may, by virtue of its content or credibility, have given rise to a reasonable doubt on the part of the jury as to his guilt.

Discussion

44. The basic contention is that the verdict is perverse as both men were active participants in simultaneous sexual activity and so to acquit one and convict the other is illogical.

45. The approach of an appellate court regarding perversity is well settled and eloquently stated by MacMenamin J. in *The People (DPP) v Tomkins* [2012] IECCA 82 :

"This court will only quash a decision as being perverse where there are very serious doubts 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."

46. To succeed in an application to quash a verdict on grounds of perversity there is a very high threshold to be passed by an appellant. This is for obvious reasons grounded in the right to trial by jury as arbiters of fact. An appellate court will not substitute its view of a case for that of the triers of fact unless the case falls within the criteria stated in *The People (DPP) v Egan* [1990] ILRM 780.

47. Obviously, the credibility of a witness is entirely within the province of a jury and where the judge has properly charged the jury, this Court will be most reluctant to intervene.

We disagree with the appellant's submission; a jury might rationally take the view that the prosecution has failed to prove its case beyond reasonable doubt in respect of one accused but may be entirely satisfied insofar as another accused is concerned, notwithstanding that the events complained of are alleged to have occurred simultaneously. It must also be recalled that the ultimate case against the co-accused was that of attempted oral rape and that that accused gave evidence.

48. It is not our role to speculate on how a jury may have viewed the evidence, simply to assess the evidence and to consider whether there existed credible evidence to support the verdict. However, in that context, the appellant denied being present at the scene of the offending at all, whereas the co-accused's evidence placed him at the scene. That was evidence in the case for the jury's consideration which the jury could accept or reject. The jury was also entitled to accept aspects of the complainant's evidence and reject other aspects of her evidence, in the same way as a jury treats any witness's evidence.

49. We find no material to suggest that the evidence was of such an unsatisfactory nature that the trial was unsatisfactory and the verdict unsafe. The complainant's evidence was tested in cross-examination on behalf of the co-accused, the co-accused gave evidence which evidence potentially implicated the appellant and the appellant in his interviews denied being present at the location in question at all.

50. It must be recalled that the jurisdiction to quash a verdict on grounds of perversity is an exceptional one and the threshold to succeed on appeal is a very high one. In our view, there was evidence before the jury to found the verdict returned, the jury were properly charged and no issue lies with the trial judge's directions. Consequently, this ground fails.

51. Accordingly, the appeal against conviction is dismissed.