THE COURT OF APPEAL

Record No: 190/2022

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

P.G.

APPELLANT

JUDGMENT of the Court delivered on the 15th day of February 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 28th July 2022, the appellant was convicted of one count of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act, 1990, and one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended.

2. This appeal concerns a sole ground relating to the refusal by the trial judge to stop the trial, relying on the inherent jurisdiction of the court. For the reasons stated below, we are not persuaded that the trial judge erred in refusing the application.

Factual Background

3. On the 28th November 2018, the child complainant was in a Social, Personal and Health Education class. The teacher was explaining about how they could let someone know that they were uncomfortable with certain touches. The complainant raised his hand and made certain disclosures to the teacher and the class.

4. The teacher alerted the deputy principal of the school, who on the 5th December 2018, had a discussion with the complainant in the presence of the principal. During the course of this discussion, the complainant said that when he was 7 or 8 years of age, his mother's then boyfriend, the appellant, told him that he should have a shower with him. The complainant said that the appellant did not nice things to him and that it was "*a bad word that began with the letter R*."

5. This event is the subject matter of count 1 on the indictment and is alleged to have occurred on a date unknown between the 1st May 2016 and the 30th September 2016, when the complainant was 8 or 9 years of age.

6. The complainant further alleged some contact with the appellant after the complainant got out of the shower and before going to his room. This is the subject matter of count 2 on the indictment, subsequent to that particularised at count 1.

7. On the 5th February 2019, the complainant was interviewed by Child Specialist Interviewers and told them that the conversation with his principals was the first time he had told anyone of this alleged event.

8. The jury were permitted to hear evidence that in 2013, the complainant made a complaint of sexual assault against a cousin which had initially been disclosed to his father and then to his mother who reported it to An Garda Síochána and Tusla and that Tusla concluded that the allegations were founded. The jury were told that the complainant's mother did not proceed with the complaint as she wanted the complainant to obtain counselling.

9. The deputy principal gave evidence in cross-examination that, "*[the complainant] said something bad happened when he was four but he didn't like to talk about it*." He said the principal joined the conversation and the complainant then said that "*his cousins did something to him and they are in prison now*." Upon being asked why they were in prison, the complainant replied that "*they were in prison because of what they did to him*."

10. The prosecuting member was cross-examined about a notebook in which the complainant was observed writing in school in January 2019, which included the words:-

> *"Last time it was [named person in respect of whom the 2013 disclosure was made] RPED me. This time it's [the appellant's first name], he RPED me to. It was not nice."*

The *P'OC* Application

11. Counsel for the appellant sought to invoke the inherent jurisdiction of the court to stop the trial, relying on *People (DPP) v PO'C* [2006] 2 IR 238; that the trial proceed no further on the basis of unfairness.

12. The appellant's position at trial and on appeal is that an unknown source gave the complainant erroneous information prior to his initial complaint to the effect that the appellant had been in custody for raping a girl and that this erroneous information posed a real and serious risk of influencing the initial complaint of the child and his subsequent interview.

13. The factual basis for this was that the deputy principal, in his statement stated that having made his initial complaint, the complainant went on to say that he had heard that *"[the appellant] did this to another girl and was sent to prison. He heard [the appellant] was out of prison and was worried he might come back again."*

14. Further, during the course of his interview with Child Specialist Interviewers, the complainant said as follows:-

> *Garda Ryan: "Okay. And tell me ; when did you tell [principal and deputy principal]"*
> *[Complainant]: "I don't know. I think it was the evening but it took me a while to say it"*
> *Garda Ryan: "Okay Okay, And tell me, why did it take you a while to say it ?"*
> *[Complainant]: "I did not want to say it to them"*
> *Garda Ryan: "Was there any reason why you didn't want to say it to them?"*
> *[Complainant]: "I thought he would come after me cos I thought he was in Jail."*

15. It is not disputed that this information is incorrect. The appellant has a previous conviction under s. 8 of the Criminal Law (Sexual Offences) Act, 2017, using information and communication

technology to facilitate sexual exploitation of a child, for which he received a sentence which was suspended.

16. The background to that particular offending is that in 2017, the appellant engaged in a graphic sexual conversation and travelled to Kildare in the belief that he was conversing with and going to meet a 14-year-old girl whereas in fact, he was engaging with a group based in the UK who portray themselves as underage children, colloquially known as "*paedophile hunters*." This group contacted the gardaí in relation to the appellant.

17. Neither of the above matters were before the jury, the evidence of the school staff was led with agreement of the appellant and the DVD of the complainant's interview with the Child Specialist Interviewers was put before the jury in a "*spliced*" form. Defence counsel objected to the admissibility of the spliced DVD on similar grounds to the within appeal, however no issue is now taken with its admissibility.

18. Defence counsel argued during the application that they were in a difficult position in that it was not in the interests of their client to venture into the realm of the accused's previous conviction before the jury.

19. Further, it was argued that the failure of the gardaí to procure a statement from the complainant's father deprived the appellant of a line of inquiry into what the father knew and might have said to his son leading to the allegation, which may have been beneficial to the accused.

20. Prosecution counsel argued that the defence could have deposed the mother, the complainant or the gardaí in respect of the background to the complainant's disclosure to his school principals and the specialist interviewers.

21. In response to the submission regarding the complainant's father, it was argued that the evidence in the case was that the disclosure was first made to the deputy principal and principal and that they in turn informed the mother and that the complainant was not challenged with respect to whom he first complained.

Ruling of the Trial Judge

22. In dismissing the application, the trial judge ruled as follows:-

> *"The lack of evidence about where the complainant formed a belief that [the appellant] had done something similar to someone else and had gone to jail, if such evidence is indeed to be forthcoming, from the father or any other person, does not, in my opinion, render the trial unfair to the extent that I should withdraw the case from the jury in all the circumstances and I refuse the application."*

23. The judge noted that no issue had been raised by the defence about the failure to interview the father of the complainant until the trial was underway.

Ground of Appeal

24. While other grounds were initially lodged before this Court, the appeal is confined to the following sole ground of appeal:-

> *"The learned trial judge erred in refusing an application for a directed acquittal based on the decision in DPP v POC*."

Submissions of the Parties

25. The appellant accepted that the trial judge applied the correct legal test, however reliance is placed on the following remarks of the judge:-

> *"What is clear is that a complaint was made in December 2018. At the time this was two years plus after the alleged event and there is no evidence to suggest that the complainant has spoken to anyone else in the interim about the matter, least of all the father. It is reasonable to infer from the evidence in the case that had the father been aware -- had the father become aware of anything untoward between the accused and his son, this would have been communicated to the mother as had previously occurred. The mother, who was interviewed and gave evidence, said she only became aware of the allegation in December of 2018.* ***Who the author of any allegation that the accused went to jail for a similar offence is may never be able to be established. The source of such a comment may not be the mother or the father. While the gardaí have a positive duty to seek out and preserve all relevant evidence, including exculpatory evidence, this is not an unlimited obligation….."***

26. *People (DPP) v RC* [2023] IECA 4 is cited. It is said that this Court emphasised the ability of the defence to approach witnesses which are considered of importance to the defence. The appellant distinguishes the within situation on the basis that even if the complainant's father had been interviewed and it was established that the child had been told something prejudicial about the appellant, the appellant remained in a "*Catch-22*" situation.

27. It is submitted that the cumulative effect of the alleged unfairness arising as it did in a context, *inter alia*, where a recent complaint had been admitted despite objection, rendered the trial unfair.

28. It is further submitted that as the defence's concern regarding the view of the complainant that the appellant had been in prison before was in effect invisible to the jury, which prejudice could not be ameliorated removed by the directions of the trial judge.

29. The respondent submits that the essence of the appellant's submission in relation to the *RC* decision is tantamount to a concession on the part of the appellant that even if a statement had been taken from the complainant's father and that theoretical statement actually bore out the speculation and/or conjecture that the complainant had been told something prejudicial about the appellant, the appellant would still have been in a "*Catch-22*" situation.

30. The respondent has interpreted the foregoing as meaning that regardless of what the father might have said, the appellant would have made a strategical decision not to canvass any such issue before the jury.

31. It is the respondent's position that the appellant made no application for an enquiry by any means into the source of the complainant's view that the appellant had been in prison for rape before.

32. It is submitted that lawyers for the appellant had an opportunity to meet and speak with prosecution witnesses before they gave evidence and so a denial of an opportunity could not and cannot now be sustained.

33. In connection with the above, it is pointed out that prior to a letter sent on the evening of the 20th July 2020, no request was made of the Director about whether or not a statement was taken from the complainant's father and if not, why not.

34. The respondent relies on *People (DPP) v JD* [2022] IESC 39 which was cited with approval by Edwards J in *RC* at para 33 as follows:-

> *"82. The case law in this area, as it evolved from Braddish onwards, shows such applications, now conducted by a trial judge, are also highly fact-sensitive exercises. Trials are not to be restrained on a remote, theoretical, or fanciful possibility (Savage v. DPP [2009] 1 I.R. 185). Other than the most straightforward type of case, the jurisprudence now establishes that it would require something "exceptional" for a judge to actually prohibit a trial. (Byrne v. DPP (Garda Enright) [2011] 1 I.R. 346, at 356.) The most significant determining factor will frequently be the proximity or centrality of the alleged lost evidence to the question of guilt or innocence of an accused (Wall v. DPP [2013] 4 I.R. 309).*
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> *83. But "lost evidence" cases are not only highly fact-sensitive. They also come with a "duty of engagement". An application to stop a trial on that ground requires an identification by the defendant of the evidence said to be lost or unavailable, and of its relevance to the central issues at the trial.* It is submitted that the appellant was required to demonstrate and did not demonstrate, what was "*lost*" in terms of "*missing evidence*" that was material to the real issues in the case."

35. Further reliance is placed on para. 35 of *RC*:-

> *"In our assessment there has been a complete failure by the appellant to meaningfully engage with what was the evidence at his trial. Indeed, the matters complained of by counsel for the appellant in this case represent no more than a missed opportunity to explore if the potential witnesses in question who were not interviewed might have had something material to say.*

36. The respondent characterises what has occurred in the present case as a missed opportunity for the defence in terms of what a potential witness might have said had they been invited to make a statement rather than any unfairness or prejudice. As such, it is submitted that the trial judge was correct in her ruling that the source of the incorrect information was not sufficient to render the trial unfair.

Discussion

37. The trial judge retains an inherent jurisdiction to protect the fairness of a trial and if the circumstances require, to stop a trial. However, something exceptional is required for a judge to stop a trial and this case falls far short in that regard. No issue is taken with the legal test applied by the trial judge, but it is contended that the issue concerning the erroneous information held by the complainant regarding the appellant, whomsoever gave him that information, was something which was invisible to the jury and rendered the trial unfair. Moreover, it is said that this was compounded by the admission of the evidence of recent complaint.

38. It is said that no statement was taken from the complainant's father which may have been of assistance. While it is speculative whether the father would or would not have been of assistance, or indeed would have known anything at all about the complainant's comments, it is the position that there is no property in a witness and there was nothing to prevent the appellant's

legal team speaking to him or to any other witness and calling evidence if necessary. Thus, it cannot be said that this is a "*missing evidence*" case.

39. It is argued by the appellant that even if there had been a witness to give the evidence, it would not have been of assistance to the defence as it would have been very risky to examine a witness on the issue, giving rise to a real risk of an unfair trial, with the consequence that the jury could never know of the complainant's contention regarding the appellant.

40. We are not persuaded by that argument, the issue could have been canvassed without bringing the appellant's prior conviction into the equation, for example, a member of an Garda Síochána could have been asked if there was such a conviction, but we can quite understand why his legal team did not venture down the route of examining witnesses on the issue, as it is difficult to see how that material would have assisted the appellant in any event.

41. We do not see how the absence of a statement on the issue from a witness was something which prejudiced the defence or deprived him of a useful line of defence. The matter could have been approached from another angle, if deemed appropriate.

42. Counsel for the appellant contends that regardless of whoever gave the child the information, the fact remains that the jury had to be left in the dark about the issue, that it was something invisible to them which rendered the trial unfair and could not be interrogated. However, we do not see the issue of whether or not the child held erroneous information regarding the appellant to be one which would bear on the fairness of the trial, justifying the trial judge exercising her jurisdiction and stopping the trial.

43. The trial judge carefully considered the application and quite properly, in our view exercised her discretion to refuse the application.

44. Accordingly, this ground fails, and we dismiss the appeal against conviction.