APPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

[2024] IECA 279

Record Number: 132/2023

Kennedy J.

Burns J.

MacGrath J.

BETWEEN/

THE DIRECTOR OF MILITARY PROSECUTIONS

REPONDENT

- AND -

RO'S

APPELLANT

JUDGMENT of the Court delivered on the 15th day of October, 2024 by Ms Justice Tara Burns

1. This is an appeal against conviction. The appellant was charged with 18 offences arising from events which occurred on 25 June 2020 at two locations at McKee Barracks, namely, the Barracks' Gymnasium and the Officers' Mess.

2. Prior to the commencement of the trial, the appellant pleaded guilty to two charges of behaving in a disorderly manner, which related to him being intoxicated at the Barracks' Gymnasium (Charges 1 and 2); one

charge of committing conduct to the prejudice of good order and discipline by uttering words unbecoming of an officer at the Barracks' Gymnasium (Charge 5); and two charges of assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997 ('the 1997 Act') (Charges 9 and 12). With respect to the assault charges, one charge related to an assault of Barracks Orderly Sergeant McI ('McI'), by grabbing her wrist at the Barracks' Gymnasium, whilst the other related to an assault of Company Quartermaster Sergeant B ('B'), by putting his arms around her torso at the Officers' Mess.

3. The trial proceeded in respect of the remaining charges. The appellant was found guilty of sexual assault of B, contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990 (Charge 13). This offence was committed in conjunction with the s. 2 assault offence relating to B at the Officers' Mess, to which he had pleaded guilty. The circumstances of the offending were that, having placed his arms around the torso of B, the appellant moved his hands up and down her back whilst saying "*come on, come on*" and pulled her against him. The appellant was also found guilty of committing a further assault, in the nature of a psychological assault on B at the Officers' Mess, contrary to s. 2 of the 1997 Act. After the sexual assault and having engaged with two lieutenants who were in the vicinity, he moved back towards B in a manner which caused her to apprehend an assault.

4. In respect of the remaining charges, the appellant was acquitted of seven charges and four charges were withdrawn.

Background

5. On 25 June 2020, B and McI were on security duty at McKee Barracks. They attended at the Barracks' Gymnasium to lock up after a party, when they noticed the appellant, who was asleep in a chair. They had difficulty

waking the appellant, who was intoxicated, and sought the assistance of a duty driver. Having got the appellant into the duty driver's car to bring him to the Officers' Mess, the appellant indicated that he wanted B to accompany him rather than McI. B complied with this request. At the Officers' Mess, B and the appellant went into its foyer. A discrepancy arose as to whether B went up the stairs first or whether B brought the appellant up the stairs to the entrance of the Mess.

6. What next occurred is the subject of the s. 2 assault charge (which the appellant pleaded guilty to) and the sexual assault and additional s. 2 assault charge (which he was found guilty of). B gave detailed evidence in relation to what she said occurred.

7. Two lieutenants were present in the foyer of the Officers' Mess during this event and gave their account of what they saw occurring and their interaction with the appellant. One of the lieutenants stated that the appellant's intent was of a sexual nature and that he was coercing B to his room. He indicated that B was trying to get away from the appellant. The other lieutenant stated that it was evident that the interaction was unwanted by B.

8. The appellant gave evidence at his trial. He denied the sexual assault and assault charges (to which he had pleaded not guilty), however, he stated that he had no recollection of the events of the night after a certain point. Specifically, he had no recollection of the events which occurred at the Officers' Mess.

9. A complaint of a sexual nature was not initially made by the injured party. The complaint which was made was dealt with informally by the authorities. However, an investigation by the Military Police subsequently commenced in the course of which allegations of sexual assaults emerged. Due to the delay in the sexual assault allegations

being made, CCTV footage from cameras on the McKee Barracks site was not available to the parties, as the system overwrote recordings after 30 days. However, evidence called on behalf of the respondent established that this footage did not cover the Officers' Mess.

10. In the course of the trial, the respondent became aware of additional CCTV footage on a building which housed the Directorate of Military of Intelligence. The existence of the CCTV was unknown to the respondent until it was revealed during the trial. Enquiries established that two of the three cameras on this building were not in operation at the time of the offence. With respect to the third camera, further enquiries established that it was not in operation for a period of time, however it was uncertain whether it was in operation at the time of the offence. If it was in operation, it was unknown whether it had, or indeed could have, captured the events which occurred in the foyer of the Officers' Mess in light of the location of where the assaults occurred. The respondent indicated that he intended to call evidence in relation to the missing CCTV footage.

11. The appellant successfully applied to have legal aid cover the cost of a CCTV defence expert. However, after the respondent indicated that any such expert would have to be vetted and security cleared, which process could take 6 months, an application was made by the appellant to adjourn the trial to allow this process take place, so that counsel for the appellant could be placed in a position to conduct an effective cross-examination. The trial judge refused this application, stating:-

> "*[T]his is a first application for an adjournment, made four weeks after commencement of the trial. It is sought for the purpose of conducting further investigations, apparently to verify the position reported by the prosecution, after they sought to have relevant parties confirm the position regarding three additional cameras that*

they were unaware of, until after the commencement of the trial. There has been, as I understand it, no application prior to the trial for inspection of any CCTV apparatus or system in the course of any investigation or after service of the book of evidence. The prosecution had made the results of their findings available to the defence, and they're prepared to call witnesses to give evidence in relation to the CCTV. And the matter of the CCTV has already been put to several prosecution witnesses in cross-examination, and in my view, it would be a disproportionate interference with the continuity of the trial process to allow the adjournment and in all the circumstances, I'm refusing the application."

12. The appellant moved an application pursuant to *The People (DPP) v. PO'C* [2006] 3 IR 238, at the close of the respondent's case, which relied on the missing CCTV, along with other matters which have been not been pursued in this appeal. Having considered *The People* (*DPP) v. CCE* [2019] IESC 94 ('*CCE*'), the trial judge stated:-

"In relation to the cameras, the CCTV issue I'll call it, there's been no indication from the defence or any witness that there would have been any specific matter captured on CCTV footage that would be centrally material to the incidents outside the gym or in the officers' mess […].

I'm satisfied to the required standard that there is no CCTV footage from either the barrack system or the J2 system available to the parties or the Court in this trial.

The evidence including cross-examination regarding CCTV systems and non-availability of footage has been heard by the board and forms part of the matrix of the case. No case is perfect in terms of evidence, but the imperfections perceived by the defence have been

dealt with in evidence and submissions and can be addressed in closing speeches and the charge if appropriate.

There has been evidence regarding the CCTV systems and the non-availability of any footage and what might possibly have been captured by any cameras and it's difficult to predict with any degree of confidence whether there might have been any coverage of material elements of the events of the night. In particular it seems highly unlikely that there would be any direct coverage of the two separate occasions of assault given the location of the cameras and what we have heard about the functioning of the barrack and the J2 system, including the direction and focus and purpose of the various cameras. If any such footage was available, it would have to be considered in light of the direct evidence of the two complainants based on their personal experience of the night which was clearly recalled in their evidence and cross-examination. The accused here has very limited recall of the events due to his level of intoxication on the night.

I'm satisfied that on the basis of all the materials before the Court, that nothing arising from the matters complained of by the defence including absence of CCTV footage, absence of an independent inspection of the system […], have deprived the accused of a realistic opportunity of any obviously useful line of defence.

These issues and the evidence relating to them form part of the matrix of the case and can be considered by the board in their deliberations. And that appears to be, to be the law applicable to the issues that have arisen in this application and in the circumstances I'm going to refuse the application."

Grounds of Appeal

13. By notice of appeal dated 16 December 2021, the appellant indicated his desire to appeal his conviction on Charges 9, 12, 13 and 18. At the hearing before us, it was indicated that the appeal was now limited to his conviction on Charges 13 and 18. The grounds of appeal relied on were narrowed to:-

> *"4. It emerged during the trial that a branch of the Defence Forces (associated with Military Intelligence) operated a second system of CCTV within McKee Barracks - this system was in addition to the regular barrack CCTV security system in operation at McKee Barracks. The existence of the second system was not known to the personnel responsible for normal barrack security, nor it would appear to the Military Police who investigated the allegations. The existence of the second system was not disclosed to the investigating authorities either during the course of the investigation or during the trial, until such time as the existence of a particular camera not identified on the barrack security system became known as a result of cross examination. The existence of the second system had not been disclosed to the Director of Military Prosecutions prior to or during the trial, until it was revealed. The precise location of the various cameras relating to the system were not identified with precision to the parties or the learned judge although there was evidence that one camera was pointed at the door of the Officers' Mess where the offences at charges 13 and 18 were alleged to have occurred. No CCTV footage had been sought out and preserved by the investigating authorities. The Defence Forces through the Director of Military Prosecutions eventually agreed to allow the appellant inspection facilities of this second system, however this permission was in effect illusory given that it was given mid trial and the Director of Military Prosecutions then*

objected to the trial being adjourned to facilitate this inspection - the learned trial judge was told that a period of 6 months was required to facilitate security clearance of the appellant's engineer.

5. The learned trial judge erred in law and in fact when he failed to identify that the inspection of the second CCTV system was essential to the proper conduct of the defence case, in terms of:-

(i) Ensuring equality of arms between the parties - the prosecution called various military and security cleared civilian witnesses concerning the operation of this system.

(ii) Ensuring that the CCTV system could be effectively and properly examined by an independent expert of the appellant's choice.

(iii) Ensuring that Counsel for the appellant could adequately prepare for the cross examination of the various military and civilian witnesses armed with a report from an expert of the appellant's own choosing.

(iv) Undermining the prosecution case on this issue or advancing matters favorable to the appellant

6. The learned trial judge erred in fact and in law in refusing to grant the appellant an adjournment to enable him to inspect the second CCTV system, the existence of which was not disclosed to him until mid trial

7. Alternatively the learned trial judge erred in fact and in law to discharge the Board to enable the appellant to inspect the second CCTV system, the existence of which was not disclosed to him until mid-trial.

8. As a consequence of these matters the appellant was subjected to an unfair trial.

9. The learned trial judge erred in fact and in law when he refused to withdraw the prosecution from the Board following a PO'C type application on the grounds that CCTV footage had not been preserved, whether from the McKee Barrack CCTV security system or the second previously undisclosed system. In respect of the McKee Barrack system the military authorities (this being the appellant's superior officer and Office Commanding McKee Barracks) failed to ensure that the CCTV was preserved in the aftermath of a complaint of ill-discipline being made against the appellant. This was in circumstances where an informal disciplinary process was adopted by the military authorities as no complaint of a sexual nature had been made by either complainant. It was however open to either complainant to reject the outcome of the informal process, which in fact occurred, and the matter was referred for investigation to the military police. By the time the matter was referred to the military police the CCTV footage captured by the McKee Barrack system had been over-written."

Submissions of the Parties

14. The appellant submitted that the non-availability of the CCTV footage, and the refusal to adjourn the case to permit an examination of the CCTV system, rendered his trial unfair. It was suggested that the importance of the missing CCTV footage related not only to the possibility that it captured the actual incident itself, but also that it may have had a significance with respect to B's credibility, regardless of whether the incident was captured on CCTV, as it may have established that she was incorrect about some matters about which there had been a discrepancy, such as whether she walked up the steps of the Officers' Mess alone or

with the appellant; whether the door to the Officers' Mess was open or not; and whether one of the lieutenants in the foyer was smoking.

15. The respondent submitted that, on the basis of the particular facts of the case, the missing CCTV footage (if it ever existed and captured the events in question), could only have been of minimal importance as the mechanics of the sexual assault (occurring behind B's back, by the appellant rubbing his hands up and down her back, in circumstances where the appellant admitted he put his arms around her torso), and the psychological assault (which involved the appellant moving towards B), realistically could not be interpreted from CCTV footage. Furthermore, there were two witnesses to what had taken place. Accordingly, even had the CCTV been operational and had the camera captured the events in question, the value of the CCTV for the appellant's case was minimal and did not fall within the realm of a realistic lost line of defence.

Discussion and Determination

Refusal of Adjournment

16. The trial judge did not err in refusing to adjourn the case for a six-month period to permit an examination of the CCTV system to take place. CCTV footage from the intelligence cameras covering this date no longer was in existence, had it ever been so. Accordingly, the only purpose of obtaining an expert opinion was to challenge the evidence proposed to be called by the respondent in relation to the operation of the system. In those circumstances, having regard to the desired unitary nature of the trial process, the asserted deficiency in the respondent's case, namely the possible missing CCTV footage, was more appropriately dealt with in a *PO'C* application rather than an adjournment.

17. Accordingly, the trial judge did not err in this regard and the grounds of appeal relating to this issue fail.

PO'C Application

18. In *CCE*, the Supreme Court set out the governing principles to be applied by a trial judge when considering a *PO'C* application. O'Donnell J., as he then was, stated (at paras. 14 -19 of his judgment):-

> *"14. […] trial judges must exercise [the PO'C] jurisdiction fully and conscientiously, and be prepared to withdraw cases based on their own consideration of the impact of a lapse of time on the case. It should be emphasised, moreover, that the test is not whether a trial judge would himself or herself consider that a guilty verdict was or could be appropriate (that is, that as a matter of fact the defendant was or might be guilty of the offence), but rather the distinct question of whether any question of guilt, if arrived at, could be considered to have been achieved by a process which would be considered just. The trial judge is not asked to second-guess or anticipate the decision of the jury, but rather whether the process meets the standard required to permit a jury to deliver its verdict.*
>
> *15. Not only is this a distinct function of the judge, it is one to which a judge is particularly suited. It might be thought that most questions of the extent and significance of the evidence can safely be left to a jury, who must be satisfied beyond any reasonable doubt before they can convict an accused. Generally speaking, deficiencies in the evidence – lapses, inconsistencies, gaps, and absences – will tend to make it more difficult to reach that standard. Furthermore, a jury in delay or in lapse of time cases will be given a detailed warning about the impact of delay upon their adjudications [...]*

16. These are, themselves, substantial guarantees of the fairness of the process. Nevertheless, a trial judge has critical information and experience in this regard that a jury lacks. The assessment of the impact of lapse of time and the unavailability of evidence necessarily involves an assessment not just of the evidence actually adduced, which the jury can be expected to appreciate and assess, but rather a consideration of the absence of evidence. A jury has no comparator against which to gauge the trial which they are hearing. A trial judge, by contrast, will normally have heard many cases and may have participated in such trials as a practising lawyer, and therefore may be expected to have the capacity to attempt to assess the impact on the trial in reality of what is now unavailable. A trial judge may be expected to understand that in a trial in which all available evidence is adduced and tested, there may be a number of side-issues which may be explored with greater or lesser effect, which may give rise to unexpected twists and turns, and which may be of benefit to the accused, if not in providing evidence that is positively exculpatory, at least raising doubts about the case. This investigation is part of the trial process.

17. Even, therefore, if the core components of a case remain – the complainant's allegation and the defendant's denial, whether contained in evidence, a statement made, or simply by maintaining that the case has not been established – a trial which is limited to such matters may be rendered unjust because it has been shorn of all the surrounding detail which might be expected in a trial held soon after the event, the investigation and testing of which is a normal part of the fair trial process.

18. Few trials, however, are perfect reproductions of all the evidence that could possibly exist. The absence of a witness or a piece of evidence does not render such trials unfair. A trial judge has

therefore a vantage point which allows him or her to consider whether what has occurred crosses the line between a just and an unjust process. In shorthand terms, this involves considering whether the evidence which is no longer available is "no more than a missed opportunity", as the trial judge and the Court of Appeal considered, or by contrast whether the applicant has "lost the real possibility of an obviously useful line of defence", as considered by the majority in this court, adopting in this regard the language of Hardiman J. in S.B. v. Director of Public Prosecutions [2006] IESC 67, (Unreported, Supreme Court, 21 December 2006) ("S.B."), at para. 56. These judicially adopted phrases seek to identify either side of the dividing line: it is inevitable that many cases will proceed to trial without all the evidence that was potentially available at the time of the alleged offence, but that in itself does not prevent a trial occurring. There is a point, however, at which the deficiencies are of such significance and reality in the context of the particular case that it can be said that it is no longer just to proceed.

19. It follows that there is a particular and distinct onus upon trial judges to address this issue separately and conscientiously. This jurisdiction, which is in addition to the power of the jury to consider the impact of lapse of time, is an important protection for fair trial rights in circumstances which can be challenging. The exercise of that jurisdiction can, and must, be reviewed on appeal. That is a further important aspect of maintaining a fair trial. However, it is in the nature of such a determination, which is to some extent dependent upon an appreciation of the manner in which the case has progressed, the demeanour of witnesses and parties, and the manner and cogency with which evidence is given, that a significant margin of appreciation must necessarily be afforded to the decision of the judge presiding at the trial. For this reason, it is important that trial judges should set out the relevant factors involved, their

assessment of them, and the reasons for arriving at their conclusion, in order to permit an assessment of the matter on appeal".

19. O'Malley J., whom the trial judge relied on in the instant case, stated (at para. 4 of her judgment):-

> *"4. […] considering an application of this nature, will involve an assessment of the prosecution case. There must, of course, be sufficient evidence for a properly instructed jury to convict the accused, since otherwise he or she will be entitled to a direction in any event. Assuming that this threshold is met, the trial judge must next consider the evidence said to be missing. What is required here, if the accused is to succeed in the application, is a legitimate basis on which it can be said to be reasonable to infer that particular evidence, potentially favourable to the defence, might have been given had the trial taken place at an earlier stage. If the prosecution case is very strong, then the evidence said to be missing would need to be such that there was a real possibility that it could influence the decision of the jury notwithstanding the strength of the prosecution case. A theoretical possibility that the absence of some tangentially material piece of evidence might render the trial unfair is not enough. It is necessary to look at the case in the round, to have regard to the likelihood of evidence favourable to the defence being genuinely lost by reason of the lapse of time and also to have regard to the role which the evidence might reasonably have been expected to play at the trial, in the light of the prosecution case as it actually appeared at the trial. The issue to be determined is whether the accused has lost the real possibility of an obviously useful line of defence. The task of the trial judge is to determine whether the trial is fair, rather than whether the accused is guilty or innocent. The burden in such an application is on the accused, who may be able to make the case on the basis of the evidence already adduced by*

the prosecution or may need to adduce defence evidence. It may be necessary to call evidence in absence of jury".

20. On the particular facts of the instant case, it is hard to see how the CCTV footage which might have been available (although this was not established) could assist the defence case at all. The mechanics of the sexual assault and psychological assault renders it questionable that the CCTV would have assisted in interpreting what was occurring, had these events even been captured. With respect to the sexual assault: in circumstances where the appellant accepted that he had put his arms around B, the sexual assault involved him moving his hands up and down her back, uttering words to her and pulling her against him. The movement of his hands up and down her back would not be captured if his back was to the camera; the words uttered would not be recorded; and it is implausible that the detail of pulling her towards him could be interpreted as such in light of him having his arms around her and the distance of the recording. With respect to the psychological assault: this involved the appellant moving towards B causing her to apprehend a further assault upon her. Realistically, this is not something which CCTV footage, at such a distance, could assist with. In relation to the discrepancies in the evidence which the appellant relies on, it is fanciful to suggest that the injured party's credibility would be damaged to such an extent if the CCTV established that one of the lieutenants was smoking or that she was incorrect about walking up the stairs before the appellant, having regard to the other evidence called from both lieutenants and the duty driver.

21. In the circumstances of this case, the missing CCTV footage (if it ever existed) cannot be classified as the loss of a realistic line of defence having regard to what it might reasonably have been expected to depict and having regard to the other evidence in the case.

22. Accordingly, the trial judge did not err in refusing the *PO'C* application brought by the appellant and the grounds of appeal relating to this issue also fail.

Conclusion

23. In circumstances where we have not upheld any of the appellant's grounds of appeal, his appeal against conviction is dismissed.