THE COURT OF APPEAL

[2021] IECA 91
Court of Appeal Record No. [79/18]

Edwards J.
McCarthy J.
Donnelly J.

BETWEEN/

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

RESPONDENT

-AND-

I.G

APPELLANT

JUDGMENT of the Court delivered on the 26th day of March 2021 by Mr Justice McCarthy:

1. The appellant was convicted of five offences on the 24th November, 2017, after a trial. They are as follows:-

   (1) Count 1: the offence of rape on the 8th July, 2016 at 2 Woodbrook Place, Green Lane, Carlow;

   (2) Count 3: the offence of sexual assault on the 8th July, 2016 at a place unknown within the State on a bus between Georges Quay, Dublin and Hanover Bus Park, Carlow;

   (3) Count 5: the offence of sexual assault of the complainant on the 8th July, 2016 at 2 Woodbrook Place, Green Lane, Carlow;

   (4) Count 7: Making a threat to kill or cause serious harm to the complainant on the 8th July, 2016 at 2 Woodbrook Place, Green Lane. Carlow (at the time of commission of the rape and sexual assault offences there).

2. The appellant was found not guilty on Count 2 (a count of rape) and Count 4 (sexual assault) and was acquitted by the jury on Count 6 (also sexual assault). The appellant was sentenced to ten years imprisonment on Count 1, two years imprisonment on Count 3, five years imprisonment on Count 5, such sentences to be served concurrently and

Count 7 was marked "taken into consideration". The sentences were backdated to the 24th July, 2016.

3. The complainant was from abroad. She had come to Ireland on the 1st of May 2016 to study and undertake a work placement. Her accommodation was in Carlow and at the material time two others, males, were resident in the house; she knew them merely to say hello to them. She had made friends with a Mr. L and on the 7th July was travelling to Dublin to meet him. She intended to return that night and bought a return ticket.

4. She met the applicant near the bus stop and he was unknown to her. He engaged her in conversation both there and during the journey to Dublin (which he was apparently also making). He told her that he might also be returning to Carlow later and they exchanged phone numbers for the purpose of contact about the bus timetable. On their arrival in Dublin she went with the defendant to a park and bought what is described as a small Smirnoff which she sipped but did not finish. She took two puffs of a cannabis cigarette which he proffered to her and at a certain stage he urged her to go into the bushes in the park with him "for the best ten minutes of my life" (as he put it) but she declined. She further rebuffed repeated attempts at sexual contact and he accompanied her to Trinity College where she had arranged to meet Mr. L. After a period in his apartment, during which some intimacy took place after which the complainant washed (we mention this solely because the fact of the washing is relevant), he walked her to the bus stop at George's Quay, arriving at approximately 12.20am and he left her when the bus arrived. At George's Quay she noticed the presence of the appellant; he had phoned her about the bus timetable and in the course of that call he said that he had returned to Carlow. She was unhappy at the fact that he was there and her concern was noticed by Mr. L. She told him what had transpired during the day. During the journey the appellant sat next to her and whilst she attempted to ignore him he repeatedly engaged in touching her in a sexual manner though she sought to stop him from doing so. She did not know how to call out for help (his travelling companion was sitting behind her and a stranger wearing headphones in front).

5. He indicated that he wished to go to her home but she rejected the proposition. Her English was poor and this effectively prevented her from making a complaint to the bus driver. The appellant accompanied her home although she repeatedly said that she did not want him to do so. On arrival at her home she permitted him entry because of his request to use the lavatory to which she directed him (one passed through a living room to get there). As she waited for the appellant in the hallway, having left the front door open, she sent a message to Mr. L at 2.29am referring to the fact that the appellant had followed her and would not leave but unfortunately he did not see the message until the following morning. In any event, thereafter, the appellant appeared at the living room door, masturbating, and asking her to have sex to which she responded no, holding up her mobile phone towards him and telling him that if he did not leave she would photograph him, whereupon the appellant became aggressive and pushed her against the wall (in the hallway) and they fell onto the lower steps of the staircase. The appellant was on top of her and she was thereupon raped. As this occurred she screamed and he

threatened to kill her if she refused to be quiet. She was crying. He also engaged in digital penetration of her anus. She describes herself as having acquiesced in this because of her fear (she "had given up all hope"). One of her housemates, Mr. D, was awakened by what had occurred and, in particular, her screaming and, thereafter, when he went to the upstairs landing, he described what he heard as more like crying. He saw the appellant on top of the complainant. He went downstairs and as he descended the appellant apparently noticed his arrival and ran out of the house through the open door.

6. The appellant was arrested and detained for investigation of the offences on the 24th of July and in four of five interviews denied sexual intercourse but when the results of certain DNA tests showing the presence of his semen in or on the body of the complainant (bodily samples had been lawfully taken from him in custody) were put to him in the fifth, he said that intercourse had taken place by consent in the sitting room leaning against the couch. He said that he was in a state of confusion during the four interviews during which his denials were made and hence did not remember what had occurred. The verdict of the jury indicates that his version of events as to consensual sexual intercourse was rejected. After the Gardaí arrived the complainant was cared for and was taken for a medical examination in the ordinary course of investigation of offences of this kind and this was conducted by a Dr. John Birmingham. It is with respect to that evidence that the sole ground of appeal arises. That ground is as follows:-

   (1) The learned trial judge erred in law and in fact by admitting the evidence of Dr. John Birmingham regarding his observations and conclusions relating to the purported presence of foreign debris in the perianal area of the complainant during his examination of her at the Sexual Assault Treatment Unit of University Hospital Waterford on the 8th July, 2016.

7. Dr. Birmingham is a Consultant Obstetrician and Gynaecologist as well as a Forensic Clinical Examiner attached to the Sexual Assault Treatment Unit at Waterford University Hospital. At about 6.00am on the 8th July (later in the morning of the day on which the offence occurred) he was introduced to the complainant who was in the company of a garda and a friend. Having first taken a history from her in the ordinary course of his work as a Forensic Clinical Examiner in sexual offence cases he conducted a physical examination with special reference to the complainant's genital, perianal and anal areas. His examination extended to seeking to recover samples by the use of swabs which might be used for investigatory purposes. The examination extended to her back where he found a sign of recent bruising over the bony prominence of the scapular area consistent with pressure on that area. It was not present anywhere else on her back. He found what was described as rugosity or a type of crumbling as well redness in the vulval area. The former was described as swelling and as having some resolution but it had not gone back to what was described as its normal anatomy – it seems clear from the context that such a state was consistent with intercourse whether consensual or non-consensual. Internal examination was normal.

8. There was no injury to the anal area but there was "foreign debris" in the natal fold which is the area of skin between the vagina and the anus, described as being between the buttocks. He gave evidence before the jury that the presence of the debris was "consistent with carpet, lying on a carpet or some such fabric". The issue of admissibility had been decided on the basis of his statement which was to the effect that the debris was "consistent with contact perhaps with the floor area" but here we are concerned only with what was actually said in evidence.

9. No swab was however taken of the debris. When asked whether or not he knew what the debris was he said that it did not look like the debris that one would find on an ordinary clinical examination of the average person presenting in a disrobed condition for an intimate examination. He said that he had not taken a swab of the debris inasmuch as his mind was directed to taking swabs to detect DNA evidence (with the consequence that the evidence in relation to debris was limited to his observations only and his opinion was based thereon). He did not disagree with the proposition that if a swab had been taken it could (at least) be examined forensically.

10. There was a fitted carpet on the stairs. A Garda Culleton, who is a scenes of crime examiner, took wet and dry swabs of the bottom six steps. He also took tape lifts of such steps and of the carpet. The latter were for the purpose of a potential match with any suspect's clothing and also for the purpose of seeking to ascertain whether or not a person had been in contact with the stairs.

11. The swabs taken by Dr. Birmingham, including the low vaginal, perianal and rectal swabs, were analysed for the purpose of extracting DNA and DNA matching that of the appellant was so extracted. The bodily material obtained from him thereafter had been compared with the former: this is referred to above. Evidence about DNA was given by Dr. Flanagan of the Forensic Science Laboratory; her department did not engage in analysis of tape lifts of the kind in question here although another department would have been in a position to do so. As she understood the position no request had been made for such analysis.

12. Counsel for the appellant at the trial effectively contended that in the absence of any scientific or forensic analysis to corroborate Dr. Birmingham's opinion (as he put it) and because no sufficient material was found "let alone any conclusion drawn from it" Dr. Birmingham should not have been permitted to give such evidence. He said that in the absence of forensic analysis counsel was left in the position of seeking to address a freestanding observation made by him. It was further submitted that Dr. Birmingham's expertise did not extend to giving such opinion evidence. In any event there is evidence to the effect that any such debris, if a sample thereof had been taken, could have been examined or analysed to attempt to ascertain its origin, although we can only speculate as to what this would have yielded and of course this is something we do not do.

13. In reply to counsel for the appellant counsel for the respondent submitted that having regard to his expertise as Consultant Obstetrician, Gynaecologist and Forensic Examiner the evidence in question was within his expertise. It was further submitted that insofar as

the appellant's argument was that such evidence could not be given unless supported by independent forensic analysis that was not the law. The evidence was probative of the appellant's account as to how and where the intercourse had taken place and this tended to disprove that of the appellant.

14. The trial judge dealt with the matter as follows: -

> *"Objection is taken by the accused or on behalf of the accused in respect of certain material contained in the report Consultant Obstetrician and Gynaecologist Dr. Birmingham whose expertise has not been questioned by the defence and that is quite properly so since he has been operating as such in Waterford Regional Hospital since 2001. And as he is as stated in the report, a Forensic Clinical Examiner and he carried out his examination of the complainant in the [Sexual Assault Treatment Unit] Clinic in that regard. Objection is specifically taken to a particular examination carried out by Dr. Birmingham wherein he says: 'There was some foreign debris on the natal cleft consistent with contact perhaps with the floor area' [this by reference to the witness statement and not the evidence ultimately given]' And Mr. Cody takes up this piece of evidence and questions its admissibility. Whereas Mr. Cody says no foreign debris was submitted by the witness Dr Birmingham [for] analysis by Forensic Science Ireland. And that whilst Dr. Birmingham is an expert in the area of Obstetrics and Gynaecology he is not sufficiently qualified to give this opinion as he seeks to do, that the material can be examined and found on the natal cleft was consistent with contact perhaps with the floor area to quote what is in the report of Dr. Birmingham. Now the position in law is that this man is an expert, he is entitled to give evidence of his examination and his observations, He is also entitled to give his opinion on facts put forward to him by a complainant whether or not those facts are accurate. But he is entitled to give his opinion based on the facts as proffered to him by the complainant. And as I said, he is entitled to give evidence of his observations and his opinion. He is also in my view, entitled to consider whether the foreign debris which he says that he found was consistent with contact with the floor area or whether such debris is something which ordinarily might be found in that area, that is entirely within the area of the expertise of the witness.*
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> *... Furthermore, and I accept the prosecution's argument to this [effect] that the defence can extensively cross-examine Dr. Birmingham as to why he failed to take samples of this material which he describes as debris and, of course it is entirely open to the defence to adduce the nature of the material which he says that he observed. It seems to me to be absolutely relevant and probative evidence and is admissible evidence, and I permit the introduction of the evidence."*

15. Here, a more elaborate argument to the effect that the admission of the evidence was erroneous (as it is contended) is advanced in the appellant's submissions and the appellant relies on the following propositions, namely:-

"(a) The only forensic examination of the locus carried out was conducted on the8th July, 2016 on foot of an account provided by the complainant, 'as best she could' to Garda John O'Connor in the absence of an interpreter;

(b) There was no forensic examination of the sitting room on that date albeit cigarette butts were removed from the room and subsequently forensically examined;

(c) Neither the sitting room nor the downstairs bathroom were forensically examined after the appellant gave his account at interview on the 25th July, 2016;

(d) Mr L.'s apartment was not forensically examined;

(e) The foreign debris in issue was not retained, photographed or made an exhibit;

(f) The foreign debris was not forensically examined;

(g) The complainant's clothing was not examined and/or tested by FSI;

(h) The tape lift taken from the stairs was not examined or tested by FSI;

(i) The defence was denied the opportunity to examine or analyse the foreign debris;

(j) The defence was denied the opportunity to corroborate its case;

(k) The defence lost its opportunity to cross-examine Dr. Birmingham effectively;

(l) Its prejudicial value outweighs the probative value."

16. We think that the propositions could be viewed as seeking to extend the ground of appeal inasmuch as there is a difficulty in seeing the connection between the only ground and a number of them. We are, however, prepared to proceed upon the basis that they fall within the ambit of the ground although it will be seen below that they do not impress us.

17. We cannot see how there is any basis for a complaint because of the fact that the Gardaí conducted a forensic examination of the locus on the basis of what the complainant told them on the 8th July, 2016 and there is no reason why as a matter of common sense it was necessary for them to conduct some form of forensic examinations in relation to the sitting room or the downstairs bathroom. As a matter of common sense also there was no point in conducting a forensic examination of the sitting room on the basis of an account given weeks later. We cannot see how the fact that Mr. L's apartment was not forensically examined has the slightest relevance to the case - prior to the matters in issue here the complainant had spent some time with him there. That is all. We find it hard to believe that there was any reason why the Gardaí might have sought to compare fibres or any other substance recovered from the stairs with the use of tape lifts with the clothing of the complainant; courts are not in the business of imposing a counsel of perfection on the Gardaí in their investigations by requiring them to go beyond the limits of common sense on the available information, as any criticism of a failure to take that step would be. Since

the complainant resided in the house a connection between her clothing and the carpet would hardly be of any significant evidential value.

18. The remaining issues pertain directly to the admissibility of Dr. Birmingham's opinion that the debris he found was "consistent with carpet, lying on a carpet or some such fabric"; suffice it to say first that on what we might describe as the free-standing basic rule about receipt of expert evidence such evidence is admissible in respect of matters that call for expertise, that is to say, which fall outside the ordinary knowledge or expertise of a jury. Such evidence may of course be given only by persons who are qualified to do so. Such evidence may be based *inter alia* on evidence or observed facts. Expertise may be judged by reference to the experience in a particular walk of life of an individual as well as what one might attribute to professional qualifications or both. Dr. Birmingham is not just an obstetrician and gynaecologist but he is a forensic medical examiner attached to a Sexual Assault Treatment Unit and accordingly is eminently qualified to give evidence in respect of what he sees on the physical examination of individuals who have been the subject of sexual crime. It seems to us that there cannot be any doubt but that Dr. Birmingham's expertise extended to giving expert testimony as to the potential source of the debris based upon his experience and the history which was given to him. There is simply no rule of law to the effect that evidence of this or any other kind cannot be received unless it is corroborated.

19. In their written submissions counsel for the appellant rely on *DPP. v. Wilson* [2019] 1 IR 96 pertaining to the admissibility of DNA evidence. We cannot see its relevance. Reference is also made to *R. v. Mohan* [1994] 2 SCR 9 cited in McGrath on Evidence to the following effect:-

> *".. Expert evidence which advances a lovely scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether itis essential in the sense that the trial fact will be unable to come to a satisfactory conclusion with the assistance of the expert."*

This is an unexceptional proposition. *Fitzpatrick v. DPP* [1997] IEHC 180 is referred to, as cited also by McGrath, to the effect that McCracken J. there said:-

> *"It is my strongly held view that where a witness purports to give evidence in a professional capacity as an expert witness, he owes a duty to ascertain all the surrounding facts and to give that evidence in the context of those facts, whether they support the proposition which he is being asked to put forward or not."*

20. It is arguable, accordingly that Dr Birmingham ought to have taken a sample of the debris but that does not go to admissibility. *Liverpool Roman Catholic Archdiocesan Trust v. Goldberg* (2001) NLJ Law Reports 1093 is advanced in support of the proposition that where there exists a relationship between expert and the party calling and a reasonable observer might think this was capable of affecting his views and making him unduly favourable to that party his evidence should be excluded. This is of no possible relevance. Again, for the sake of completeness we refer to *The People (DPP) v. Egan* [2010] 3 IR

561, which pertains to the admissibility of items of circumstantial evidence; the evidence of the fact of the presence of the debris was admissible as such.

21. The question here, accordingly, is whether or not, notwithstanding the general rule of law, the judge ought to have excluded the evidence of opinion as a matter of discretion because it was, as a fact, uncorroborated or that its receipt would give rise otherwise to some want of fairness of procedure due to a failure to take steps to secure material which might potentially be analysed (e.g. a sample of debris), or, such material having been secured to subject it to analysis (e.g. comparison with substances obtained from tape lifts), and, it seems, the lack of forensic evidence *per se*. We can say without hesitation that there is no rational basis for the proposition that the prejudicial effect of this evidence exceeds the probative value: the evidence is capable of corroborating the complainant's version of events, in particular that she was on the carpeted stairway when raped.

22. It is also said that because the sample of the debris on the complainant's body was not secured coupled with the fact that tape lifts from the stairway were not examined for the purpose of ascertaining whether or not similar debris was to be found thereon the appellant was handicapped in challenging or testing Dr Birmingham's evidence. Undoubtedly, availability of the debris might have been of assistance: if it was shown that similar debris to that found on the complainant was present on the carpet with the use of the tape lifts it would constitute further free standing evidence corroborating her version of events and would also be consistent with the view expressed by Dr. Birmingham. If, on the other hand, no such debris was recovered from the stair carpet and it was shown that this meant it was simply not there when an expert would expect it to be there it might undermine Dr. Birmingham's evidence. It seems to us that in the absence of speculation the height of the appellant's case can only be that there was a potential for securing evidence which, if secured, had also the potential for undermining Dr. Birmingham's evidence. However, it is to be noted that no request was made to examine the tape lift or seek an analysis of anything taken up by means of the tape lifts - part at least of the relevant evidence was available, not for direct analytical comparison it is true, since no debris was available, but potentially to establish whether or not debris existed on the stairs and of what kind.

23. We accordingly agree with the approach taken by the learned trial judge. Even if we are wrong, no trial is perfect and it is a question of judgment on a case by case basis whether or not on the facts the absence of potentially relevant evidence, howsoever arising, or the failure to secure potential evidence, could give rise to the exclusion of evidence or, in a more extreme case, an application to direct an acquittal in the interests of ensuring that an accused person has a fair trial. This is not such a case.

24. In approaching this matter we must be conscious of the overwhelming evidence of guilt. Any evidence about the nature of the debris would have added little; it is difficult to believe it could have had any significant effect. It is rare indeed that there is an eye witness to rape. There is such an eye witness whose *bona fides* and accuracy of

recollection could not be meaningfully be challenged – indeed it was not. The complainant had an injury to her back consistent with the immediate event itself. There is evidence showing her state of mind and her attitude towards the appellant when she met him at the bus stop on the way home indicative not of an openness to intimacy but the opposite. There is what we regard as consistency in her version of events throughout. There is forensic evidence showing the presence of the appellant's semen on the body of the complainant. There is the fact that his denial of intercourse with the complainant in four of his interviews is capable of being viewed as a lie suggestive of guilt- he made an admission of intercourse only when confronted with objective forensic evidence. There is the fact (and it is undoubtedly part of the *res gestae*) that the complainant communicated by mobile phone with Mr. L seeking his help and also that the appellant ran away through the open front door when he was interrupted.

25. We are not persuaded that there was any basis for exclusion of the evidence at trial: the judge was right. We think that even on the more elaborate arguments developed here this is so.

26. We accordingly dismiss the appeal against conviction.