



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

Record No. 45/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

and

D. O'D

Appellant

Judgment of the Court delivered on the 19th day of November 2015 by Mr. Justice Mahon

1. The appellant in this case was convicted on 27th April 2012 at Dublin Circuit Criminal Court of eight counts of sexual intercourse with a mentally impaired person, Miss A, on dates between July 1998 and July 2003 contrary to s. 5 of the Criminal Law (Sexual Offences) Act 1993. The appellant was sentenced to five years imprisonment on each count. This is the appellant's appeal against his conviction. The appellant was subsequently released on bail pending the conclusion of this appeal.

2. At the conclusion of the hearing of this appeal on 29th October 2015 the court announced its decision to dismiss the appeal, and directed that the appellant return to custody on 24th October 2015 pending the outcome of his appeal against the sentence of five years which would be heard at a later date. The purpose of this judgment therefore is to give the court's reasons for its decision to dismiss the appeal against conviction.

The background facts

3. The appellant and Miss. A are first cousins. On dates between July 1998 and July 2013 and while Miss A stayed with the appellant and his family on holiday, the appellant engaged in sexual intercourse with Miss A. These instances occurred in the appellant's

family home, two separate addresses in Dublin, on one occasion in the Imperial Hotel in Cork and on another occasion in a wooded area in Co. Dublin. The appellant was prosecuted on the basis that Miss A was mentally impaired and was convicted by the jury on that basis. At the time of these offences Miss A was in her late twenties and early thirties while the appellant was in his late thirties and early forties. The appellant is married and has one young daughter, and resides in County Dublin.

The ground of appeal

4. The sole ground of appeal advanced by the appellant relates to the order made by the learned trial judge on 23rd July 2010 permitting the complainant to give evidence by means of a live television link pursuant to the provisions of S. 13(1)(b) of the Criminal Evidence Act 1992.

5. It was contended that in circumstances where the sole issue for the jury in the case was to decide whether the complainant was mentally impaired for the purposes of s. 5 of the Criminal Law (Sexual Offences) 1993, the making of the said order pursuant to s. 13(1)(b) of the Act of 1992 amounted to a real and substantial pre determination of that issue.

The relevant statutory provisions

6. Section 5 of the Criminal Law (Sexual Offences) Act 1993 provides as follows:-

"5(1) A person who –

(a) has or attempts to have sexual intercourse, or

(b) commits or attempts to commit an act of buggery, with a person who is mentally impaired (other than a person to whom he is married or to whom he believes with reasonable cause he is married) shall be guilty of an offence and shall be liable on conviction on indictment to –

(i) in the case of having sexual intercourse or committing an act of

- buggery, imprisonment for a term not exceeding 10 years, and*
- (ii) *in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery, imprisonment for a term not exceeding 3 years in the case of a first conviction, and in the case of a second or any subsequent conviction imprisonment for a term not exceeding 5 years."*

7. The expression "mentally impaired" is to find in s. 5.5 of the Act of 1993 as follows:-

"(5) In this section "mentally impaired" means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation."

8. Part (III) of the Criminal Evidence Act 1992 provides as follows:

"(12) This Part applies to:

- (a) a sexual offence,*
- (b) an offence involving violence or the threat of violence to a person, or*
- (c) an offence under s. 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998,*
- (d) an offence under s. 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008 or*
- (e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of an offence mentioned in para (a), (b), (c) or (d)."*

9. A "sexual offence" is further defined by s. 2 (as amended) of the Act of 1992 as:-

"Sexual offence" means rape, an offence under s. 3 of the Criminal Law (Sexual

Offences) Act, 1993, sexual assault (within the meaning of s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, aggravated sexual assault (within the meaning of s. 3 of that Act), rape under s. 4 of the Criminal Law (Rape)(Amendment) Act 1990, or an offence under –

- (a) Section 3 (as amended by s. 8 of the Act of 1935), or 6 (as amended by s. 9 of that Act) or 11 of the Criminal Law Amendment Act 1885,*
- (aa) Section 6 inserted by s. 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007) of the Criminal Law (Sexual Offences) Act 1993,*
- (b) Section 4 of the Criminal Law (Sexual Offences) Act 1993, s. 17 as amended by s. 11 of the Act of 1935 of the Children Act 1908, or*
- (c) Section 1 (as amended by s. 12 of the Criminal Justice Act 1993 and s. 5 of the Criminal Law (Incest Proceedings Act) Act 1995) or 2 (as amended by s. 12 of the Act of 1995) of the Punishment of Incest Act 1908,*
- (d) Section 17 (as amended by s. 11 of the Act of 1935) of the Children Act 1908.*
- (e) The Criminal Law (Sexual Offences) Act 2006, or*
- (f) Section 5 of the Criminal Law (Sexual Offences) Act 1993..”*

10. Section 13 of the Act of 1992 provides as follows:

"13(1) In any proceedings (including proceedings under s. 4 E of 4 F of the Criminal Procedure Act 1997) for an offence to which this part applies a person other than the accused may give evidence, whether from within or outside the state, through a live television link –

- (a) if the person is under eighteen years of age, unless the court sees good reason to the contrary,*
- (b) in any other case with the leave of the court. ”*

11. Section 19 of the Act of 1992 provides as follows:

"The references in sections 13 (1) (a), 14 (1) (b), 15 (1) (b) and 16 (1) (a) to a person under 18 years of age and the reference in section 16 (1) (b) to a person under 14 years of age shall include references to a person with mental handicap who has reached the age concerned.

The decision of the learned trial judge

12. On 20th February 2009 the learned trial judge made a pre-trial order directing *inter alia* that the complainant, Miss A, be permitted to give evidence via video link pursuant to s. 13(1)(b) of the Act of 1992. That order was successfully challenged by way of judicial review and was quashed by order of *certiorari* by O'Neill J. in the High Court on the basis, *inter alia*, that the learned trial judge did not apply the correct test with regards to s. 13 and consequently the appellant was at risk of an unfair trial. The matter was remitted to the Circuit Court for a further hearing of a s. 13 application.

13. A further s. 13 application was made to the learned trial judge on 23rd July 2010. An order was again made pursuant to s. 13(1)(b) of the Act of 1992 directing that the evidence of Miss A be given by way of video link. An attempt to challenge that order was unsuccessful. The trial of the defendant duly commenced on 23rd April 2012 and the complainant gave her evidence by video link as provided for in the order of the learned trial judge made on 23rd July 2010. Verdicts of guilty on all eight counts were returned on 27th April 2012.

14. In the course of her charge to the jury at the conclusion of the trial, the learned trial judge stated the following:-

"Now, A gave evidence by way of video link, but you should not draw any conclusions or – as – because she – or at first inferences because she gave evidence by video link, that is common procedure in this case".

15. The appellant argues that it was not open to the learned trial judge to direct that the

complainant's evidence be giving by way of video link pursuant to s. 13(1)(b) of the Act of 1992. Instead, it is contended, any such order ought to have been made pursuant to s. 13(1)(a) of the Act of 1992. It is maintained by the appellant that an order under the latter provision was the only basis on which provision ought to have been made to have Miss A's evidence given by way of video link if, as was so found by the learned trial judge, she was an individual who suffered from a mental handicap. It is argued by the appellant that s. 13(1)(a) provides specifically for circumstances where an individual is either under eighteen years (whether or not the person has a mental handicap) or if over eighteen years has a mental handicap, in accordance with s. 19 of the Act of 1992. It is pointed out on behalf of the appellant that s. 13(1)(b) can only be operative "*in any other case*", or in other words, in circumstances where the person is either under eighteen years (with or without a mental handicap), or is over eighteen years and has a mental handicap.

16. The main thrust of the appellant's argument is best illustrated by quoting para 14 of his written submissions, as follows:-

"It is submitted that the two sub sections represent discrete and distinct basis upon which an order for video link evidence might be made. There are not interchangeable. Adopting even an ordinary literal reading of the relevant provisions makes it clear that this so. That said, less there would be any doubt about it, it is submitted that as s. 13 makes provision for an exceptional mode of trial in criminal proceedings, allowing in confined circumstances for interference with an accused' ordinary fair trial rights, the section should be construed narrowly and in a manner that affords the greatest protection to the right of an accused person. It is permitted therefore that the circumstances capable of properly being considered in assessing whether to make an order under s. 13(1)(b), been "*other*" than those for which provision is made in s. 13(1)(a) must exclude the fact that the person is a minor or

suffers from a mental handicap.”

17. The appellant further argues that the order made pursuant to s. 13(1)(b) of the 1992 Act amounts to a real and substantial pre-determination of the only real issue in the case (namely, the mental infirmity of the complainant), and created a risk of unfairness which was not capable of being, and was not in fact, remedied at trial. In this regard, reliance on the following comments of O’Neill J. in *DOD v. DPP and Judge Ryan* [2009] IEHC 559 (being the judicial review proceedings arising from the first order under s. 13(1)(b) made by the trial judge herein) as follows:-

“In my judgment, it is clear that evidence by video link in the circumstances of this case does carry with it a real risk of unfairness to the accused person which properly cannot be remedied by directions from the trial judge or statements from the prosecution.”

The law

18. While it is certainly common practice that witnesses in trials give their sworn evidence while physically present in court, there exists statutory provision for evidence to be giving by other means, including and in particular, evidence to be giving by video link where the person, although not physically present in court, is visible and audible to all concerned. The s. 13(1)(a) and (b) are such examples.

19. There is no constitutional entitlement on the part of an accused person that his accuser or indeed any other witness given evidence must be physically present in court while doing so. In *Donnelly v. Ireland The A.G. and the DPP* [1998] 321, the Supreme Court, in a unanimous decision held as follows (as per the head note):-

(i) *It was well established that the right of the accused to a fair trial was a superior right in the hierarchy of constitutional rights, insofar as it is possible or desirable to construct one.*

- (ii) *The right of an accused to a fair trial did not include in all circumstances the right to physical confrontation with his accuser and consequently there was no such constitutional right. Therefore the circumstance in which physical confrontation was denied an accused was a matter for the Oireachtas and did not require case by case determination.*
- (iii) *Fair procedures were satisfied by requiring that the witness give evidence on oath which was subject to cross examination while the witness was under the scrutiny of the judge and jury."*

20. In *O'Sullivan v. District Judge Hamill* [1990] 2 I.R. 9, the High Court held that a s. 13(1)(b) of the Act of 1992 provided that evidence could be giving by way of live television link in all cases with the leave of the court, the jurisdiction of the court to allow evidence to be giving by way of television link was not based on a prior finding that the person involved had a mental handicap. At p. 14 of the judgment, O'Higgins J. stated:-

"Indeed it might be possible to argue that, such the issue of the mental handicap of the witness might be a vital issue before the jury at the trial, it would be preferable to rely on the provisions of s. 13(1)(b) rather than s. 13(1)(a) at the preliminary examination. It is to avoid any perception of pre judgment that the Respondent proceeded under s. 13(1)(b)."

The decision of the trial judge

21. The application that the complainant's evidence be heard by video link pursuant to s. 13(1)(b) of the Act of 1992 was heard on 23rd July 2010. The court heard evidence from the clinical psychologist who had assessed the complainant on a number of occasions. He expressed his strong view that his testimony would be "*seriously impaired*" if she was required to give evidence in open court. He stated:-

"..I think that Miss A is a person who because of her disability has had a very

restricted and sheltered life. She has no experience of being at the centre of attention. She has no experience of talking or speaking in a very public forum and her experience to date would be of interviews in a one to one capacity or in a very formal, very structured environment in terms of maybe one to one or maybe two people to one and that is her experience and I think that she would find it extremely difficult to deal with the extra variable that would be present in an open court setting and I think that it would impair and seriously injure her ability to give full evidence for her."

22. He also stated:-

"I think it would be extremely important for A to give it by video link because I think it would allow her to focus her attention exclusively on what she is been asked and to give a full and frank answer to what she has been asked."

23. In her ruling on the application, the learned trial judge said (referring to the complainant):-

"Her pervasive mental handicap was outlined to the court and it was also outlined to the court by Mr. Buttimer about her difficulty in given evidence in open court."

24. The learned trial judge went on to discuss in some detail the evidence provided to the court by Mr. Buttimer in relation to the complainant, Miss A, and another complainant, Miss V (the decision in relation to Miss V is not relevant to this appeal). The learned trial judge proceeded to make orders permitting the giving of evidence by video link pursuant to s. 13(1)(b) of the Act of 1992.

Decision

25. A central focus of the appellant's argument is that permitting the complainant (Miss A) to give evidence by video link amounted to a pre determination of her mental capacity and the existence of a mental handicap or a mental impairment such as rendered the

outcome of the trial and the verdict of the jury a foregone conclusion. It is the appellant's case that an order pursuant to s. 13(1)(b) amounted to such a pre-determination, and also, and in any event, was an order which, if it was to be made as properly provided for by statute, ought to have been made pursuant to s. 13(1)(a) of the Act of 1992. However, if such an order had been made pursuant to s. 13(1)(a) such an order could, arguably, be said also to be a pre-determination of the issue of the mental condition of the complainant. Indeed, from that perspective, it made no difference whether an order allowing evidence to be given by video link was made under s. 13(1)(a) or (b) of the Act of 1992.

26. Section 3 of the Criminal Procedure Act 1993 provides that on hearing an appeal against conviction, the court may *inter alia*, affirm the conviction (and may do so notwithstanding that it is of the opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred). This provision is generally referred to as the *Proviso*. It will operate where the Court of Appeal (as the successor to the Court of Criminal Appeal) is satisfied that "*no miscarriage of justice has actually occurred*".

27. In this case, the court is satisfied that irrespective of whether permitting Miss A to give evidence by way of video link was made under s. 13(1)(a) or (b) the outcome was exactly the same. The risk (be it real or perceived) of pre-determination of the mental condition of the complainant was present in either event and although probable less so where (as indeed occurred in this case) s. 13(1)(b) was used in any event, and most importantly, the clear direction given to the jury at the conclusion of the learned trial judge's charge to the jury was sufficiently strong and clear as to render any sense of pre-determination may have been in the minds of the jury of little practical consequence.

28. The appeal against conviction is therefore dismissed.

Approved Judgment

23rd November 2015

A. J. Martin