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Rape Law: Victims on Trial?

Dublin Rape Crisis Centre & the Law School Trinity College Conference

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Introduction

Firstly, I would like to thank the Dublin Rape Crisis Centre for their initiative in organizing this conference and for inviting me to give a closing address. It was a privilege to be able to assist Senator Ivana Bacik by providing information concerning the incidence and outcome of applications to cross-examine complainants about their sexual history. When the Dublin Rape Crisis Centre made an enquiry about this to me six months ago I was surprised that no accurate information was available and I readily agreed to do what I could to try to remedy this lack of material.

I propose to say a little about Senator Bacik's research and to make some brief comments on some other matters which I think are relevant to the conference theme. Of necessity I can only deal with a limited number of issues.

Separate Legal Representation

Firstly, I want to compliment Senator Bacik for her presentation which in my view is a very thoughtful and measured contribution to the debate on the subject.

It is important to understand that the material we were able to provide to Senator Bacik had a number of limitations. The principal problem is that the information that we would really like to have is not always to be gleaned from looking at a completed file. The research indicates a higher number of applications to cross-examine in relation to sexual experience in recent years than appears to have been the norm previously but what is more difficult to ascertain is why this should be so, whether there has been a change in judicial thinking, or whether the courts have in practice been applying the jurisprudence set out in the judgment of Mr. Justice Kearns in the Court of Criminal Appeal in the *G.K*[1]. case. For this reason, it seems to me that it is necessary to carry out further research in order to try and answer some of those questions. I therefore intend to continue recording, as cases happen in the future, the basis on which applications to cross-examine complainants about their sexual experience are made, the basis on which they are granted, and the extent to which they appear to affect outcomes. I think it would be premature to assume that the current legislation requires to be changed. On the face of it, section 3(1) of the Criminal Law (Rape) Act, 1981, as amended by section 13 of the Criminal Law (Rape) (Amendment) Act, 1990, is quite tight and its scope as interpreted by the Court of Criminal Appeal in *G.K.* to permit cross-examination as to past sexual history seems quite limited. What is important is to have a legislative scheme which will allow evidence of previous sexual history to be admitted where it is

[1] *The People (DPP) v. GK* Unreported, Court of Criminal, 5 July 2006

properly relevant, as will frequently arise where a rape is alleged to have been perpetrated by a person who is or has been in a sexual relationship with the complainant, while at the same time excluding the use of such evidence where it is merely intended to incite prejudice against a complainant by, for example, suggesting that she is a person whose habits are sexually promiscuous even though this has nothing whatsoever to do with the actual facts of the case. Having said that, however, and while acknowledging that there are many cases in which questions as to previous sexual history legitimately arise and may be properly examined at a trial, it may be that an examination of the current practice will indicate that some legislative change is required. I would not rule out the possibility that we might need to amend the legislation along, for example, the lines of the legislation in Scotland.[2] But before we promote amendments to legislation I think it is necessary for us to be very clear whether there is a problem which would need to be addressed by legislation and if so what exactly that problem is and whether there are other possible solutions short of legislative change. These questions can only be established by empirically based research. It may also be the case that my Office needs to take steps to ensure a uniform approach to such applications by the prosecution and for this purpose it may be desirable for us to adopt guidelines on the matter. Again, before doing this we need to be fully aware of current practices.

Juries

Another area which I feel warrants attention is the jury system. The Hanly *et al* Report threw up a very interesting finding in relation to juries which many people found curious, namely the apparent reluctance of female dominated juries to convict.[3] I do not propose to comment on that particular issue, other than to say that it provides a reason to conduct academic research into why juries decide as they do. Without such research, we can only speculate as to why such apparent anomalies exist. For example, I have heard it suggested that in practice female jurors tend to judge the behaviour of the female complainant whereas male jurors tend to concentrate on the behaviour of the male defendant. This may well be the case and indeed such a theory sounds plausible. However, speculation about jury behaviour is no substitute for actual research.

It has been suggested that juries are influenced by so-called "rape myths".[4] It certainly seems to be the case that juries are more willing to convict in cases where a complainant has put up a physical struggle or has sustained injuries. One possible explanation of this is that juries are influenced by the rape myth that real rape involves physical violence inflicted by a stranger. However, an alternative explanation is that in cases involving injury there is objective evidence supporting the complainant's account whereas in

[2] The Sexual Offences (Criminal Procedure) (Scotland) Act 2002 was introduced in response to the perceived failure of ss. 274 and 275 of the Criminal Procedure (Scotland) Act 1995.

[3] Hanly, C. *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin: Liffey Press, 2009), p. 325.

[4] See generally, Munro, V. and Ellison, L. *Complainant Credibility and General Witness Testimony in Rape Trials: Exploring and Influencing Mock Juror Perceptions* (Swindon: ESRC, 2009).

cases involving acquaintance rape where the only issue is that of consent there is typically an absence of independent evidence and the case has to be decided solely on the basis of the evidence of the two parties involved. In such cases it is important to note that the task of the jury is not simply to decide which of the two accounts they believe is more likely to be correct but to be satisfied beyond a reasonable doubt that the accused is guilty before they convict him. It is perfectly logical for a jury to form a view that on the balance of probabilities they believe the account given by the complainant but are unable to be satisfied to the standard required to sustain a conviction.

I want to reiterate my view that the jury system in this country is very much in need of reform. As a result of the wide variety of exemptions from jury service which are given to various professions and occupations – including many of the professions and in practice much of the public service, the professional middle classes appear to be underrepresented on juries. It seems to me that in principle we ought to have trial by juries which are broadly representative of society as a whole, including representatives from all professions and walks of life.

Secondly, the use of challenges without cause can be used to attempt to distort the balance of the jury in relation to matters such as age, class or gender. Where there are multiple defendants in a case this is a particular problem as each defendant has seven challenges and if defendants think they will have an advantage if they obtain a jury skewed in the direction of one sex or age group they will have sufficient challenges to achieve this result. I do not believe that defendants should be in a position to use challenges in order to distort the overall representative nature of the jury. The simple solution to this is to limit the number of challenges which may be made without showing cause.

Thirdly, in an era where there have been on occasion attempts to intimidate jurors it is important that we take steps to protect juries from such practices. In this regard, the arrangements at the new criminal court complex will be a major help. However, I think it would be useful if we had a provision whereby completely anonymous juries could be sworn in cases where there was a risk of intimidation, allowing them if necessary to hear evidence from behind one way glass screens or even from a distance using video link. While I do not dispute the necessity of non-jury courts in exceptional cases the right to trial by jury is regarded as a valuable democratic right to such an extent that it is has been enshrined in our Constitution and jury trials will remain the norm for the great majority of cases. In recent years a number of European countries coming from a tradition which did not use juries have adopted the use of juries. We should not see juries as somehow an old fashioned way of doing things which can be lightly dispensed with without long term damage to this important democratic element in our legal system. The fact is that a properly representative jury should have a breadth of experience and understanding of life which no single judge could ever hope to emulate.

Fourthly, I believe that there are inefficiencies resulting from the legislation concerning the way in which we summon and assemble juries. Essentially the method of doing this is still a 19th century one which frequently involves many people hanging around doing nothing for long periods of time before being sent home. I do not believe that in the age

of information technology we cannot find more efficient ways to summon and select juries, thereby saving time, increasing the efficiency of the trial process and reducing the demands made on citizens who are asked to do jury service.

Sentencing

Concerns are frequently expressed about consistency in sentencing practice and this was one of the themes dealt with in Ivana Bacik's report 10 years ago.[5]

There is probably a greater degree of consistency in sentencing for rape cases than exists in relation to certain other offences. There are a number of reasons for this. In the first place, all rape cases are centralized in the Central Criminal Court and are therefore dealt with by a relatively small number of judges. Indeed, a very high proportion of rape cases would be dealt with by a single judge, our chairman today, Mr. Justice Carney. Secondly, there has developed a degree of jurisprudence within the past ten years which has helped to ensure consistency in sentencing. The case of *WD*[6], a judgment of Mr. Justice Charleton, attempted to catalogue a large number of sentencing decisions in rape cases and to classify them according to whether they fell into the low, middle or most serious scale of offences and to identify the factors and characteristics which put them in those categories. This judgment has proved to be of great assistance in addressing sentencing issues in rape cases. Thirdly, within the past few years, largely as the result of the efforts of Mr. Justice Carney, the practice has developed whereby the prosecution is frequently asked for submissions in relation to sentencing and it is now the norm for counsel for the DPP to address the court on the principles to be adopted in relation to sentencing when requested by the trial judge and to indicate where in the DPP's opinion the case falls on a scale of seriousness of the offence and to address the court as to what factors are properly to be regarded as mitigating or aggravating the seriousness of the offence. Of course, the sentencing decision remains with the trial judge and not with the DPP, but I believe that some of the judges find it of assistance to have relevant sentencing precedents opened to them in this manner.

However, a major problem remains the fact that we have a very weakly developed system of appellate criminal courts in this country. An appeal court should fulfill two functions, firstly, and of course most importantly, to ensure that justice is done in the particular case before the court, but secondly, to set out a clear and coherent set of principles and guidelines which should inform the trial judge in sentencing. A major problem with the existing statutes establishing the Court of Criminal Appeal is that the Court established by statute is essentially *ad hoc*, consisting as it does of one Supreme Court judge and two High Court judges who come together for the particular appeal. The number of different possible compositions of the Court is very large. It may be that any particular combination of three judges will never sit again as a Court of Criminal Appeal. As a result, while an appellate court constituted in this way is capable of doing justice in the individual case, because of the lack of continuity in the composition of the

[5] Bacik, I., Gogan., S. and Maunsell, C. *The Legal Process and Victims of Rape* (Dublin: Rape Crisis Centre, 1998).

[6] Unreported, Central Criminal Court, Charleton J., 4th May 2007

court it is much more difficult for it to lay down coherent guidelines and principles. Indeed, because of the continually shifting personnel of the Court of Criminal Appeal much of the jurisprudence of that court lacks consistency. To say this is not to criticize the individual judges who constitute that court because creating a court of appeal which contains different judges each time it sits is inevitably going to lead to inconsistent caselaw. For this reason, I believe it is essential that we establish a permanent Court of Appeal in this country so as to ensure that appellate decisions are made, if not by exactly the same people each time, by a number of judges drawn from a relatively small panel. The Working Group on a Court of Appeal chaired by Ms. Justice Denham in its Report concluded that a court of appeal with permanent judges was likely to lead to more coherent development of criminal jurisprudence.

I am aware that in the present climate of financial stringency it is difficult to get a hearing for the argument that a further court needs to be created but the fact is that the absence of a permanent appellate court is a severe impediment to a properly functioning criminal justice system. I believe that the creation of a permanent court of appeal would achieve increased efficiencies within the criminal justice system. For example, uncertainty as to the likely sentence tends to lead defendants to postpone guilty pleas until they know the identity of the trial judge, whereas consistency in sentencing tends to encourage early pleas. Finally, it seems to me that in principle the same judge should not sit on one occasion as a trial judge and on another occasion sit to hear an appeal against the decision of a colleague at the same level as can be the case under the existing statutory arrangements. There should in principle be a clear separation between the trial judge and the appellate court. This is lacking where the same judge may on different occasions exercise both functions.

Attrition

An additional area that merits attention is the question of attrition. The *Hanly*[7] Report is an invaluable document in relation to the question of attrition. I spoke at the launch of that report and I do not intend to say much about that very valuable report on this occasion. However, I would like to say a little about the suggestion in the Daphne II Report that somehow the low rate of successful rape prosecutions as a proportion of the total number of complaints is due to under-prosecution.[8] I do not accept that this is a logical conclusion to be drawn from the figures which we have. The figures show that the rate of prosecution is falling but they show that the rate of convictions of those cases which are prosecuted is also falling. Given that the practice of my Office is to prosecute those cases where we judge there to be the best chance of success and that despite this quite a number of such prosecutions end in an acquittal, I fail to see how prosecuting a significant number of other cases which are weaker is going to improve the situation overall. As Hanly et al pointed out:

[7] Hanly, C. *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin: Liffey Press, 2009)

[8] Lovett, J. and Kelly, L., *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*(London: CWASU, 2009), pp.73-74.

> "To bring a prosecution, in a case whose evidential base is so weak that there is no prospect of a conviction, thereby requiring the complainant to undergo the rigours of the trial process with no prospect of the compensation of seeing the defendant convicted, surely would be a poor use of prosecutorial discretion."[9]

In England and Wales, where a much higher proportion of rape complaints are prosecuted, the overall conviction rate is very similar to that in this jurisdiction.[10] The question of why the rate of prosecution has been dropping needs further research and in the coming months I will be attempting to answer this question through an examination of the files in the Office.

Dealing with Victims

Last, but not least, in a seminar whose theme is "victims on trial", it is appropriate that I say a few words about how our Office deals with victims in rape cases. Both I and my staff have for a long time now been working with victims themselves and victim support groups to try to improve their experience of the criminal justice system. From a purely pragmatic point of view victims are essential prosecution witnesses and as such we recognise that anything that we can do to help them to better understand the process which they are undergoing will assist in the long run. As a matter of good practice injured parties in rape cases are through the Gardaí routinely offered a meeting with the legal team dealing with the case. While legal constraints mean that we cannot discuss theirs or anyone else's evidence during that meeting it is we think helpful for the injured party to understand the process that they are facing into and for them to be familiar with the lawyers representing the prosecution.

We also try through the good offices of the Garda Síochána to keep injured parties informed of progress in their cases even for example after court if an appeal is lodged. We have worked closely with the Commission for the Support of Victims for several years now and while we acknowledge that there is always room for improvement we think that things are moving in the right direction. However we are very conscious that people may not be aware of the information which we offer and this is available on our website at www.dppireland.ie which has a specific section dealing with information for victims.

In conclusion, once again I thank the Dublin Rape Crisis Centre for commissioning this research and arranging this conference. Both will, I believe, make a significant contribution to our understanding of the issues we have been discussing today.

[9] Hanly, C. *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin: Liffey Press, 2009) P.368

[10] *Ibid*. pp.44 and 80.