THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

No. 225/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

F. McL. and B.W.

Appellants

JUDGMENT of the Court delivered on the 25th day of October 2016 by

Mr. Justice Birmingham

1. On the 1st August, 2014, the appellants FMcL and BW were each convicted of a number of counts of indecent assault. Subsequently on the 13th October, 2014, FMcL was sentenced to terms of two years imprisonment on certain counts, the sentences to run concurrently with each other and a consecutive sentence of two years on a further count with the final six months suspended. BW was sentenced to a term of two years imprisonment on one count and two concurrent terms of one year's imprisonment in respect of other counts, all his sentences were suspended in their entirety.

2. By way of background, it should be explained that there were two complainants in the case, GS whose date of birth was the 31st August, 1957 and KS his younger brother whose date of birth was the 1st January, 1961. FMcL faced nineteen counts on the indictment in respect of offences alleged to have occurred between 1963 and 1974. Twelve of these counts were alleged to have been committed against GS. These were said to have occurred between 1963 and 1974. Seven counts were alleged to have been committed against KS and these were alleged to have been committed between 1966 and 1973. Of these seven counts, five were alleged to have occurred at a time when the co-accused BW was present and abused KS in a similar fashion. These offences, when both appellants were said to be present, occurred between 1971 and 1973. BW faced five counts relating to these incidents. Both FMcL and BW now appeal against their convictions.

3. Each appellant has advanced a number of grounds of appeal though there is some element of overlap. The grounds advanced on behalf of FMcL might be summarised as follows:

- Refusal to sever the indictment and order separate trials.
- The adequacy of the charge in relation to corroboration.
- The adequacy of the charge in relation to delay.
- A failure on the part of the trial judge to distinguish the corroboration warning and delay warning.
- Inadequacy of the charge in relation to system evidence and the approach to separate counts on the indictment.
- General unfairness – under this heading there is a complaint that the judge's summary of the evidence and her charge was biased against the applicant and unfair and that despite being requisitioned, she failed to put the defence case. There is also a complaint that the judge unfairly excluded evidence which the defence sought to introduce and to rely on in order to meet the allegations

4. The grounds relied on by BW might be summarised as follows:

- Complaints about the charge in relation to corroboration.
- The issue of corroboration and system evidence.
- Complaints about how the issue of delay was dealt with in the charge.
- Separate trials.

The refusal to order separate trials

5. This issue has been raised, though in slightly different terms by both appellants. The issue first surfaced on the 15th July, 2014, the first day of the trial, when counsel on behalf of the first appellant, FMcL, indicated that he was seeking to have the indictment severed. Counsel contended that his client was in effect facing three trials, these he identified as a trial involving the counts where GS was the complainant, a trial were KS was the complainant and he categorised as a third trial those counts where KS was the complainant and when the allegation was that both co-accused were present and that each in turn engaged in acts of abuse. Counsel submitted that there was nothing in the evidence of KS that could corroborate what GS said as neither complainant said they were present when the other was abused. Counsel was particularly concerned with one specific count on the indictment, count 14, where the allegation was that his client abused KS in his bedroom, at a time when he was recuperating from a childhood illness. He

submitted that if the jury concluded that FMcL was so malevolent as to do that, that they would be prejudiced when considering the evidence of the other complainant.

6. Counsel for the other appellant, BW, did not make an application for separate trials at that stage, but rather indicated that she was reserving her position depending on how the particular evidence unfolded. Counsel referred to concerns that she had if certain remarks made by the co-accused, FMcL, during his first garda interview were put in evidence. In fact evidence in relation to that garda interview was not led, so that issue never resurfaced in the manner envisaged.

7. Senior counsel for BW raised the issue of separate trials at the conclusion of the evidence of GS. At that stage, counsel for BW said that following the conclusion of the evidence of GS that it was clear that he was not making any allegations against her client BW, to the extent of saying that BW had never laid a hand on him. Reminding the Court that she had reserved her position at the start of the trial, she then formally applied for separate trials. It must be said the application at that stage was a surprising one and frankly it seems quite misconceived. GS had given his evidence in accordance with his statement in the book of evidence and nothing new had emerged to embarrass BW. There was no reason why the trial judge should depart from her earlier ruling refusing separate trials.

8. In relation to the substantial application on the first day, the trial judge took time to consider the matter before ruling on the issue. In the course of that ruling she commented:

> "I note from the decision in *DPP v. G.(L)* there is a recommendation from the Court of Criminal Appeal that a trial judge should preferably ideally rule in advance on whether the evidence on the counts relating to the two complainants is cross admissible at the time of the application for separate trials is being made. This is not a straightforward matter, in the context where one has not heard the evidence, but on the basis of the information contained in the indictment in terms of location and dates, and on the basis of what I am told by the DPP about the manner of commissioning of offences and what I am told are patterns that will emerge in the course of the trial, in terms of how – things happened. It is submitted to me that there is system evidence and on that basis I propose to allow these charges to go ahead together and I refuse the application to sever."

9. In this case, the prosecution were claiming so far as certain counts on the indictment were concerned that KS was abused by both co-accused present at the same time, and each behaved in an identical manner. It is inconceivable that these offences would not be dealt with together. So, the real question is whether the counts which alleged abuse of GS by FMcL should have been dealt with separately. In the Court's view there are many factors present to justify a joint trial. The nature of the physical abuse described by each of the complainants was very similar. Both complainants were saying that they were abused by trusted employees of their parents business, who took advantage of their parents' absence in order to abuse the brothers in locations, which in a number of cases were linked to the parents' business. Saying more in the course of this judgment about the nature of the family business and how it was conducted would give rise to a serious risk that the complainants would be identified. For the same reason, a considerable degree of circumspection is required in what can be said about the manner and circumstances in which the abuse occurred. There are factors present which make the complainants readily identifiable. However, the Court will simply observe that the nature and circumstances of the abuse alleged against FMcL involving GS and KS meant that there was an overwhelming argument in favour of these counts being tried together. This was a case where the arguments for joint trials were particularly strong. With particular reference to count 14, the Court sees no reality in the suggestion that the jury would be so overwhelmed by the evidence on this count that a boy who was recovering in bed from an illness would be abused so as to be prevented from considering the balance of the counts dispassionately. The Court is in no doubt that this was an appropriate case for a joint trial and the Court will therefore dismiss this ground of appeal in respect of both appellants.

Corroboration warning

10. This is an issue which has been raised by both appellants. Essentially the case made is that what the judge had to say on this topic was deficient because there was a failure to contextualise the warning and a failure to elaborate for the jury on why she felt it necessary in the circumstances of the case to give such a warning.

11. It is thus therefore necessary to consider what the trial judge had to say on this topic. She dealt with this subject on day 11 of the trial and did so in these terms:-

> ". . . and now, I am coming to an end. Your lunch is going to be a bit late but before I do so and before I round up, I need to give you some particular warnings which are necessary to give in these type of cases. And the first is in relation to corroboration and one of the counsel has already mentioned corroboration and what it is, it's independent evidence of material circumstances or facts which are supportive of the fact that a crime has been committed and who committed it. So it's independent evidence supporting the commission of a crime and the person who committed it. Now, corroboration isn't essential in cases of this nature as a matter of law and it is not usually available in these kind of offences. They usually take place in private if they occur. But the difficulty in these type of cases is that the charges of abuse occurring in private as they invariably do can be very difficult to disprove and what you are dealing with is one person's word against another and for this reason the law requires that you exercise special care in reaching a decision as to whether you are satisfied beyond reasonable doubt of the truth of the complaints which are alleged, bearing in mind that they are difficult to disprove and that – bearing in mind in this case that the accused also gave evidence. But you are dealing with one person's word against the other and that can be difficult for an accused person and the courts are always concerned lest an unsafe conviction occur. It must be guarded against and there have been cases where that has occurred in the past - - where plausible evidence has transpired to be untrue and so I give you that warning about corroboration. As I say, it is not necessary but you need just to be careful in assessing the evidence for the reasons I have said. Now, in relation to corroboration the prosecution say that there are similarities of evidence in this case in relation to details of the alleged acts of abuse. How they were committed in cars, the respective position of the persons involved and they say that this is borne out by the evidence – - the independent evidence of both of the complainants and they say that the similarities amount to evidence which is in itself capable of corroboration. That the evidence of one supports the fact that the offences were committed and the person who committed them and it is called 'system evidence' and it is evidence which is based on similarities basically, given independently and without collusion. So you need to consider if there is such system evidence. If it is given independently, if there has been no collusion and it is for you to determine if there are such similarities and if so what the significance is and whether they are capable of providing corroboration."

12. The issue was the subject of requisitions, but the judge took the view that the subject had been dealt with by her as clearly as she could and she declined to revisit the subject.

13. The starting point for consideration of the criticism has to be s. 7 of the Criminal Law (Rape) (Amendment) Act 1990, which made

the giving of a corroboration warning discretionary and further provided that if a judge in the exercise of his or her discretion decided to give a warning, it is not necessary to use any particular form of words. While it is not necessary to use any particular form of words, it is of course the case that if it is decided to give a warning that it is necessary that the warning actually given be an appropriate and adequate one.

14. In this portion of her charge, the judge referred to the fact that abuse usually or invariably occurs in private, and that these are cases of one person's word against another, which can be difficult for an accused person. There was also a specific reference to the fact that unsafe convictions had occurred in the past, and cases where plausible evidence had transpired to be untrue. It seems that the judge was very aware of the decided cases in this area. The reference to one person's word against another can be traced to *DPP v. Gentleman* [2003] 4 I.R. 22, while the reference to "plausible evidence found to be untruthful" echoes the language of O'Donnell J. in *DPP v. C.C. (No. 2)* [2012] IECCA 86.

15. The charge is criticised because of its reference to an accused having difficulty in disproving and it is suggested that this could have mislead the jury into believing that there was a positive obligation on an accused to disprove his guilt or even to prove his innocence. The word "disprove" was not a particularly happily chosen one, but nonetheless the Court does not see this as a point of substance. No juror who listened to the charge in full, to say nothing of listening to the submissions of counsel could have been left in any degree of uncertainty about the fact that the onus of proof throughout was on the prosecution, that the onus never shifted and that there was no onus on the defence to prove anything. While there is never any obligation on the accused in a criminal trial to disprove anything ordinarily, a defendant in a position to do so will be more than happy to do just that. The reference to disprove was no more than an indication that the position, in which an accused in cases such as this is put, is a difficult one and accordingly very particular care was required.

Delay warning

16. Again this is a complaint that is common to both appellants and once more this is an issue that surfaced at requisition stage. As was the case in relation to the corroboration warning, the trial judge is criticised for what is said to have been a failure to contextualise the warning she gave. The judge is also criticised for failing to read the *Haugh* warning as referred to in *People (DPP) v. R.B.* (Unreported CCA, 12th February, 2003) to the jury.

17. Once more it is necessary to see what the judge actually said. She addressed the issue in these terms:-

> "And the other factor I need to draw to your attention which has already been touched upon and that is that these charges are historic. They are old complaints. They are made firstly after a passage of time and secondly, they relate to events which occur over 40 years ago and this presents difficulties for the accused persons. And the first difficulty is the prejudice to the accused in dealing with offences which lack detail and in particular specific dates and you will see some of the offences are alleged to have occurred over a period of time and the difficulty this represents for an accused is that they are hamstrung in finding evidence or information which could prove their innocence. So, for example, witnesses who were with them on a specific date when it is alleged - - when an offence is alleged to have been committed. And you will recall in this case that a number of witnesses have died and the defence have stated that they are concerned that these witnesses were no longer available to them. That is something which you must take into account. The other difficulty is that you – because of the lack of specificity it is difficult to say that you might have been elsewhere: you might have been at the ploughing championship or to a football match on a particular date. So, the absence of detail as to the specific date of an alleged offence can present a real difficulty of prejudice for an accused person and I need to warn you that an accused person cannot be disadvantaged because the case relates to events of such a long time ago. So you need to be all the more careful and it must be much harder to satisfy you in relation to an event that is appraised in a vague and general way rather than an event which is specific in detail. I don't say that all of the offences are unspecific in detail, but some are and you need to take that into account.
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> And the second difficulty arising from the antiquity of the alleged offences is in relation to the reliability of the evidence because memories fade and time can affect recall, so that memories of certain facts such as dates or who else was present at a particular time can become distorted or fuzzy or incorrect. On the other hand, there are events which can be fixed in your head if they are of a particular nature and you can recall them – you can probably something very vivid from your own childhoods. So there are things that you can recall and there are other things which you can get wrong or get fuzzy or get distorted. So the question is whether the memories can be relied upon as being reliable and that is a matter for you to assess. It is your job as I have said before to assess the credibility of witnesses and decide what weight to give their evidence. You may accept all or some of the evidence or you can reject it. Ask yourself was the evidence credible? Were the witnesses credible? Was what they said credible? Were the version of events they gave credible? Taking into account the manner in which they gave it and demeanour is important. How they present themselves can be as important as the words used and I know that you have been observing the witnesses as they gave their evidence. And apparently small details can be important in assisting you to decide whether the recollection of a witness is credible and there were a lot of small details given. But there are also conflicts in respect of details and dates and in respect of details ask yourselves are the differences material or significant? They may not be. But dates are significant particularly in the context of these charges. I need to say to you that a witness can recall something or recall further details after they have made a statement to the gardaí and you can decide if that were the case and if so, whether it is significant or not. You can also bear in mind that there are witnesses who are entirely unreliable and/or biased and there are also witnesses who lie for whatever reason.
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> But in summary given the historic nature, given the absence of corroboration, other than if you think there is such system of corroboration, I need to warn you that you need to be careful in your consideration of the evidence recognising the difficulty the accused persons have in dealing with historic, old cases of this particular nature and the frailties of memory and the effect of time on people's ability to recall with accuracy. But if having given due and careful consideration as I have suggested to you in the manner I have in assessing the evidence: if you are satisfied having done all that, that either of the accused is guilty beyond reasonable doubt, then your duty is to convict."

18. When requested to read the so called Haugh warning as she was at the requisition stage, the trial judge responded in these terms:-

"And in relation to the *Haugh* warning, I have seen the eyes of jurors glaze over when the *Haugh* warning has been read out because it was an excellent warning in its own case, but a lot of it is not relevant to other cases, and therefore I adopt the view expressed in some of the authorities that I should adopt it for the case in question, and not read it out which I am told is the safest thing to do, but I would prefer to try and make myself as clear to the jury as I can in my own words and that is what I have done. And if I am told to do otherwise elsewhere then that is what I will do then."

19. The position of the appellants diverges somewhat in relation to the interconnection of delay and corroboration. The first named appellant, FMcL, is critical of the fact that both issues are referred to in the same context, while the second named appellant BW contends that the absence of corroboration, as he contends was the situation, compounds the difficulties and necessitated a particularly strong delay warning. The Court does not agree with the first named appellant that these issues must be kept rigidly apart. The fact that allegations of sexual abuse relate to activities that occurred in private and that cases often take the form of one person's word against another gives rise to difficulties for an accused person. Historic cases also present difficulties for accused persons and hence the necessity for the delay warning. There can be nothing objectionable in referring to the absence of corroboration in the context of a delay warning and it is clearly a relevant factor.

20. The second named appellant Mr. BW also criticises the fact that there was no specific reference to the fact that the most earliest allegation against him went back 41 years and that there had been an interval of 37 years between the date of the latest allegation and the complaint. In the Court's view this last criticism completely ignores the fact that the charge was not being addressed to individuals hearing about the case for the first time, but was directed to jurors who had sat throughout the entire trial and had heard all the evidence and submissions. The Court overall is satisfied that the warning given was an appropriate one. The Court is also of the view that the judge is to be commended for seeking to put the warning in her own words rather than seeking safety by reading extracts from a decided case which may prove a less effective form of communication. Accordingly this ground of appeal fails.

Inadequacy of the charge in relation to system evidence
21. This is an issue that is raised by both appellants, but understandably given that they face different counts, they come to the topic in somewhat different ways.

22. The judge addressed the question of system evidence as follows:-

> "Now, in relation to corroboration the prosecution say that there are similarities of evidence in this case in relation to details of the alleged acts of abuse. How they were committed in cars, the respective position of the persons involved and they say that this is borne out by the evidence – - the independent evidence of both of the complainants and they say that the similarities amount to evidence which is in itself capable of corroboration. That the evidence of one supports the fact that the offences were committed and the persons who committed them and it is called 'system evidence' and it is evidence which is based on similarities basically, given independently and without collusion. So you need to consider if there is such system evidence, if it is given independently, if there has been no collusion, and it is for you to determine if there are such similarities and if so what the significance is and whether they are capable of providing corroboration."

23. The appellant FMcL complains that there was a failure to address properly the issues that arise in circumstances where there was more than one complainant and the prosecution was relying upon system evidence. The judge is criticised for failing to instruct the jury that it must consider each of the counts in respect of each complainant separately.

24. The second named appellant BW, takes as his starting point, that where there are multiple complainants that the trial judge should instruct the jury as to the extent to which the evidence of one complainant can be used to corroborate that of another. He points out that in this case, there were two complainants, both of whom were saying they had been assaulted by his co-accused FMcL, but there was only one complainant, KS, who was making any allegation against him. Consequently he says his situation was very different, and it was incumbent on the trial judge to make clear that there was this critical distinction.

25. Junior counsel for the appellant, Mr. Dockery BL, sought to raise this issue at the requisition stage and to highlight the fact that his client's position stood in marked contrast to that of his co-accused. Unfortunately, his request for clarification was resisted by the prosecution who instead submitted as follows:-

> "That unique system of offending [putting the child face down, the penis between his legs] that unique system, method of conducting the abuse is equally as corroborative of Mr. BW in circumstances where he is a co-accused, he is a joint offender."

26. It must be said that the situations of the two defendants, now appellants were very different. Two complainants were making allegations against FMcL. The allegations were strikingly similar, in particular the *modus operandi* described was strikingly similar, and those similarities were by no means confined to the description of the physical activity involved referred to by prosecution counsel when replying to submissions at the requisition stage.

27. In sharp contrast in the case of BW, there was only one complainant making any allegation against him, the other complainant GS was saying explicitly that BW had never laid a hand on him. System evidence or similar fact evidence in the context of corroboration is not an easy concept to explain to a jury. In the present case, the starting point for any exposition of the subject was to refer to the very different situations in which the two defendants found themselves. The argument can be made that the jury had heard the evidence and must have been conscious that GS was not making allegations against BW. While that is so, the trial judge was introducing two important and it must be said complex legal concepts to the jury, those of corroboration and system evidence and was giving directions in relation thereto to the jury. The failure to distinguish between the situations of the two appellants/defendants must have had the capacity to confuse or mislead the jury. So far as BW is concerned, the charge is therefore in this respect unsatisfactory. However in respect of the first named defendant/appellant, FMcL the charge does not give rise to any difficulty and so the Court will allow the ground of appeal raised in this connection by BW, but will refuse to allow the appeal on this ground in the case of FMcL.

General unfairness
28. This is a complaint made by the first named appellant FMcL. The complaint seems to be in the nature of an omnibus one, and encompasses criticism of the judge's summary of the evidence, which was said to be biased against the appellant and unfair, her comments on the evidence in the course of her charge which was said to have been one sided, biased against the appellant and in favour of the prosecution and there is a criticism of a failure on the part of the trial judge to put the defence case. Linked with this, there is also criticism of rulings on admissibility during the course of the trial and in particular criticism of rulings which precluded the defence from adducing certain evidence. The language of the criticisms directed against the judge is notably robust. So, the judge was criticised for a "pro prosecution indulgence, and an attitude to get this case to the jury irrespective of its frailties, inconsistencies and without putting the defence appropriately or at all". The first named appellant concludes his written submissions by appending a table which purports to list the rulings made by the trial judge. It is said that five of these rulings went against the prosecution and thirteen went against the appellant. This, it was submitted, speaks for itself. With respect to the authors of the submissions, it does nothing of the sort. In any given case there may be few if any rulings against a particular side, perhaps because that side was restrained and selective when it came to seeking rulings. On the other hand, there may be cases where a less targeted

approach has been taken by one side giving rise to multiple applications and rulings. In such cases that some of the rulings will be adverse to the party raising the issues is not surprising. In this case the 13-5 count is no indication of bias or lack of balance on the part of the judge.

29. Reading the transcript, and in doing so one bears in mind everything that is being said about the inadequacy of the arid pages of transcripts, one does not get any impression whatever of a trial that was biased or unfair. Certainly it emerges that the case was not an easy one. There was an amount of tension between prosecution counsel and counsel for the first named appellant. Counsel for the prosecution for example at one stage criticised her colleague for "shouting and doing all manner of things during the three day cross examination of a witness". This observation was made in the context of interruptions at an early stage of the cross examination of Mr. FMcL by senior counsel for the prosecution, an interruption to which she took strong exception. The impression one has is that this was a case where no quarter was asked or given. However one also has the sense that it was a case which the judge conducted with firmness, fairness and sensitivity.

30. Dealing specifically with the rulings on admissibility which prevented the defence putting certain material before the jury, the position is that on day 3, the appellant Mr. FMcL sought to introduce photos said to be relevant to the history between the appellant and complainant and their respective families. The prosecution objected on grounds of relevance and also on the grounds that the photos could not be properly proved. It must be said that this was surprisingly the subject of an objection. The trial judge is recorded in the transcript as ruling in the terms below:-

> "I have ruled against other material of a competitive nature which I felt was not relevant to these proceedings and I have ruled that out and I rule out these photographs. I don't think they are relevant in the context where there is no ready admission from the complainant that the families were friendly and continue to be friendly, and that their children play with each other, so those photographs don't add anything to that. So I regard them as irrelevant in the case and in any event, they can't be properly proved by having the developer here, so - - but even leaving that aside, it seems to me they are not relevant in the context of the evidence as it has emerged."

31. There must be some doubt whether the transcript is entirely accurate. It seems unlikely that the judge was speaking of a "competitive nature", a reference to comparable nature or something of the sort would seem more likely. Again the transcript refers to "there was no ready admission" when in fact there certainly was. This can be explained by a transcription error or it may have been that there was a slip of the tongue on the part of the judge. The other material of a competitive nature, or perhaps comparable nature to which there was reference would appear to have been a reference to a video of a country road on which an accident, where an act of abuse, the subject of count 1, in the indictment was alleged to have occurred.

32. If one reads the exchanges in relation to both these issues, what emerges is that the judge approached her task in a careful and balanced manner. What is entirely lacking is any indication of bias or hostility on the part of the judge. Once an allegation of unfairness in essentially general terms is advanced, all one can do is read the transcript to form an impression of what occurred. In this case overall, the Court is satisfied that the complaints as to unfairness are without merit and that this ground must fail.

33. In summary, the Court is of the view that so far as the appellant FMcL is concerned, there was nothing to render the proceedings unsatisfactory, or his conviction unsafe and in these circumstances the Court will dismiss the appeal of FMcL and affirm the convictions. However insofar as BW is concerned, as indicated he has indeed raised issues of concern to the Court in relation to the treatment of system evidence/corroboration so far as the issue has any relevance to him. In his case therefore, the Court will quash the conviction. The Court will hear counsel on whether or not a new trial should be ordered.