THE COURT OF APPEAL

[2013 149]

The President

Birmingham J.

Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

NIALL COUNIHAN

APPELLANT

JUDGMENT of the COURT (Ex tempore) delivered by The President on the 3rd day of March 2015

1. The Court is satisfied that this case involves a decision of no issue of principle or departing from existing principles of law and that it is appropriate to give an ex tempore judgment.

2. The appellant was convicted on 21st February of two counts of rape and two counts of indecent assault. That conviction was on 21st February 2013, and the offences related to a period of months between 1985 and 1986.

3. The circumstances were that the appellant was married to the complainant's elder sister. The appellant was aged 25 at the time and they had two children. The complainant, then aged 13 going on 14, so she was 13 at the time of some of the crimes and 14 at the time of others, used to babysit for the appellant. The complainant testified and the appellant was convicted of two counts of rape and two of indecent assault. Those were perpetrated in the box room bedroom of the home on occasions when the complainant was staying over in the house and when the appellant and his wife came back from socialising. He made his way into her room, as she testified, and on two occasions raped her and on two further occasions committed indecent assault.

4. So, the trial took place obviously a considerable number of years after the events that were complained of. The trial judge gave a detailed warning about the impact of delay in accordance with a form of expression that has been endorsed by the Court of Criminal Appeal on many occasions. Following that charge, there was no requisition in respect of the issue that arises now. The jury returned and asked for a copy of the judgment or further information about the delay and the judge repeated the warning, and again, there was no complaint about that, but on this occasion, Counsel for the appellant requested that the judge would advise the jury that there was evidence in the case in relation to what the complainant had said about her mother and why she did not tell her mother about the sexual invasions, but he said there was not evidence in the case in relation to the period subsequent to that in relation to the making of the complaint. The evidence had been given that the girl, who was then a schoolgirl, had been very reluctant to approach her mother because of the personality of that lady and that was explained in evidence as to why she did that. But she did say that there came a point in early 1986 when, as a result of the assaults that had been committed on her, she explained to her sister, the appellant's wife, that she would not and could not any longer babysit for them for reasons that she did not want to go into. That evidence was confirmed at trial by the elder sister.

5. The parties were aware, the prosecution and defence, of further information furnished by the complainant about her subsequent career, the events that happened to her and her personal history and the question was not explored in the trial as to why, subsequent to the removal or departure from the influence of her mother, she did not complain about abuse until 2009. The prosecution did not lead evidence on that matter and the defence did not explore it either. It is not for the Court to endorse the judgments or to criticise or agree to disagree. The Court has to look at the trial to see whether the trial was satisfactory and whether the convictions were safe. The particular challenge in this case is simply on the basis that the judge did not say "of course there is no explanation for the period after the influence of the complainant's mother was removed, there is no explanation for why she did not complain between then and 2009". Had the judge done so, he would have done so in circumstances where there was a potential explanation for the failure to complain. This Court does not say that that was an explanation that had to be accepted or that it was an explanation that would not be accepted, but it would not have been correct to say that there was no evidence and that would have given a misleading impression.

6. It seems to the Court that the problem in this case is that that would have been grossly unfair. It would also have been inaccurate, it would have been wrong. The defence, for reasons that they thought appropriate and which this Court understands and appreciates, made a decision not to enter into that area by way of cross-examination and to say "why didn't you complain in all that period?" The Court, of course, accepts Mr. Gillane's point for the appellant that there is no obligation on the accused to prove anything. But it is also the case that the defence cannot adopt entirely inconsistent positions, you cannot approbate and reprobate, and in circumstances where the defence chooses not to explore a particular area, it can scarcely be heard afterwards to complain that the learned trial judge did not give an instruction to the jury to say that there was an absence of explanation when no explanation had been soughtand when, to everybody's knowledge, there was a potential explanation that had never been explored and not been explored for perfectly understandable reasons.

7. That is the only point in the case. Mr. Gillane referred the Court very helpfully to the case of *L.G.* decided in 2003. In response to this, Ms. Gearty points out that the state of knowledge of the world and the state of knowledge in Ireland and the state of knowledge in courts has changed from 2003 to date, and people now understand a great deal more about the impact of child abuse and the nature, and it is true and there are judgments of the Supreme Court and of the Court of Appeal that actually recognise that there may well be circumstances where a child is abused and where layers of shame, guilt and embarrassment are deposited on the personality in such a fashion as to make it difficult, if not impossible, to reveal the abuse for considerable periods. That is nothing new and there are cases expressly referring to that.

8. It does seem to the Court, in any event, that the case of L.G. which is cited in support of the proposition here is in fact distinguishable. The Court said in that case that there was no satisfactory explanation given as to the delay which ensued from 1986 until 1997 in making the complaint. But in this case, there was in fact available an explanation whose satisfactoriness is not a matter for this Court to appraise, but that it would have been misleading for the learned trial judge to declare the absence of any explanation and it would also have been unfair to the complainant in the circumstances.

9. Taking all these things into account and the submissions made by Mr. Gillane and Ms. Gearty, the Court is satisfied that the conviction in this case was safe and that the trial was satisfactory and the Court dismisses the appeal on conviction accordingly. The Court will now move to the question of the Director's application for a review of the sentence.

Approved: Ryan P.