THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

[290/2016]

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J.G.

Appellant

JUDGMENT of the Court delivered on the 23rd day of February 2018 by

Mr. Justice Birmingham

1. The appellant's trial took place at the Central Criminal Court in Castlebar before Hunt J between the 19th July, 2016 and 28th July, 2016. There were two complainants in the case and both were sisters of the accused. The offences ranged in time from 30th September, 1979 to 31st December, 1986 in relation to one complainant, Ms. A.Z., and from 1st January, 1976 to 28th October, 1983 in relation to the second complainant, Ms. B.Z. The appellant was found guilty of six counts in relation to allegations of sexual assault, and a further three counts of indecent assault against Ms. B.Z., and was convicted of one count of indecent assault in relation to Ms. A.Z.

2. He has now appealed the convictions. It should be pointed out that he had stood trial on 65 counts in all relating to the two complainants. He had stood trial on four charges of rape relating to Ms. A.Z., and 29 counts of indecent assault or sexual assault in respect of the same complainant. Counts 35 to 65 related to the second complainant, Ms B.Z. and were counts of indecent or sexual assault.

3. Three issues are raised in the course of this appeal, these being:

> i. A contention that the judge erred in failing to accede to an application for the severance of the indictment so that the allegations made by Ms A.Z. would not be heard in the same trial as the complaints made by Ms. B.Z.
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> ii. That the judge erred in refusing to give a corroboration warning in relation to the evidence that had been given by Ms B.Z.
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> iii. A complaint that the verdict in relation to count 24 was perverse. Ms A.Z. was the complainant on this count.

4. To provide context for the issues raised in the appeal it is necessary to say a little more about the evidence that was before the jury and a little about the individuals who are central to the case. It should be noted that the appellant's date of birth was 10th May, 1959. Counts 1 – 34 related to the counts involving the complainant Ms A.Z. Offences were alleged to have occurred between 30th September, 1979 and 31st December, 1986 when Ms A.Z. was between the ages of 10 and 17 years. Counts 1 – 4 alleged rape offences against the appellant whereas the remainder of the counts alleged indecent or sexual assault offences. The jury retired to consider all counts relating to Ms A.Z. apart from count 3, in respect of which the trial judge directed a not guilty verdict be returned by the jury. The jury returned not guilty verdicts in respect of all counts, apart from count 24, in respect of which a guilty verdict was returned. Counts 35 – 65 on the indictment related to indecent or sexual assault counts against the other complainant, Ms B.Z., and were alleged to have occurred between 1st January, 1976 and 28th October, 1983 when Ms B.Z. was aged between 15 years and 23 years old. In this case the jury returned guilty verdicts in respect of counts 41, 42, 47, 48, 49 and 50, not guilty verdicts in respect of counts 35 to 40 and the balance of the counts resulted in not guilty by direction verdicts. So far as the complainant Ms A.Z. is concerned, the allegation was of untoward sexual activity occurring within her bedroom at times when her sister B.Z. was not present, activity occurring in a car owned and driven by the defendant, who took her for drives in it, and activity in a pit in a garage which the defendant used to service cars. The allegations made by Ms B.Z. were that the appellant would come into her room at night time and would touch her breasts over her clothing, at a time when her sister Ms A.Z. was in the same bed.

5. At trial and again at the hearing of this appeal, counsel for J.G. in contending that this is a case where the indictment should have been severed has focused on the dissimilarities between the complaints made by the two sisters. He draws attention to the difference in ages of the two sisters at the time of the alleged offences. The offences allegedly involving Ms A.Z. commenced when she was just ten, while the offences alleged by Ms B.Z. related to a time when she was between 15 and 22 years. The allegations made by Ms A.Z. were all together more serious, involving actual rapes, as well as acts of digital penetration and other forms of sexual assault committed in various locations while the allegations made by Ms B.Z. were confined to the touching of her breasts while she was in bed. The respondent says that while it is obvious that there were certain dissimilarities, there were also significant similarities. Both complainants were younger sisters of the appellant and both allege being abused by their brother in the same bedroom which they shared. The judge dealt with the matter as follows:

> " … I think we can certainly fairly observe that B.K. loosens any previous requirement in terms of striking similarity between allegations before matters can be tried together. The question really is at the end of the day is the evidence of one person admissible in the sense of being relevant to an issue in the case that involves the other person. I do agree with Ms Burns [senior counsel for the prosecution], to borrow a phrase from B.K. itself, a sentence having an element of obscurity applies exactly limb A at page 211 because what the decision is all about is the absence of a requirement for exact similarity. So, I don't really understand that particular reference. In my view, what's more relevant is the inherent improbability of several persons making up allegations of serious sexual assault. The fact that they are not minutely identical is in my view neither here nor there and in any event whether there is exact similarity or not, there is reference to a practice which would rebut accident, innocent explanation or denial and the practice in my view does not require exact similarity. The practice in broad terms that is required is a practice of engaging in serious sexual misconduct. The fact that one person may be subject to even more serious misconduct is in my view neither here nor there but even

> taking *B.K.* on its own terms and looking at the manner in which its been applied certain cases, of course there are differences but it couldn't be that similar trials can't take place simply because there are differences. The question is, are there sufficient similarities in terms of two accounts and in terms of the aspect of sexual assault or indecent assault both the question of location and access and the matters pointed out by Ms Burns seems to me to constitute sufficient similarity within the overall thrust of the *B.K.* decision and at base, even if one leaves these things aside, coming down the line there will no doubt be suggestions of fabrication and so on and so forth and that matter firmly brings it within the ambit of *B.K.* because do you have – is there an inherent improbability in two persons making up stories involving sexual misconduct against their brother? Notwithstanding that they're not exactly similar but in certain aspects they are exactly similar insofar as bedroom and method of indecent assault is concerned and the practice of abusing a sibling, if established, would rebut accident, innocent explanation or denial. So, in my view this case is not out of the run of cases which have on the basis of B.K. been permitted to run together …"

6. As was contended by the prosecution and was acknowledged by the trial judge, there were undoubtedly similar instances of abuse. In *DPP v D. McG* [2017] IECA 98, a judgment of this Court it was stated that "repeated incidents of sexual abuse by an abuser are unlikely to be precisely similar in form or in nature and to expect them to be flies in the face of common sense and, indeed, also the experience of the courts." That was a case that involved allegations of sexual abuse directed against two step children, one a boy, and one a girl. As in this case, much effort was devoted, both at trial and on appeal, to identifying and stressing the dissimilarities. Mahon J. dealt with that issue at para. 23 as follows:

> "In the instant case there are indeed striking similarities in the allegations made against the appellant by the two complainants. The nature of the sexual offending is, while not precisely similar, broadly so. Its dissimilarity may simply be explained by the fact that one complainant was male, and the other was female. Importantly however, both were children. There is also the fact that both complainants were the stepchildren of the appellant, and that the locations in which the sexual abuse took place were, for the most part, the family home at the time. Another similarity is the allegation by both complainants of being offered money as an inducement to facilitate sexual abuse."

7. It seems to the Court that the matters that jump from the pages of the transcripts in terms of similarity between the accounts of the two complainants are the relationship between each of the complainants and the accused, being that of younger sister – older brother, the fact that in each case acts of abuse were alleged to have occurred in the family home and indeed in the same bedroom. In those circumstances, the Court is in no doubt that the trial judge acted well within his discretion in deciding not to sever the indictment. In that regard, the observations of Prof. O'Malley in *Sexual Offences* (2nd Ed.) are relevant, that,

> "The one recurring theme in the jurisprudence on severance is that the decision on ordering separate trials is very much within the judge's discretion. An appeal court will not overrule a trial judge's decision to refuse severance (unless it can be seen that justice has not been done, or unless compelled to do so by some overwhelming fact)." (Reference *R. v. Flack* [1969] 1 WLR 937)

Indeed, it will be recalled that Barron J. opened his much-quoted summary of the case law in *DPP v. B.K.* [1999] 2 I.R. 199 by saying at para. I, "the rules of evidence should not be allowed to offend common sense." A strong argument could be made for saying that severing the indictment involving two children who were sisters and so preventing the jury dealing with the case from seeing the full picture would indeed offend common sense. The Court is in no doubt that this ground of appeal must fail.

A Corroboration Warning

8. Counsel on behalf of the appellant, at trial, sought a corroboration warning in respect of the evidence of each of the two complainants. The response of the trial judge was to accede without hesitation to the request so far as the complainant Ms A.Z. was concerned but to refuse the request in the case of Ms B.Z.

9. In seeking a corroboration warning in respect of the evidence from complainant Ms B.Z., counsel at trial commented that the only issue that presents there is the fact that at all stages Ms B.Z. was present in bed when the allegations involving her took place and her sister Ms A.Z. would also have been present, but there was no suggestion that Ms A.Z. at any stage became aware of anything taking place in the bed, and this was in circumstances where Ms B.Z. had indicated that she had left items of furniture about so as to disturb the entrance of the individual. He added that he was not suggesting that there was any doubt in terms of what she had said as regards her evidence of who was there, but he said it just struck him as curious that at no stage did Ms A.Z. become aware of anything. The judge responded by saying that he really thought that those were matters for the jury to assess in terms of weight. In subsequent exchanges with defence counsel the judge commented that a corroboration a warning arises where there are reasons to think that there is something suspicious about the testimony and the witness. He said that there might be difficulties of the kind mentioned by the defence counsel but that they were not inherent to the evidence given by Ms B.Z.

10. There are really two elements to the present appeal. First, counsel argues that the issues surrounding the evidence of Ms B.Z. were such that if that evidence is taken in isolation, that a corroboration warning was warranted and the factors which militated in favour of a warning were such that a failure to give the warning when it was sought amounted to an error requiring intervention by this Court. Secondly, counsel says that the fact that there were two complainants, and a warning was being given in respect of only one complainant is a relevant consideration. It is said that the absence of a warning in the case of Ms B.Z. may have caused the jury to believe that there was less need for care when considering her evidence.

11. The appellant has said that the judge erred in his reference to only giving a warning when there was something suspicious about a witness' testimony. The appellant says that the judge erred in this regard and that a warning should be considered when external circumstances are such that there is a heightened risk of an unsafe conviction, rather than where there is a "suspicion" in relation to the testimony of the witness. Counsel for the appellant urges that the factors present that militate in favour of giving a warning were (i) the dangers of uncorroborated evidence leading to a conviction where there had been a significant passage of time; (ii) the general and vague nature of the allegations; (iii) the fact the case involved a young complainant, and (iv) the fact that the alleged assaults were taking place in the bedroom of the complainant, when only she was aware of them, although she was sharing a bed with her sister who was present and there was also the evidence of items being moved around the room regularly to thwart the appellant. What emerges clearly from the exchanges between defence counsel and the trial judge is that the judge was acutely aware of the jurisprudence relating to the issue of corroboration warnings and was very conscious of the fact that he had a discretion to exercise. Members of the Court have noted the same comfort with the issue emerging from other transcripts involving the same trial judge. In the Court's view there were factors present which meant that a serious case could be advanced for a warning being given in the case of Ms B.Z.'s evidence. However, the judge's reference to suspicion was in the Court's view a shorthand for the established jurisprudence that there should be an evidential basis for giving a warning, going beyond the assertions of counsel. The Court is satisfied that the discretion was properly exercised by the trial judge and that the conclusion that he reached in relation to Ms B.Z. was one that was open to him. If the evidence of Ms B.Z. is considered in isolation then certainly it cannot be accepted that

the judge was compelled to issue a warning. His decision not to was well within his rights. Neither is the Court persuaded that the fact that a warning was being given in respect of a different complainant removed the discretion and mandated that he give a warning in respect of Ms B.Z. In the circumstances, this ground of appeal fails.

Ground of appeal in relation to court 24

12. The final issue raised on the appeal is specific to count 24. To put this ground in context it must be appreciated that the appellant faced an indictment that contained 36 counts in relation to allegations made by his sister, the complainant Ms A.Z., which involved allegations of indecent assault, sexual assault and rape. Of these, he was convicted only on count 24. That outcome is easily explicable when one has regard to the fact that a strong corroboration warning about the dangers of convicting in the absence of corroboration was given in respect of the evidence of Ms. A.Z. but the only count in respect of which there was direct corroboration was count 24.

13. The complainant had given evidence that she was raped in summer, 1984 at a stage when she was around 11 or 12 years of age. She identified the incident occurring on a fine sunny summer's day when hay was being saved. She described the incident occurring in what was described as the "lads' room". In her evidence she had described the door to the room opening at a time that she was lying on the bed with her bra on and her top pulled up. While she saw the door open, she did not see anyone come in. Mr G.G., a brother of the appellant and of the two complainants gave evidence that he had seen the appellant on top of the complainant. He described an incident when he was eight to ten years of age when he opened the door of the "lads' room" and saw his sister A. on the bed face-up lying on her back with his brother, the appellant, on top of her. He describes that A. had no top on, that she had a bra on and that it looked to him as if she was trying to fight off her brother.

14. The prosecution closed the case on the basis that the evidence of G.G. corroborated the account of Ms A.Z. about being raped and linked his evidence to count 4 on the indictment. It should be noted that count 24 was framed in terms of a sexual assault between 1st July, 1984 and 30th September, 1984 whereas the timeframe on count 4, the allegation of rape, was between 1st June, 1984 and 31st August, 1984.

15. The appellant submits that the jury was not directed in relation to the requirement that all members of the jury should agree on the mode of commission of the offence and it is further submitted that the failure to particularise the indictment to a greater extent, coupled with the failure to charge the jury adequately or at all that they must be unanimous in relation to the evidence forming the basis of any conviction on count 24, should lead to a finding that the conviction of the appellant on that charge is unsound. The appellant says that the verdict on count 24 could have been reached on the basis that the appellant lay on top of the complainant while she had her top off but her bra on while she was trying to fight him off, as per the evidence of G.G., or alternatively the verdict could have been reached on the basis that some of the jury were satisfied that the appellant lay on top of the complainant while she had her top off but bra on and whilst only some of those members of the jury were satisfied that he had raped her, all members of the jury agreed that the appellant had sexually assaulted her. Attention was drawn to the decision of the Court of Criminal Appeal in the case *of The People (DPP) v. R.M.* [2010] 1 IR 577. The Court has not been persuaded that this is a point of substance. The jury returned a verdict of guilty of sexual assault in the summer of 1984 in circumstances where it had evidence from both the complainant and her brother G.G. It is true that the complainant gave evidence that went beyond a sexual assault and it is equally true that her brother could never have been expected to give evidence going beyond what he did. However, the verdict of the jury must mean that the jurors were in agreement that the ingredients of sexual assault had been established to their satisfaction beyond reasonable doubt. In these circumstances, the Court will dismiss this ground of appeal. In summary then, the Court has not been persuaded that the trial was unsatisfactory or that the verdicts were unsafe and so must dismiss the appeal.