THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Appeal No.: 143/14

The People at the suit of the Director of Public Prosecutions

Respondent

- and -

MM.

Appellant

Judgment of the Court delivered on the 3rd day of May 2016 by Mr. Justice Mahon

1. On 7th May 2014, at Carlow Circuit Criminal Court, the appellant was convicted of twenty five counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001, one count of attempted buggery of a person under seventeen years, contrary to s. 3 of the Criminal Law (Sexual Offences) Act 1993, and one count of buggery of a person under seventeen years, contrary to s. 3 of the Criminal Law (Sexual Offences) Act 1993.

2. The appellant was sentenced on 8th May 2014 to four years imprisonment on counts 1, 5, 9, 13, 17 & 28, with other counts being taken into consideration. In respect of the sentences imposed for counts 5, 9 & 13 these were directed to be served concurrently with the four year sentence on the first count. In respect of counts 17 and 28, these were to be concurrent *inter se*, but consecutive to the sentences imposed on counts 1, 3, 5 & 9. In effect, the total prison term imposed was eight years, with no portion suspended. It was also directed the appellant would be subject to a one year post release supervisor order, and it was directed that he be placed on the Sex Offenders Register for an *indefinite duration*.

3. The appellant has appealed both as against his conviction and his sentence. This judgment relates only to his appeal against conviction.

4. Compared to many cases involving sexual assaults, there are a number of unusual features in this case. The appellant was charged and tried in respect of twenty nine counts of sexual offences. The alleged victims were twin brothers who were born on 9th November 1983, and it was alleged that the offences all occurred in or around their family home and farm where the appellant had been employed as a labourer. The offences were said to have taken place between February 1991 and February 1999. All but one of the charges related to one twin, A, and occurred when he was aged between seven and fifteen years, while the appellant was aged between sixteen and twenty four years. The assaults took place within the period in question and in which there was a three year gap (between 1994 and 1997) when no assaults occurred. The jury returned a not guilty verdict in respect of the second twin, B, so that guilty verdicts were returned only in respect of charges relating to A.

5. Other features of the case were that the sexual activity in respect of which the appellant was found guilty did not involve threats or violence, and that further consensual sexual activity took place in 2004 after A reached adulthood.

6. The appellant's grounds of appeal (in relation to his conviction) are as follows:-

> (i) The learned trial judge erred in law and/or in fact in permitting the counts on the indictment to go to the jury in circumstances where there was no case to answer on the evidence that was given to the court.
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> (ii) The court misdirected the jury in its charge in failing to address adequately or at all the prosecution burden having to prove beyond a reasonable doubt that each and every element of each and every count on the indictment occurred within the timeframe set out therein.
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> (iii) The learned trial judge erred in law and/or in fact in allowing the charges to go to the jury in circumstances where the lack of evidence pertaining to alleged events having occurred within the period charged brought same into the realm of vagueness and/or unreliability; particularly when coupled with the delay of some twenty years between the date upon which it is alleged the alleged offences commenced and the date of complaint.
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> (iv) The learned trial judge erred in law and/or in fact in his refusal to give any or any appropriate corroboration warning.
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> (v) The learned trial judge erred in law and/or in fact in his failure to afford any or any adequate weight to the combination of certain factors present in the case when considering the exercise of the court's discretion as to whether it would give a corroboration warning.
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> (vi) The learned trial judge misdirected himself when determining the basis upon which he would exercise his discretion as to whether he would give a corroboration warning.
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> (vii) The learned trial judge erred in law and/or in fact in determining that his issuing a delay warning was, in all of the circumstances, sufficient to address the issues raised by counsel for the appellant in the context of the court determining whether to issue a corroboration warning.
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> (viii) The delay warning given to the jury was insufficient and lacking in any or any requisite substance particularly where the learned trial judge had, it is submitted erroneously, determined that it would not be issuing any corroboration warning.
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> (ix) The learned trial judge erred in law and/or in fact in inviting the jury to draw inferences from, and speculate with regard to, the fact that a subsequence sexual encounter took place between the complainant, "A", and the appellant in

2004 when both were of age.

(x) The learned trial judge erred in law, and/or in fact in failing to direct the jury adequately or at all with regard to the prosecutor's suggestion that weight should be attached to the appellant's failure to mention certain matters to the gardaí during the course of questioning.

7. At the commencement of the hearing of this appeal, Mr. O'Kelly identified the following issues as being central to the appeal:

(i) The evidence did not identify any of the offences allegedly committed within the period 1994 and 1997 as having been committed within the periods of time stipulated in the Indictment. It was furthermore contended that the learned trial judge was wrong in his refusal to accede to the appellant's application for Direction in the course of the trial in relation to this issue, and furthermore that the issue was not adequately addressed in his charge to the jury.

(ii) The learned judge's warning to the jury in relation to delay was inadequate and, more particularly, did not sufficiently emphasise the extent to which delay adversely affected memory in the context of cross examination.

(iii) The learned trial judge was wrong in his ruling on the issue concerning whether or not a corroboration warning should be given to the jury. In particular the learned trial judge was wrong in his decision not to give such a warning to the jury.

Background

8. The complainant twins, A and B, grew up on their father's farm in County Carlow. Their date of birth is 9th November 1983. The alleged assaults occurred between February 1991 and February 1999. Only one alleged assault related to B, and the appellant was acquitted by the jury in relation to that charge. The remaining assaults relate to A.

9. The assaults were said to have taken place in two distinct periods, with a gap of approximately three years between the two. The first period was between February 1991 and August 1994, when A was aged between seven and ten approximately. In the second period, between September 1997 and February 1999, A was aged between thirteen and sixteen. A identified the end of the first period as corresponding with the date of the appellant's marriage in August 1994, and the commencement of the second period as corresponding with the day Mother Teresa died. The appellant was aged between sixteen and twenty four over the two periods in question.

10. In 2004, there was one incident of consensual sexual activity between the appellant and A, when both were adults.

11. Complaints relevant to the charges laid against the appellant were made by A and B to the gardaí on 9th October 2011, some twenty years after the alleged assaults had commenced and some seven years approximately after the single incident of consensual activity between the appellant and A in 2004. No reference was made by A to the gardaí of the 2004 incident at the time when the complaints were initially made. One statement was made to the gardaí by B on 9th October 2011, and statements were made by A on that date, and again on a date in December 2011.

12. Within the first period, spanning some three and a half years approximately, it is alleged by A that there were seventeen instances of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990. This three and a half year period is divided into periods of between eight and twelve months. Other than identifying the said particular periods of between eight months and twelve months, the Particulars of the Offences in the Indictment are, essentially, similar. For example, the Particulars of Offence of count no. 1 states:-

> "That you, M.M., did on a date unknown between 23rd February 1991 and 31st December 1991, both dates inclusive, at [a named location] in the County of Carlow, sexual assault one [A], a male."

A's evidence

13. In the course of his evidence, A described the layout of his family farm and the circumstances in which he came to befriend the appellant when he was employed on the family farm as a farm labourer. A was unable to recall specific dates on which assaults took place but he estimated that the incidents complained of commenced when he was about seven or eight years old. He recalled the first incidents occurring happening during a game of "I spy" with B, some cousins and the appellant. Shortly after that game, A said he was approached by the appellant in a barn in the farmyard adjacent to the family home. On that occasion A described how the appellant opened his trousers and exposed himself. He stated that:-

> *"It was the start of something that probably continued for a number of years, probably quite frequently. I am estimating maybe once or twice a month. It could have been more often. It might have been less often. I don't remember many of the incidents that would have occurred during this time. I can remember another couple of time."*

14. A proceeded to describe in quite graphic detail a number of sexual assaults that occurred during the period of three and a half years approximately that followed that first occasion. He was not able to say that any particular incident or incidents had occurred at any particular time within that period, but he was able to relate some of them to particular activities, and some of them as having occurred at particular locations on the farm such as on a hay bale behind the shed, in a shed, in a hen house, and in yards around the family home.

15. A recalled that the first period of three and a half years approximately ended around the time the appellant got married. (The appellant married on 25th August 1994).

16. On the third day of the trial counsel for the appellant applied for a direction on the basis that there was no case to answer on the evidence that had been adduced in court. Mr. O'Kelly S.C. made the following submission:-

> *"Well, it is mine (sic) submission that though we can speak of two periods, the charges that are in fact laid before the court, and this is absolutely vital, come within specific dates and they are not .. there is no charge to the effect that sometime between 23rd February 1991 and a date in 1994. What the charges are, the first four charges relate to offences allegedly committed between 23rd February 1991 and 31st December 1991 so, they are the first four charges. Then, the next charges 5, 6, 7 and 8 are laid in relation to offences alleged to have occurred between 1st January 1992 and 31st December 1992. The next tranche, 9, 10, 11 and 12 are alleged to have occurred between 1st January 1993*

and 31st January 1993, and then the next set, 13, 14, 15 and 16 are alleged to have occurred between 1st January 1994 and 25th August 1994, and in my submission they are the important date. It is all very well for us, as an aid to try and understand the overall allegations, to speak of two tranches and two periods. In other words, the period from the beginning of 1991 to a period in 1994, and then starting in 1997 until sometime in 1999, but the charges that are before the court and before the jury are that certain events are alleged to have happened within these dates and it is my submission that in fact there is not evidence to actually place .. I am just talking about the first period here. They is not actually evidence that will place particular allegations within any of those specific periods. The most that there is, is a general allegation that "while I was between seven and ten years of age" which would cover the period from 1991 to 1994, that certain events happened, but that does not provide the jury with evidence upon which they could be satisfied on any basis, not mind beyond a reasonable doubt, that a particular event allegedly actually occurred within, for example, the period of 23rd February 1991 and 31st December 1991, and that is the way that 'A' gave his evidence.."

17. He also stated:-

> *".. What they have done is that they have said "No, you can bring multiple charges broken down in say three month tranches or six month trances (sic)" and that has been the normal practice. Now, the important point here is that it is actually means something to have them broken down into those periods because otherwise the courts would not have disapproved of just general accusation and therefore …"*

18. The learned trial judge ruled as follows:-

> *".. This is an application then for a direction in relation to the large number of indictments which have been preferred and I propose at this stage to give my decision and then the matter can proceed on Tuesday in the usual way. The first application is that there should be a direction on all grounds on the basis that the indictments are effectively two broad and should have been more limited in terms of time, and I understand the point that is being made by Mr. O'Kelly, but my view is that in this particular case involving allegations of this type going on on a reasonably persistent nature in relation to a child, there is no difficulty in my view or no unfairness or injustice in permitting the indictments to be put before the jury in the manner that they are and it is a matter for the jury to decide on the evidence whether the offences alleged occurred within the various periods. In my view, there is sufficient particularity in relation to the time given by the principal complainant and, of course, obviously the second complainant is very specific in terms of its time .."*

19. In the course of that ruling, the learned trial judge also dealt with an issue raised by Mr. O'Kelly in relation to the frequent use by A of the word *would* in his evidence. Mr. O'Kelly suggested that A's evidence was along the lines of "he would have done this, that and the other". It was submitted that the use of this word implied *"a certain distancing of ones self from events"*, thus emphasising the vagueness and uncertainty of A's evidence. The learned trial judge however expressed his view that there appeared to be no doubt in A's mind as to the detail of the events that he was recounting. He did not consider the word to be in any way a qualification on the part of A that the particular incidents recounted by him may not have occurred, or that he had any doubt about their occurrence. In this matter the court is of the belief that the learned trial judge's view was correct. Although it is not grammatically correct, many people in Ireland routinely and idiomatically use the past conditional tense instead of the past tense in describing something that they have done. Where this occurs it is most frequently just a matter of idiom and rarely is it an attempt to distance the speaker from the event.

20. In the course of his charge to the jury, the learned trial judge stated the following:-

> *".. What the State have done is that they have started on 23rd February 1991 on the basis of the evidence that was called in front of you, they are gone from there to December 1991 and then they have proffered four charges in respect of each year, going up to the date where we know it all terminated on the basis of the evidence that was proffered by the prosecution on 25th August 1994, because, if you recall the prosecution evidence was that these things stopped when he got married. So, in each year then, in 1991 you had four charges, 1992 you have four charges, 1993 you have four charges and then between January 1994 and August 1994 you have again four charges. So, these are put forward as the .. as allegations that M.M. committed sexual assaults on A in those periods and you must be satisfied in respect of each charge that each and every aspect of the charge is met. So, that means you read the charges and you say well, am I satisfied that between those dates there was a sexual assault, am I satisfied that, for example, on number 2, between those dates, other than the first one, there was a second sexual assault and so forth. And you apply the same reasoning to each and every set of charges… So, you are entitled to either accept or reject to whether they occurred within the periods in the manner suggested, that is entirely for you .."*

21. Essentially, the appellant maintains that it was not reasonably possible for the jury to place any of the sexual assaults described by the appellant, many in considerable detail, into a time period, or periods, specified in the Particulars of Offence relating to any particular count or counts on the indictment.

22. By their very nature, allegations of sexual assault committed against children, where such allegations are being made many years after they are said to have occurred, will not be precise as to dates or, indeed, locations. In this case, A was unable to identify dates with any precision. His evidence as to the detail of the assaults and their locations was, however, in many instances, quite specific. He clearly identified that the assaults commenced when he was about seven years old. His seventh birthday was 9th November 1990. The first of the offences is said to have occurred on or after 1st January 1992. The first period of offending was said to have ceased at or close to the time when the appellant was getting married. The appellant married on 25th August 1994. The last offence committed within the first period of offending was said to have occurred on or shortly before 25th August 1994. There was therefore quite definite evidence as to the duration of the first period of offending. The evidence did not identity specific dates, nor could it reasonably have been expected to have done so. On a number of occasions in the course of his evidence, A was asked to state how often such instances occurred. His answers were consistent. For example:-

> *"Once or twice a month maybe. Some I am estimating once or twice a month, maybe more often, maybe less often."*

> *"I know this happened regularly. I can't specifically state how often it happened. I am estimating again like it was maybe once or twice a month. It could have been more often. It could have less often.."*

> *"It was happening quite regularly. I am estimating maybe once or twice a month, but again it could have happened more often or less often."*

23. The various counts in the Indictment were said to have occurred within specific periods of time, ranging between eight months and twelve months, and therefore sufficiently accommodated the timing description of the assaults as provided in evidence by the appellant.

24. The text book, Criminal Law (Charleton, McDermott & Bolger), states the following in relation to the content of indictments (p. 393):-

> *"Sometimes it may only be possible to say that an offence took place within two dates, or during a particular year. In some sexual abuse cases one may only be able to state that Count 1 occurred between two specified dates, as did Count 2, but "other than on the occasion referred to hereof"."*

25. In relation to each of the Counts in this case, and as has already been indicated, the periods in question ran from eight months to twelve months. The Particulars of Offences in relation to each count, from count number 2 onwards, refers to the offence being committed *"on an occasion other than that referred to in Count 1.."* and so on, in relation to each count.

26. In his charge to the jury, the learned trial judge emphasised their responsibility to satisfy themselves that *"if these things occurred they occurred within the period alleged in the Indictment, so a specific part of each and every case."* The court is satisfied that the overall effect of the learned trial judge's charge in relation to this issue would have made it quite clear to the jury that what they could not do was to convict simply on the basis that they were satisfied that sexual assaults of the nature described by A had generally occurred within or over an approximate three year period. Their attention was brought to focus on the necessity to consider the evidence in the context of the specific periods of between eight and twelve months specified in the Indictment.

27. The court is satisfied that sufficient particulars were provided to the jury in the course of A's evidence, particularly as to the approximate dating of the offences such as enabled the jury reach verdicts of guilt or innocence in relation to each count. The repeated references by the complainant that the sexual assaults such as he described had occurred once or twice a month, maybe more, maybe less, sufficiently placed such offending within the periods of between eight and twelve months stipulated in the Particulars of Offences. In those circumstances the learned trial judge was quite correct to refuse the appellant's application for a direction.

28. This ground of appeal therefore fails.

29. The next issue raised by the appellant related to the question of delay. It is contended that the learned trial judge mis-directed the jury with regard to the issue of delay in that the delay warning as issued was deficient in both substance and context.

30. In the course of his charge to the jury, the learned trial judge referred to the fact that passage of time makes recollection of specific events more difficult. He was, understandably, requisitioned in relation to the matter by both counsel for the appellant and for the respondent. Mr. O'Kelly S.C. addressed the learned trial judge thus *"I just thought it would have been appropriate if you could have send (sic) something to them on the effect of delay and the possible effects…"*. In any event, the jury was recalled and addressed in the following terms:-

> *"I want to just address you on, which is a matter of law, so .. and that is that in the overall context of this case the allegations are quite historic. They go back a long number of years and certainly from the age of eighteen or so they could have been brought to the attention of the guards. So there is a delay in the overall context of allegations about what happened in the early 1990's and the mid and to late 1990's and today and that delay is there and delay influences the memory of people, again how you put that into the picture is a matter for you, how significant you think it is, is a matter for you, but it must be said that the witnesses' recall could be less precise than it might otherwise be. Again, that is a matter for you as to what you, what you say in relation to that, but you should exercise if you like to say all the more care in coming to your verdict and perhaps you should, it should be harder for you to be satisfied of all the matters beyond reasonable doubt, given the fact that there is such an extensive delay, but ultimately the matter of whether or not you find the evidence credible for the prosecution to the standard I have described is a matter for you. So, I am just given you that warning because there is a delay and you have to keep it in mind when dealing with it .. so, be cautious, take all the more care .."*

31. The court is satisfied that even if the delay warning given by the trial judge, in the course of his main charge to the jury had been insufficient, any such insufficiency was more than adequately compensated for in the course of the trial judge's further address to the jury following the requisition made to him on this issue by counsel for both sides. . This ground of appeal also fails.

32. The appellant further maintained that the learned trial judge erred in law and/or in fact in his refusal to give any or any adequate or appropriate corroboration warning to the jury. It was submitted that the jury ought to have been warned of the danger in convicting the appellant without corroboration. It was contended that the following factors warranted a corroboration warning:-

> (i) The delay of approximately twenty years from the first alleged offence to the date of complaint to the gardaí;
>
> (ii) the absence of any or any reasonable explanation for the said delay;
>
> (iii) the absence of the production of any corroboration evidence, and
>
> (iv) the complainants' stated in evidence that they had never discussed the alleged events complained of save and except their discussing same in the period immediately preceding the making of the complaint, some twenty years after the commission of the first offence.

33. Prior to charging the jury, the learned trial judge very sensibly initiated a discussion with Counsel as to the necessity or otherwise for a corroboration warning. There had been no evidence in the course of the trial that was capable of amounting to corroboration.

34. Section 7(1) of the Criminal Law (Rape) Amendment Act 1990 provides as follows:-

> *"7(1) "Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all*

the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished."

35. In *DPP v. Wallace* (Unreported, Court of Criminal Appeal, 13th April 2001), Keane C.J. stated:-

> *".. as this court has pointed out in the judgment delivered by Mrs. Justice Denham on 1st February 2000 in the case of DPP v. JFM, the express legislative provision for the abolition of the mandatory warning, if I can call it that, must not be circumvented by trial judges simply adopting a prudent or cautious course of giving the warning in every case where there is no corroboration or where the evidence might not amount in the view of the trial judge to corroboration. That would be to circumvent the clear policy of the legislature and that of course, the courts are not entitled to do."*

36. In this case the learned trial judge decided not to give a corroboration warning to the jury. He ruled:-

> *"My view of the evidence is that on the face of it, .. having heard all the evidence in the case, it is not a matter for me to decide obviously as juries role, but I found the evidence to be reliable as to its features, not vague on dates, in fact remarkably specific as I think has been pointed out and it was absent in consistencies in my view and the memories were very specific, so that while I do accept than in overall terms, and I am sure counsel on behalf of the accused would point this out to the jury, it is difficult to meet allegations over a long period of time ago, in my view, the corroboration warning is not called for in this case for the reasons I have outlined and I don't propose to give it. Having said that I do propose to step, I am not stepping outside my jurisdiction, because it is the jury's role always in this case but I do propose to point out to them that there was a long delay between 2004 certainly and 2011 before the complaint was made and they can make of that what they wish, absent speculation."*

37. In the court's view, the learned trial judge's ruling was both reasonable and fair. A corroboration warning was not required and indeed it might have been inappropriate to have given one. This ground of appeal also fails.

38. The court has therefore dismissed all grounds of appeal, and the appeal on conviction is therefore dismissed.