**THE COURT OF APPEAL**

**[31/17]**

The President

Edwards J.

McCarthy J.

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**AR**

**APPELLANT**

**JUDGMENT of the Court delivered on the 29th day of July 2019 by Birmingham P.**

1. Following a seven-day trial in the Central Criminal Court, the appellant was convicted on 20th October 2016 of eight counts that had appeared on an indictment: four counts of rape and four of indecent assault. The trial related to allegations made by two complainants who were sisters and who were former neighbours of the appellant. The first complainant, Ms. J, was aged between fourteen and sixteen years during the period in which the prosecution say that she was raped and indecently assaulted, while the second complainant, Ms. G, was approximately ten/eleven years of age during the period in which she is said to have been indecently assaulted.

2. Subsequently, the appellant was sentenced to a total of eight years imprisonment. The aggregate sentence was structured by the imposition of concurrent sentences of seven years imprisonment in respect of each of the rape counts (Counts 1 to 4, inclusive) which related to Ms. J; a further concurrent sentence of twenty months imprisonment in respect of Count 5 on the indictment, which related to an indecent assault on Ms. J; and there were then individual twelve-month sentences, concurrent inter se, but each consecutive to the sentences on Counts 1 to 4, inclusive, in respect of Counts 6, 7, and 8, which related to indecent assaults on Ms. G. He has now appealed both against his conviction and against the severity of his sentences. This judgment deals with the conviction aspect only.

3. While initially quite a large number of grounds were formulated, at the hearing of the appeal, it was indicated that the appellant was proceeding on four grounds only. These might be summarised as follows:

> (i) Severance – it is said that the trial judge erred in refusing to sever the indictment so that the counts involving each complainant would be dealt with separately;
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> (ii) The admission into evidence of certain remarks made by the appellant to the investigating Garda when first approached by her – it is said that the judge erred in admitting the evidence;
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> (iii) Direction application – it is said that the judge erred in refusing an application for a direction; and
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> (iv) It is said that the judge's treatment of Count 5 on the indictment was fundamentally unsatisfactory, in that there should have been a direction on this count, but also that the judge erred in failing to highlight the extent of the inconsistency of the complainant, Ms. J, in relation to this count.

**Severance**

4. At trial, the appellant sought to sever Counts 1 to 5 on the indictment, the counts relating to the first complainant: Ms. J, from Counts 6 to 8, those relating to the second complainant, Ms. G. The judge's approach to the application is criticised as is her conclusion that the level of similarity present in relation to the alleged offences against each sister did not justify separate trials. The appellant acknowledges that there were some similarities and some common features but says there were also very significant differences. He says that this was a case where there were two complainants, and that, accordingly, were there to be a unitary trial, the degree of similarity had to be very great. He refers to a passage in McGrath on Evidence, 2nd Ed., p. 1613 as follows:

> "[i]n circumstances where there are large number of accusers, who have independently made allegations of a similar type of conduct against the accused, sufficient probative force might derive from the number of complainants alone without the need for their allegations to be very similar in substance. As the number of accusers falls, so the level of similarity required to maintain the required level of probative force based on the unlikelihood of coincidence, rises until the point is reached at which there are only two accusers and the similarity must be very great indeed."

The appellant points out that this passage was cited with approval by Hardiman J. in *DPP v. McCurdy* [2012] IECCA 76.

5. The appellant says that the most striking difference between the allegations presented by the two sisters is the severity of the alleged offences themselves. Whereas the allegations involving Ms. J are very serious indeed, involving actual vaginal rape in four cases and what would today be categorised as s. 4 oral rape/attempted oral rape in the other, the allegations made by Ms. G are of a different order of magnitude. They were allegations which ordinarily would be expected to be dealt with in the Circuit Court and certain of those, if they stood alone, might well be regarded as suitable for summary disposal. Anticipating an argument that might be made in other circumstances, he points out that in the case of Ms. J, it was not a question of progressing or graduating from less serious behaviour to behaviour of the utmost seriousness. As such, the case cannot be made that a similar pattern of escalation was being followed in the case of Ms. G, but was interrupted. The offending involving Ms. J is alleged to have been at the very highest level from the outset.

6. The judge dealt with the matter as follows:

> ". . . the test for severance is whether the accused would be prejudiced in his defence to such an extent as to make it desirable to order separate trials. The accused seeks to sever counts 1 to 5 from counts 6 to 8 on the indictment. Counts 1 to 5 refer to the complainant, [Ms. J], and counts 6 to 8 refer to the complainant, [Ms. G]. The complainants are sisters who were neighbours of the accused. [Ms. J] was aged between 14 and 16 years at the relevant time and [Ms. G] was aged between 10 and 11 years at the relevant time. The allegations made by [Ms. J] are of four counts of rape and one count of indecent assault and [Ms. G] alleges incidences of indecent assault.

The accused man resided at [precise address stated] and four of the alleged offences relating to the first complainant are alleged to have occurred at the address. One of the two offences relating to the second complainant is alleged to have occurred at that address, also. In fact, two of the offences relating to the second named complainant are alleged to have occurred at that address. The offence of indecent assault regarding the first complainant is alleged to have taken place in a laneway and against a wall in that laneway, that being the offence of rape, and the offence of indecent assault regarding the second complainant is alleged to have taken place in a different laneway, but in a vehicle. It seems that the first girl used to babysit for the accused man and his wife and the second child would play with the children or take them for walks while the mother was busy. In any event, both girls were present for that particular purpose as carers in the accused man's home.

The offences are related in time. Regarding the first complainant, the allegations are alleged to have occurred between March of 1973 and March of 1976, and regarding the second complainant, between January 1972 and December 1973, there being, therefore, an overlap in time in relation to some of the allegations.

The defence argue that there is insufficient similarity between the allegations made by the complainants to permit that they be tried together and say that, where there are two complainants, the degree of similarity must be very great in those particular circumstances. The nature of the allegations made by the first complainant are those of, as I said, rape, regarding a number of the counts, and a count of indecent assault. The allegation of indecent assault is that of the accused man allegedly putting his penis in the complainant's mouth. The allegations of indecent assault by the second complainant involved touching her on the vagina and the breast area over her clothing; placing her hand on his penis through clothing and pressing his penis against her back and also, on another occasion, against her bottom.

The prosecution contends that there are sufficient similarities to permit the counts to be tried together and argue that the allegations are closely related in time; that the complainants were of similar age and both, of course, being minors at the relevant time, that they are sisters. Regarding the question of opportunity, that the accused met them as his neighbours and that they came to be in his house by way of babysitting or playing with or caring for his children in some capacity or another. The locations are the same house bar the allegations alleged in laneways, one in a car and one against a wall in a laneway, both being in laneways. Each complainant, I am told, speaks on occasions of the accused laughing menacingly either during or after the alleged offending behaviour.

Now, there are undoubtedly similarities regarding the counts and I have to consider whether the similarities are such as to permit the counts to be tried together and the test is whether the evidence is cross-admissible and, as stated in the well-known decision of DPP v. BK, to be so admissible, the probative value must outweigh the prejudicial effect and, in practice, this test is applied where there is a similarity between the facts relating to the several counts on the indictment. The oft-quoted passage in BK sets out the principles which were distilled by Mr. Justice Baron at p. 210 of that judgment and it states as follows:

> '…It seems that the underlying principle is that the probative value of multiple accusations may depend on part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of independent accusations is a coincidence in itself which has to be taken into account in deciding admissibility. A number of principles emerge from these cases:
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> (i) The rules of evidence should not be allowed to offend common sense;
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> (ii) so, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted;
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> (iii) the categories of cases in which the evidence which can be admitted is not closed;
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> (iv) such evidence is admitted in two main types of cases: -
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> (a) to establish if the same person committed each offence because of the particular features common to each, or
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> (b) where the charges are against one person only, to establish that offences were committed

In the latter case, the evidence is admissible because:-

> (a) there is the inherent improbability of several people making up exactly similar stories;
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> (b) it shows a practice which would rebut accident, innocent explanation or denial'.

And that is the passage, and the well-known passage, in respect of this type of application. It is the position that the allegations do not have to be exactly similar. All of the circumstances, in my view, of the particular cases need to be assessed. The allegations against the accused is that he sexually abused two sisters who were neighbours, of similar ages, in the same, or broadly similar

locations, within a similar timeframe: in fact, as already stated, there is an overlap in time. The allegations made are that he acted somewhat forcefully and, on occasion, either laughed menacingly during or after the alleged offence. The opportunity to allegedly abuse the girls came about as a result of them coming into his house to care, in some manner or another, for his children, either to play with them or to babysit them, but that was the manner in which they came to his home. The incidents are not exactly similar, but there is, in my view, sufficient similarity in all of the circumstances to allow them to be tried together and I am refusing the application."

7. In the view of the Court, the trial judge approached her consideration of the application with considerable care and proceeded to apply the correct principles. The conclusion that she arrived at was one that was certainly open to her. In that regard, while not ignoring the points made on behalf of the appellant about the fact that the offending involving Ms. J was in a different league of seriousness to that involving Ms. G, the Court would, nonetheless, feel that there were a number of factors here that leaned heavily against separate trials. There was, first of all, the fact that the two complainants were sisters; secondly, that their point of contact with the appellant was as neighbours for whom they babysat. Thirdly, they played with and cared for the children of the appellant and his wife. Fourthly, much of the offending occurred in the appellant's dwelling. Fifthly, each sister refers to the appellant's habit of laughing in a menacing fashion. Having regard to the combination of factors present, the Court is not prepared to uphold the Ground of Appeal relating to the failure to direct severance of the indictment.

**Allowing the Admission of Notes made by the Appellant in Conversation with the Investigating Garda Prior to Arrest and Prior to the Appellant having an Opportunity to Access Legal Advice**

8. The background to this issue arises in circumstances where the principal investigating Garda, Garda Amanda Hart, with a colleague, Sergeant Kevin O'Reilly, called to the home of the appellant in south Dublin at about 9pm on 17th July 2014. She informed him that Ms. J and Ms. G had made allegations against him of a sexual nature. The Garda described the nature of the allegations, informing the appellant that former neighbours of his from a suburb in south Dublin, Ms. J and Ms. G, quoting their married names and referring to their maiden names, had made allegations against him; that Ms. J had claimed that a number of rapes had occurred; and that Ms. G had claimed that a number of sexual assaults had occurred. Garda Hart took contemporaneous notes and she records that the appellant, after caution, responded "Two in forty years, is that all? That's not bad, I've had a good life". It appears that the appellant asked who the people were who were making allegations against him, and that the Garda informed him that they were JT and GB, respectively. Initially, the Garda identified them to him using the married form of their names, but went on to say what their previous surname, i.e. their family name had been. The Garda further stated that the two women, as children, had lived at a particular house, identified by its number, in a particular suburb. The Garda asked him if he had been a resident of that suburb back in the 1970s and he confirmed that he had been. Garda Hart advised the appellant to seek legal advice in relation to the allegations.

9. As Garda Hart and her colleague were leaving the area in the patrol car in which they had arrived, the appellant approached the passenger-side window and spoke to Garda Hart. He asked her again what was the name of the people that had made the allegations and she again told him, in each case referring to the first name and married name and also to what the previous family name had been. The Garda's evidence was that, at that point, the appellant smiled and said "Oh yes, I remember something like that". He then walked back into his residence and that was the end of that conversation.

10. The prosecution sought to put the contents of the conversation before the jury. The defence objected to its admissibility and a *voir dire* was conducted on the issue. The result of the *voir dire* was that the trial judge excluded the remark "Two in forty years, is that all? That's not bad, I've had a good life", but admitted the remark "Oh yes, I remember something like that".

11. In seeking to exclude the memo of the conversation, the appellant had argued that the Judges' Rules had not been complied with; in particular Rule 9, which stipulates that a statement should, wherever possible, be taken down in writing and signed by the person making it after it has been read to him or her, and after he or she has been invited to make any corrections he or she might wish to make. It was pointed out that what was recorded by the Garda in her notebook was not read out to the appellant at the time, or subsequently, when, on a number of occasions, he was interviewed at a Garda station about these matters. It was, and is, argued that apart from the failure to comply with the Judges' Rules, that the notebook entries were made against a background of general unfairness.

12. In the course of her ruling, the trial judge noted that there had been a contemporaneous record made by Garda Hart, but that it had not been read over to the accused man at any stage, and she was satisfied that the opportunity to do that had presented itself when the accused was formally arrested and interviewed. The judge said she was satisfied that there was a technical breach, therefore, of Rule 9, but that she still had a discretion as to whether or not to exclude the material. She said in seeking to exercise her discretion, she had looked, and she felt was entitled to look, to the entirety of the circumstances and to the purpose of Rule 9. So far as the first comment was concerned, i.e., that in relation to "Two in forty years, is that all?", she was not satisfied, to the requisite standard, that sufficient clarity existed regarding that particular comment, or regarding the background to it, or that it related to the complainants, and on that basis, found that comment to be inadmissible. However, in relation to the second comment, "Oh yes, I remember something like that", she did not see that the evidence fell below the standards of fundamental fairness having regard to the manner and the circumstances in which it was obtained. Accordingly, she exercised her discretion so as to exclude the former, but to admit the latter.

13. In the Court's view, once more, the approach of the trial judge was careful and considered. The fact that one comment was excluded and one admitted shows the degree of care that was being brought to bear. In the Court's view, the trial judge was entitled to exercise her discretion in the way she did. The Court placed some emphasis on the fact that the comment that was admitted was made in circumstances where the appellant chose to approach the Garda patrol car as it was in the process of being driven from the scene. This was not a situation where Gardaí, having advised the appellant to obtain legal advice, embarked on questioning before that advice could be obtained or anything of that nature. After the conversation had ended, as Gardaí were leaving, the appellant approached the vehicle and made a remark. Garda Hart, very properly, immediately recorded that remark, and in the view of the Court, the trial judge acted properly in admitting it.

**Direction Application**

14. Following the close of the prosecution evidence, on Day 4 of the trial, the defence sought a directed verdict of not guilty by reference to the principles enunciated in *R v. Galbraith* [1981] 1 WLR 1039 and/or to have the trial halted by reference to the decision of the Supreme Court in *DPP v. P'OC* [2006] 3 IR 238. In both applications, the defence took as its starting point that it was a very

old case involving matters going back some 40 years. It was said to be a case with very few islands of fact, but that islands of fact were to be found in the dates of birth of the appellant's children. It is said that the dates of birth were objectively verifiable and that, if regard is had those dates, the narrative presented by both complainants falls apart.

15. Other purported inconsistencies are also identified. These included the fact that at different stages, two quite different versions of a particular incident were provided by Ms. J; and that Ms. G had described going up Chelmsford Avenue and turning right, but the evidence was that there was, in fact, no right turn. It is also said that there is an inherent improbability about the complainants' returning to a house where such horrendous events had occurred, if indeed they had occurred. Moreover, the sequence of events provided by Ms. J. was said to have changed. Her statement to Gardaí had suggested that an incident, which at trial was referred to as the "needle and thread rape", had been the fourth event in time, whereas her evidence to the jury stated that this was the second incident.

16. Another matter on which considerable emphasis was placed was the purported inconsistency as to whether Ms. J's mouth had, in fact, been penetrated with the appellant's penis, or whether this was an attempt. Senior Counsel for the appellant acknowledges that cases which will be withdrawn from the jury because of inconsistencies are likely to be rare, and accordingly, accepts that the threshold for obtaining the orders that she seeks was high. However, she says that this is one of those relatively rare cases where withdrawal of the case from the jury was not merely justified, but positively mandated. It is submitted on behalf of the appellant that the totality of the inconsistencies, but in particular those in relation to the dates of the offence and the dates of birth of the appellant's children, puts the case into that exceptional category.

17. To put the issues relating to dates and the ages of the appellant's children in context, it is necessary to explain that the complainant, Ms. J, had a date of birth of 30th March 1959. Count 1, a rape charge, was laid as occurring between 30th March 1973 and 30th March 1974 i.e. between the complainant's fourteenth and fifteenth birthday. Count 2, also a rape charge, was laid as occurring between 30th March 1973 and 30th March 1975 i.e. between the complainant's fourteenth birthday and sixteenth birthday. Count 3, another rape count, was laid as occurring between 1st January 1974 and 30th March 1975 i.e. during the fifteen months prior to her sixteenth birthday. Count 4, the final rape count, was laid as occurring between 30th March 1975 and 30th March 1976 i.e. between her sixteenth and seventeenth birthday. The final count relating to this complainant, an indecent assault, was laid as having occurred between 1st January 1973 and 30th March 1975 i.e. during the fifteen months before her 16th birthday.

18. In the course of her evidence, Ms. J said that she remembered the family of the appellant moving into the area and that there was excitement as there was a new family moving in, and because they had children, babies. The complainant was fourteen years old when that happened. The appellant and his wife had two little girls at the time: E and D. When asked if she remembered roughly what ages they were, as best she could recall, the complainant said that E would have been around three years old and that D was maybe a year old, around that age. In the course of her evidence, she referred to an evening when the appellant and his wife had gone out to a local public house that provided musical entertainment, but stated that he had returned alone, that he had come into the upstairs bedroom behind her, that he had taken down her underwear and that he had then raped her. She commented that he raped her, "a 14-year old virgin". She said that E was in the bed and D would have been in the cot. She described another incident when she was told by a friend that the appellant was looking for a sewing needle, a needle and thread. She went to the house, the door was opened by the appellant, she went upstairs and she stated that she was raped on the marital bed. She said that she was around fourteen or fifteen years of age at the time, when she was still only a child, and that she did not actually know how soon after the first rape it had happened.

19. The first complainant also described an incident when she was washing clothes in the scullery. The evidence was that on this occasion the appellant took her hair, forced her head down and tried to put his penis into her mouth. Asked what age she was, she said "14, 15, around that age". She described another incident in the same house when she was minding E. She did not know whether the appellant's wife had gone into hospital to have a baby, or where she was. E was playing in the chair and the appellant is said to have raped the complainant again. Asked what age she was, she said "15, maybe, 14, 15, 15, I presume I'm 15". Her evidence was that while being raped she kept saying "E is there; E is there". The complainant said that she left school when she was fifteen years old. When she left school, she got a job in a newsagent in a south Dublin suburb. She described an occasion when the appellant entered the shop as a customer. She felt that this would have been summertime because she remembered that she would have been 16 years old during March of that year (she was sixteen on 30th March 1975). When she left work at the end of her shift, the appellant was waiting for her outside. He asked her to walk with him, and at one stage, dragged her down an alleyway where he is said to have raped her yet again.

20. In the course of cross-examination, counsel for the appellant turned to the arrival of the appellant and his family in the area. She introduced the topic by saying "I think you described E being three". The witness interjected to say "I'm not 100% sure on her, I know she was a toddler and then D would have been the youngest". Referred to her statement to Gardaí, which had commented that "the kids were roughly one and three years old", the witness responded "a toddler and small -". The witness added "E was walking, yes". It was put to the witness that in the course of a second statement made to Gardaí, she had indicated that she was definitely in first year in school when first raped.

21. The appellant says that the uncertainty about dates has a particular resonance in this case because he alleges that there was an element of sexual interaction between himself and the complainant, but at a time when she was older. It was variously suggested that this had occurred when the complainant was between sixteen and eighteen years of age, that what occurred had been consensual and that it did not involve full sexual intercourse.

22. So far as the second complainant: Ms. G, is concerned, she was born on 4th November 1961. Asked what age she was, roughly, when the appellant and his family moved into the area, she said she was eleven years old. The evidence was that there were two children, E and D, that they were the attraction, and that they were just adorable to her at the age of eleven years. The complainant said she was not 100% sure if she was accurate, but she thought that they were around two and three years of age. She described an incident when she went with the appellant in his car to purchase supper from a chipper. The appellant drove the car up a laneway called Chelmsford Lane, and there, sexually assaulted her. She described another occasion when she was in the front room, which was upstairs. The appellant was sitting on a chair and forced her onto him and had her in a bear lock. She also described a third incident when she was looking out the front of the house, kind of kneeling on a chair. Asked what age she was when the second and third incidents occurred, to the best of her recollection, she said "around 11", but she could have also just turned twelve years old at that point, she was not sure. The Court heard that E's date of birth was 11th May 1972 and D was born on 8th May 1973. Thus, E was six months old on Ms. G's 11th birthday. When E had her 4th birthday in May 1976, Ms. J would have been seventeen years of age.

23. There were undoubtedly some inconsistencies in this case. There were issues that were suitable for exploration in cross-examination and they were explored in a careful and forensic manner. There were, in particular, issues arising from the information

about the dates of birth of the appellant's two daughters. This had a particular relevance to the complainant, Ms. J, because she says that in the case of one of the incidents in the back bedroom, the first incident in time, E was in a bed in the room and D in a cot. However, it is the case that neither complainant sought to assign a precise age to either daughter. When the issue was raised with Ms. J, her point of reference was to the fact that E was walking. On the basis that E was born in May 1972 and that most babies tend to take their first steps around nine to twelve months, it is reasonable to operate on the basis that she would have been walking or toddling between the end of March 1973 and the end of March 1974, the dates referred to in the first count.

24. Overall, the Court agrees with the assessment of the trial judge that the issues being raised were ones capable of being considered by the jury and were not ones which would have justified the withdrawal of the case from the jury, and still less, not ones that would have required such an outcome. Accordingly, the Court is not prepared to uphold this ground of appeal.

**Count 5 (The Indecent Assault)**

25. The final ground of appeal relates to Count 5 on the indictment, the indecent assault where Ms. J was the complainant. While laid as an indecent assault, in modern terms the offending conduct comprising that indecent assault would be regarded today as a s. 4 oral rape or attempted oral rape. In the course of her evidence, the complainant had referred to the appellant trying to put his penis in her mouth, but that she had gagged because of how he smelt. However, as was put to her in cross-examination, in the course of a statement made to Gardaí, she had said "his penis made contact with my lips and face and did enter my mouth".

26. The particulars of offence in relation to this count on the indictment had originally alleged that the appellant indecently assaulted the complainant by placing his penis in her mouth. However, by order of the trial judge, following an application, the particulars were amended to read "indecently assaulted by attempting to place". In her summary of the evidence, the judge did not refer specifically to this movement from actual penetration to attempted penetration. She was requisitioned on this and asked to draw the evolution of the evidence to the jury's specific attention, but this she declined to do. The Court has no doubt that the judge was entitled to deal with this issue in the way that she did, and so this ground of appeal, too, is rejected.

27. In summary, the Court has not been persuaded that any of the grounds argued, or indeed any of the grounds dealt with in written submissions, which included a number of grounds that were not pursued at the oral hearing, have raised any doubts in our mind about the safety of the verdict or the fairness of trial.

28. Accordingly, the Court will dismiss the appeal.