THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 124/2016

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

N. R.

Appellant

JUDGMENT of the Court (ex tempore) delivered 29nd of January 2018 by Mr. Justice Edwards.

Introduction
1. On the 15th of April 2016 the appellant was convicted by a jury following a four day trial of 63 counts of indecent assault contrary to common law, and depending on the date of the offending conduct either as provided for in s. 6 of the Criminal Law (Amendment) Act, 1935, alternatively as provided for by s. 10 of the Criminal Law (Rape) Act, 1981. He was sentenced to one year's imprisonment on each of the counts provided for in s. 6 of the Criminal Law (Amendment) Act, 1935, and to six years' imprisonment on each of the counts provided for by s. 10 of the Criminal Law (Rape) Act, 1981.

2. The appellant appeals against both his conviction and sentence. This judgment deals with his appeal against conviction only.

The evidence of the complainants
3. There were three complainants in the case Ms A, Ms B, and Ms C, respectively. Their evidence as given before the jury is succinctly summarised in the written legal submissions filed on behalf of the respondent, and as that summary appears to us to be accurate and correct, and as it has not been objected to by the appellant, it is proposed to adopt it for the purposes of this ex tempore judgment.

4. Ms A, Ms B, and Ms C gave evidence that at various dates in their childhood they were indecently assaulted by the appellant. Counts 1 to 5 related to allegations relating to Ms A. She was a niece of the appellant by marriage and alleged that she was subjected to indecent assaults at her aunt's house and the home of the appellant in Estate 1 in Town A. Counts 6 to 28 related to allegations relating to Ms B at the appellant's home at an Estate in Town B and later at Estate 2 in Town A. Ms B was similarly a niece (and neighbour) by marriage of the appellant. The remaining counts related to Ms C who was (similarly to Ms B) also a neighbour of the appellant in Town A.

5. In the course of the trial, the jury heard evidence from Ms A. She stated that at the time of the trial she was 49 years of age and gave her date of birth. She named her parents, JM and Ma.M. Her mother's sister was Mn.M. and she was married to the appellant. Ms A was one of three daughters and herself had two children. Ms A's mother died when she very young and she was raised by her father and her stepmother.

6. She recalled that when she was young she was asked to baby sit for her aunt D. at a flat at a location in Estate 1, Town A. She said that this was unusual and she had not been allowed to baby sit before as this meant staying up late and would have interfered with her athletics. She said that she was not sure what age she was at this time but thought she was about 11 or 12, which would have meant the incident occurred sometime in 1978 or 1979. She said that she was minding the appellant's two children, Q and R, and D's daughter S. She thought that S was 3 or 4 years of age at the time, Q was in or around 2 and a half years of age, and R was *'literally a baby'*. She recalled that when she put the children to bed, she also went to bed, sharing a double bed with S and Q. She said that the appellant then came home on his own and got into the bed with Ms A, lying on the other side of the children. He *then 'started trying to spread my legs apart with his hand, he was reaching over.'* Ms A asked the appellant what he was doing and he replied: *"Stay quiet, I'm trying to keep yous warm"*. Ms A pretended to have nightmares so that she could kick him but the appellant ran his hand up her legs, placed his hand into her underwear, started touching her vagina and digitally penetrated her. She recalled he kept saying that he was keeping her warm. That incident then came to an end when her cousin, K.L. came into the room and asked the appellant what he was doing. The appellant jumped out of bed and she could hear an argument ensuing.

7. Ms A then recalled the appellant moving to Estate 2 in Town A, some eight doors up from Ms A. She said that she called to the appellant's house, as her stepmother would ask her to call up to collect a loan of money or cigarettes. She also would have been there on her own accord as the appellant kept birds. She recalled that when the appellant moved in after January 1982, he would make advances towards her, making Ms A turn around facing out the window and touch her. This touching consisted of touching her chest *'but mostly he would touch me down the vagina'.* The appellant would touch her inside and outside her clothes would insert his fingers into her vagina. She recalled this occurring three or four times and believed it was during the summer.

8. Ms A was extensively cross examined by counsel for the appellant. Ms A was asked about the various ages of her cousins and in particular, the ages of Q, R and S. She stated she was not sure if in fact S was present the night she baby sat in Estate 1, Town A but was sure she baby-sat three children. Ms A confirmed that she was 11 or 12 at the time of this assault which would have meant it took place sometime in 1978 or 1979. It was put to Ms A that R was not born until 20 June 1979 and so R could not have been present on this night. Ms A said in reply she could not recall which children were present that night. It was further put to her that S was not born until 1980 and so if S was present, Ms A would have been 13 years of age. It was put to Ms A that she was never asked to baby sit and that this incident never occurred and she rebutted this.

9. The circumstances of Ms A providing her statement to Gardaí were canvassed. She provided a statement on 26 March 2010 and was asked whether she recalled attending with Ms B. It was further put to her that there was no mention in this statement of a third child being present in the flat at the time of the first incident. Ms A was further cross examined then about when the abuse started

after the appellant moved to Estate 1, Town B. She was also asked about whether she spoke with Ms B or Ms C around the time of the making of their statements. She was asked about why she had never told anyone about the abuse and she replied that she was terrified of her stepmother. She was asked further about why she only told her treating GP in 2010 of the abuse. She accepted she had told Ms B when she was 18 years of age and Ms B told her that she was also abused by the appellant.

10. The jury then heard evidence from Ms B. She confirmed she had a date of birth of the 21/02/69 and similarly was a niece of the appellant by marriage. Her father's sister was married to the appellant. Ms B and Ms A were therefore cousins. She was one of six children and she had three children herself. She recalled the appellant living in a caravan in Town B prior to moving into an address in the estate at Town B. She said that when the appellant resided at the address in Town B, she would stay over in the back room facing the garden. She thought she was 8 or 9 when she started staying over so this would have meant it was around 1977 or 1978 onwards. She recalled that by that stage that Q (the appellant's daughter) was there though she was not sure if S was there. She recalled the first incident with the appellant. She said she was in bed which was a make shift bed on the floor. She said the appellant used to come in at night time. She would pretend that she was asleep. The appellant would pretend that he was *'fixing me, saying he was tucking me in'*. While he was kneeling, the appellant then would put his hands underneath the blankets and place them on her vagina on the inside of her pyjamas. While this was happening she recalled a lullaby in the background that played whenever a string on a teddy bear was pulled. This occurred every time Ms B was at the address in Town B. She further recalled one occasion when she was looking out the window in the bedroom when she could feel him come up behind her with an erection and she was held down. She screamed at the appellant to stop on this occasion. When the appellant moved to Estate 2 in Town A, she recalled incidents of the appellant rubbing against her and touching her. As she got older, she told the appellant to stop. She confirmed that she would have turned 13 in February of 1982.

11. In cross examination by counsel for the appellant, Ms B confirmed that she was cousin of Ms A and that there were two years in age difference between the two. They both grew up in Estate 2 in Town A. She was asked what age she was when she first went to the address in Town B and she said she was about 8 or 9 years of age. It was put to her that on the 1 May 1980, she would have been 11 years of age which related to the first count on the indictment and so she was older than what she had told the jury. In the course of questioning, Ms B said that the abuse began before in a caravan near the lakes in Town B. This was the subject of an application by the appellant to discharge the jury and which is dealt with in more detail at paragraphs 25 – 27 (below) relating to the appellant's second ground of appeal.

12. Ms B recalled the abuse described in the incidents in the estate in Town B stopping when she was around 12 or 13. She then left Estate 2 in Town A when she was 15 years of age and stayed with friends. She denied that it was the case that Ms B herself asked the appellant and his wife to stay over. She said the first person she told about the abuse was her friend, CO but she also remembered talking to Ms A, who broke down and told Ms B what had happened to her. This conversation lasted a number of hours and went into *'a little bit of detail'*: *'We didn't specifically about the abuse that was happening, but we both know what was going on, we both talked to each other'*. She talked about the abuse at 12 with her friend LW but did not go into all the details. It was put to Ms B that she never mentioned the abuse to her GP, Dr C., or went to the Gardaí. She said that she was afraid to go to the Gardaí and was afraid of what her family might do. She accepted that she went to the Garda station to make her complaint with Ms A but could not remember if they were in the same room together at the Garda station talking amongst themselves with Garda Wendy Doyle. She was asked if she could remember making an additional statement in the Garda Station on 31 August 2011 with Ms A and Ms C. She said that she could not remember them being together but that they could have given their statements separately. It was put to her that she never stayed with the appellant at the address in Town B. It was further put to her that in fact she had gone drinking with the appellant when she was pregnant and that on one occasion she made advances towards the appellant. It was suggested to Ms B that none of the sexual abuse happened, it was made up and that she and Ms A came together to make statements against the appellant.

13. The jury then heard evidence from Ms C. She was born on the 15 December 1976 and lived in Estate 2 in Town A her entire life. She said that the appellant was a neighbour of hers while he lived 9 doors up in Estate 2. She was friends with and would have played with three of his daughters. She said that when she was between 7 and 8 years of age, the appellant began to abuse her. The first time was in a shed in Estate 2, Town A where the appellant kept pigeons. She recalled being in the shed with the appellant on her own when he pinned her against the pigeon lofts, hoisted down her knickers and put his fingers inside her vagina. She was screaming but it was dark. She recalled this was around the summer time and it was just after her communion. After the first incident, the sexual abuse continued on a weekly basis until she was nearly 10 when she told her mother.

14. Ms C described a particular incident of oral sex with the appellant. She also recalled a specific incident around Christmas time when she was playing with Q (the appellant's daughter) when the appellant came into the room, telling Q to go to bed. When they did so, the appellant put his fingers inside Ms C's vagina, whilst in the bed. She recalled an incident where she was asked to masturbate the appellant. On that occasion, the appellant's wife came up the stairs and asked the appellant what he was at and he replied that he was just giving Ms C a *'rollie'*. She recalled an incident when the appellant placed his hands inside her vagina when she was holding the appellant's infant son. She described another occasion when the appellant was lying on a bed and rubbed Ms C with his penis. At meal times, the appellant would place his fingers inside Ms C's vagina. This abuse occurred over a 2-year period until she told her mother. As a result, she was medically examined.

15. In cross examination, Ms C said she was abused over a two year period between the ages of 8 and 10. This would have been between the period of 1984 to 1986. The abuse ended after she told her mother. It was put to her that her mother told Gardaí that Ms C told her when she was 9 years of age. She was not examined until June 1988 when she had her first doctors' examination and was then referred to Dr Ryan, a gynaecologist on 16 June 1988. She made her complaint then to Gardaí in Town A in March of 2010 and a statement was taken by Garda Wendy Doyle on 27 March 2010. She was aware that there were two other complainants and their identity. A further statement had been taken then on 31 August 2011, which was the same date that Ms A and Ms B also provided statements. She denied discussing her evidence with Ms A and Ms B. She said in her statement that the date of birth of the appellant's son was 16 March 1988. It appeared that his date of birth was in fact 10 March 1988 and it was put to Ms C. that having regard to the appellant's son's date of birth, there could not have been instances of abuse where she was holding the appellant's son because he was not born until 1988. She met with Dr Ryan in 1988 and it was put to her that she never mentioned any incident of abuse while holding the appellant's son. It was put to her these incidents in their entirety were a fabrication.

16. Ms C said the abuse did not occur every day but on the occasions she went over to the appellant's house. Regarding the incidents of abuse at meal times, it was put to Ms C that the appellant had chairs in the kitchen whereas she recalled benches.

Other evidence in the case

17. The jury further heard evidence from V.E., mother of Ms C, from a gynaecologist who had examined Ms C, from L.W., a friend of Ms B, from CO another friend of Ms B, from Garda Wendy Doyle and from a Consultant Child and Adolescent Psychiatrist. In addition a number of statements were read to the jury using the procedure under s. 21 of the Criminal Justice Act 1984.

18. Amongst the other evidence heard by the jury was evidence concerning the arrest and interviewing of the appellant by An Garda Síochána in 1988. Upon being told by Garda Doyle that he was being arrested the appellant asked *"was it Ms B?"*

The grounds of appeal
19. Three grounds of appeal are advanced, namely:

> a. The learned trial judge erred in principle and in law in failing to sever the indictment and direct separate trials in respect of the three complainants.
>
> b. The learned trial judge erred in principle and in law in failing to discharge the jury when evidence was given of an alleged offence committed by the appellant, which was not a charge on the indictment.
>
> c. The learned trial judge erred in law and in principle in failing to discharge the jury when Counsel on behalf of the Respondent in closing speeches to the jury described the particulars of the alleged offences, committed by the appellant against the three complainants, as identical in nature.

The first ground of appeal – ground a.
20. Counsel for the appellant complains that there was insufficient true nexus between the evidence of the complainants, and that the charges in relation to each of them should have been tried separately. He submitted that although there might be striking similarities, similar fact evidence was not admissible solely on the basis of such similarities alone, and the prejudicial effect of such evidence outweighed its evidential value. Counsel for the appellant maintains the indictment should have been severed and separate trials ordered.

21. In response counsel for the respondent maintains that it was correct to try the charges relating to all three complainants on the same indictment and that the evidence of the complainants was properly admissible as system evidence.

22. In argument before us counsel for the respondent referred in particular to the following indicia of a system in the abuse of these complainants by the appellant:

> (1) All three complainants were minors at the time of the offending.
>
> (2) All three complaints were female.
>
> (3) Ms A and Ms B were nieces of the appellant's wife and Ms C was a neighbour. Ms B also lived in Estate 2 in Town A.
>
> (4) Their ages at the time of the offending behaviour was 11/12 – 14 (Ms A), 8/9 – 13 (Ms B) and 7/8 – 10 (Ms C).
>
> (5) The period of offending: all three complainants gave evidence that they were sexually abused for approximately a three-year period by the appellant.
>
> (6) The locus of the offending: Ms A described the abuse happening initially at her Aunt's house, and then at the appellant's home in Estate 2, Town A. Ms B described the abuse as occurring at the appellant's home at Town B and then Estate 2, Town A. Ms English described the abuse as occurring at the appellant's home in Estate 2, Town A.
>
> (7) The nature of the opportunity which allowed the accused access to the complainants: all three complainants had cause to or reason to attend at the appellant's home. Both Ms A and Ms B would stay overnight and Ms C was friendly with the appellant's daughters.
>
> (8) The nature of the offending: Ms A describes an initial incident when she was 11 or 12 when she was minding the appellant's children and the appellant coming into the room while she was in bed, touching her vagina and digitally penetrating her. She then describes the appellant making advances towards her, turning her around facing the window and similarly touching her chest and vagina, digitally penetrating her. Ms B describes staying over at the appellant's house when the appellant would come into the room while she was pretending to be asleep when the appellant would place his hands on her vagina. She recalled the appellant coming at her from behind while she was looking out a window. She further recalled the appellant rubbing against her and touching her while at the appellant's house in Estate 2, Town A. Ms C described being in the shed with the appellant at his house when he held her and digitally penetrated her. She recalled the appellant digitally penetrating her whilst she was in a bed in the appellant's house. She also described being asked to masturbate the appellant and being digitally penetrated on other occasions.
>
> (9) The appellant was in a position of trust and authority.
>
> (10) The offences were committed discreetly.

23. We were referred to various authorities including: a passage from Sexual Offences (O'Malley, 2nd Ed., 2013) at para 14.43; this court's decisions in *The People (Director of Public Prosecutions) v. JC (No.1)* [2015] IECA 343; *The People (Director of Public Prosecutions) v. McG* [2017] IECA 98 and The People (Director of Public Prosecutions) v. *FMcL & BW* [2016] IECA 307. We were also referred to the seminal case of *BK v. Director of Public Prosecutions* [1997] 3 IR 140. Reference was also made to *The People (Director of Public Prosecutions) v. ST* [2017] IECA 73.

24. We have no hesitation in agreeing with the submission by counsel for the respondent that there was a clear basis for asserting a system on the part of the appellant in the course of his offending conduct. Accordingly, the trial judge was correct to refuse the application to sever the indictment and correct to refuse to order separate trials. We therefore dismiss this ground of appeal.

The second ground of appeal – ground b.
25. This second ground of appeal concerns a reference by one of the complainants during the course of her evidence to an incident of sexual assault that was not the subject matter of a count on the indictment. There had been an application to discharge the jury which was refused, in the following circumstances:

> *'JUDGE: and the question is whether this unencouraged and uninvited piece of evidence is fatal to the case. As you're*

well aware the superior courts and the jurisprudence is that juries are well capable of accepting and do take the directions of the trial judge.

MS CROWE: Yes.

JUDGE: This trial is due to last for four days.

MS CROWE: Yes.

JUDGE: It would seem to me at that very early stage, and I must commend Mr Colgan for moving in so quick on this before it grew any legs so to speak, but I'm not so terribly sure at that stage that it's fatal. It would seem to me that it's a relatively small event, not small I would accept entirely for the accused man, but in the context of the overall run of the evidence as it has been and as I expect it to be on the basis of the book of evidence, that if the evidence sticks to what the prosecution lead and doesn't stray from it, I think I can deal with this on the basis of it a direction. It's often the case that … it's … best not to remind juries of the slip, and I think was it Mr Justice O'Flaherty in a judgment, the name of which escapes me at the moment, said sometimes you're far better not redrawing their attention to a slip.

MR COLGAN: I think that's the problem I've highlighted as well, as I keep using this phrase, ask people not to think of elephants and what's the first thing that pops into your mind is elephants.

26. Accordingly the trial proceeded on the basis that, if it was felt necessary to do so the matter could be dealt with by means of a suitable direction from the trial judge. Immediately prior to the charge, the Learned Trial Judge sought further assistance from counsel on how he should deal with this issue. Counsel for the appellant indicated his view that the Learned Trial Judge should not specifically refer to it in his charge. In that regard, the Learned Trial Judge then referred to the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Kavanagh* [1999] WJSC-CCA 1874, where O'Flaherty J. stated:

'Often the less said about something that's crept into a case and is of no importance, the better. Rather if the decision is taken to keep referring to something, it may only attach an importance to it which it does not deserve.'

27. This Court has considered the transcript, and it is clear that the matter was dealt with quickly and correctly. It would have been a disproportionate measure to discharge the jury. Moreover, the decision not to draw the jury's specific attention to the slip in the course of the judge's charge was manifestly correct and justifiable in the circumstances of the case. We see no unfairness in the way that the matter was dealt with, and would dismiss this ground of appeal also.

The third ground of appeal – ground c.

28. No specific passage from prosecuting counsel's speech is identified in the submissions filed on behalf of the appellant, nor was any passage identified for that matter in oral submissions. However, this court, having considered the transcript, infers that the quotation we are about to set out may be the impugned passage. In the course of counsel for the prosecution's speech, counsel said:

Then you heard evidence from Ms B, herself. She's a small bit younger than her cousin, Ms A. She was born on the 21st of February 1969, and she gave evidence of being particularly close to her young cool aunt Mn.M, and she gave evidence that Mn.M and NR, who she clearly knew because he was married to her aunt who -- her young, cool aunt -- had moved into the estate in Town B after their daughter, Q, was born and we heard that Q was born I think in June of 1979, that's the estate in Town B, and she gave evidence of being there and staying there an awful lot of the time. She said she stayed on holidays, she stayed on weekends, at Halloween, mostly the summer, and when she was there she gave evidence of what N.R. used to do to her. She said it happened lots and lots and lots of times; every other day I think is what her phrase was at the time. But again, I'm straying into the facts here in talking to you about that, but your own recall might be better in relation to that. But she gave evidence of it happening an awful lot to her. Again, what was interesting was, or you might consider this as interesting, that she gave evidence of a type of touching that in my respectful submission to you was very similar in its type to -- was identical in fact in its type to what Ms A had given evidence in relation to, and that is touching inside and outside her clothes, touching on her vagina and inserting his fingers into her vagina."

29. We see nothing wrong in what prosecuting counsel said. It was entirely fair comment in the light of the evidence the jury had heard. Moreover, the jury were told clearly by the trial judge that:

"You may accept or reject some or all of the evidence as you see fit. The facts of this case are your entire responsibility. You may wish to take account of the arguments and the speeches you've just heard from Ms Crowe and Mr Colgan , but you are not bound to accept them."

30. Moreover, even if there were some merit in the point, and we are satisfied there is none, no complaint was made at the time, and no requisition was raised. The appellant clearly is precluded from raising the issue now having regard to the *The People (Director of Public Prosecutions) v Cronin (No. 2)* [2006] 4 IR 329.

31. We would also dismiss this ground of appeal.

Conclusion

32. In circumstances where we have not seen fit to uphold any of the three grounds of complaint advanced by the appellant we dismiss the appellant's appeal