THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Record No: 2015/88

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

G. C.

Appellant

JUDGMENT of the Court delivered on 21st February 2017 by Mr. Justice Edwards.

Introduction
1. In this case, the appellant was convicted by a jury at Naas Circuit Criminal Court on 17th December 2014 of two counts of indecent assault contrary to common law and as provided for by s. 6 of the Criminal Law Amendment Act 1935, and three counts of indecent assault contrary to common law and as provided for by s. 10 of the Criminal Law (Rape) Act 1981.

2. There had initially been thirty seven counts on the indictment, each of which alleged indecent assault. Of the original thirty seven counts just ten were allowed to go to the jury those being counts numbers 1, 3, 4, 5, 6, 7, 8, 25, 35 and 36. The jury convicted the appellant by a majority verdict on counts numbers 1, 3, 25, 35 and 36 respectively on the indictment and acquitted him on the remaining five counts.

3. The appellant was sentenced to two years imprisonment on counts numbers 1 and 3, respectively, which was to date from 24th March 2015. The appellant was further sentenced to three years imprisonment on counts numbers 25, 35 and 36, respectively, with the final 12 months of the said sentences suspended in each case upon conditions, the said sentences also to date from 24th March 2015. All five sentences were to run concurrently.

4. The appellant now appeals against his conviction. There is also a cross-appeal by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, seeking a review of the sentences imposed on each of the offences of which the appellant was convicted on the grounds that they were unduly lenient. This judgment is only concerned with the appeal against the appellant's conviction.

Summary of the Relevant Evidence
5. All of the counts in respect of which the appellant was convicted involved a single complainant, S.D. At the date of the trial, the complainant was a married woman aged 43 and was herself the mother of two girls aged 17 and 14 years. As a child, the complainant had lived at a particular address in County Kildare ("address no 1") from the age of four. Her family had moved into the house at that address, which was in a housing estate, in March 1975. They later moved again to a bungalow in another part of County Kildare ("address no 2") in July 1985 when the complainant was 14 years old. The original family home of the complainant's mother ("address no 3") was located approximately two miles from address no 1 and this was where the complainant's grandfather lived with his two sons, of whom the youngest was the appellant, G.C.

6. The complainant and her younger brother made frequent visits with their mother to address no 3, and during the summer holidays the complainant's father would drop the complainant and her brother up there when he was going to work and they would spend all day up there. The indecent assaults were said to have started at address no 3 when the complainant was about six years old and involved the accused masturbating in front of her in the barn. The complainant said it happened again that year while she was six years old. The complainant stated that during the time she lived at address no 1 she visited address no 3 four days out of seven, and during the school holidays she was there five days a week. As time went on the type of abuse became more serious and involved the accused putting his hands inside her vagina. These more serious incidents of indecent assault occurred initially at address no 3 but subsequently the complainant was also abused in this fashion at address no 1. Later again, the complainant was also subjected to sexual assaults at address no 2 after the family had moved there, when she was 14 years old and in secondary school. At this time, the sexual assaults consisted of acts of oral sex perpetrated by the accused on the complainant. The abuse stopped when the complainant was about 14 and a half years old when she made disclosures to other members of her family in phased stages.

Grounds of Appeal
7. The appellant seeks to appeal his conviction on the following grounds:

(i) The trial judge erred in law and in fact in refusing to direct the particularisation of the indictment by the prosecution.

(ii) The trial judge erred in law and in fact in permitting the prosecution to lead evidence of matters not referred to by the

prosecution in opening the case to the jury, the prosecution having resisted the appellant's request to particularise the indictment on the basis that the prosecuting case would be fully particularised in the opening.

(iii) The trial judge erred in law and in fact and in fact in refusing to discharge the jury on the opening of the case following the statement by the prosecution that the respondent had come to the conclusion that this was a strong case in directing a prosecution.

(iv) The trial judge erred in law and in fact in refusing to discharge the jury on the opening of the case following the emphasis placed by prosecuting Counsel on the physical and mental health of the alleged injured party as explanation for her delay in reporting the allegations.

(v) The trial judge erred in law and in fact in permitting the prosecution to lead hearsay evidence from L.F. that S.D. had warned her not to stay overnight with the appellant as a child.

(vi) The trial judge erred in law and in fact in permitting the prosecution to lead evidence from the alleged injured party's counsellor and General Practitioner.

(vii) The trial judge erred in law and in fact in failing to direct a not guilty verdict on counts 1, 3, 4, 5, 6, 7 and 8, where there was no evidence upon which the jury might properly conclude beyond a reasonable doubt that the appellant was guilty, where the alleged injured party gave evidence of two incidents occurring, but did not give any evidence upon which the jury might conclude when the incidents might have occurred within the relevant time period.

(viii) The trial judge erred in law and in fact in failing to direct a not guilty verdict on counts 35 and 36, where there was no evidence upon which the jury might properly conclude beyond a reasonable doubt that the appellant was guilty, where the alleged injured party gave evidence of a number of incidents occurring, but did not give any evidence upon which the jury might conclude when the incidents might have occurred within the relevant time period.

(ix) The trial judge erred in law and in fact in failing to direct a not guilty verdict on count 25 where the digital recording of the evidence was unclear and on one interpretation or listening, there was no evidence upon which the jury might properly conclude that the appellant was guilty beyond a reasonable doubt.

(x) The trial judge erred in law and in fact in failing to withdraw the case from the jury on the basis that it was impossible for the appellant to receive a fair trial in circumstances where he had been indicted on 37 counts, the case had been opened on that basis, and the prosecution had failed to lead any evidence in respect of 27 thereof.

(xi) The trial judge erred in law and in fact in failing to withdraw the case from the jury on the grounds of delay.

8. For the purposes of dealing efficiently with the complaints raised it is proposed to treat grounds (ii) (iii) and (iv) as a group of complaints relating to the opening of the case, and deal with them together. Similarly, it is proposed to treat grounds (vii) (viii) (ix) and (x) as a group of complaints relating to the failure to grant a direction / withdraw the case from the jury, and deal with them together. The remaining grounds, being grounds (i), (v), and (vi) will be addressed individually.

9. Although ground (xi) was advanced in the Notice of appeal, the appellant's written submissions indicate that it is no longer being relied upon.

Ground of Appeal No (i) – alleged failure to adequately particularise

10. At the opening of the trial before the court below, and before the appellant was arraigned, counsel for the appellant made two complaints in respect of the indictment on foot of which it was proposed to arraign his client. The first was that the indictment was duplicitous in that, in many instances, there were counts that alleged that the incident of indecent assault the subject matter of that particular count had occurred at two locations i.e., at address number 1 and at address no 3. The second complaint was that quite apart from any duplicity, each count was in any event insufficiently particularised.

11. In relation to the first complaint, the trial judge had no hesitation in finding that the indictment, in the form in which it was pleaded at that point in time, was indeed duplicitous and he insisted that an amended indictment be preferred by the prosecution identifying in each instance a single address, even though that was going to involve almost doubling the number of counts. That was duly done.

12. However, even after the indictment had been amended in that way, each count from 1 to 34 in the indictment was still framed in terms that "*on a date unknown between* (bracketed dates) *G.C. indecently assaulted S.D. at* (a specified address)". It was alleged that this *pro forma* type of pleading rendered it very difficult to relate any individual count to any specific allegation of abuse in the Book of Evidence.

13. Counsel for the appellant opened the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v E.D.* [2007] 1 I.R. 484 to the trial judge. That case had also been concerned with the adequacy of the particularisation in an indictment in an indecent assault and unlawful carnal knowledge case, and the judgment of the court was delivered by Herbert J who, having considered the provisions of the s.(4)(1) of the Criminal Justice Administration Act 1924, held (inter alia) (at para 22):

> "22. This court is satisfied that in every prosecution on indictment the statutory obligation to provide "such particulars as may be necessary for giving reasonable information as to the nature of the charges" can only be satisfied if the indictment is so framed as to inform the accused person in plain and unambiguous language what it is that each count in the indictment alleges he or she has done or not done and, with sufficient particularity, by reference to the degree of information available to the prosecution, to enable the accused, in the words of Rougier J. to "marshal his mind on more important evidence to counter these allegations". The court accepts that these particulars will vary of necessity with the circumstances of each individual prosecution. In cases of the nature of the instant case, there may well be an inability on the part of the complainant to be precise as to times, dates and even places, for some or all of the reasons indicated by Rougier J. in *R. v. Evans* [1995] Crim. L. R. 245. However, to borrow the elegant phrase of Kennedy J. in *R. v. Terrance John Rackham* [1997] 2 Cr. App. R. 222, "a difficulty in being precise in every respect is not a reason not to be precise when one can".

14. Counsel further relied in particular on the following additional passages (at paras 27 & 28):

"27. … This court is satisfied that additional particulars of time, date and location could have been provided in the indictment while steering 'a safe course between prejudicial uncertainty and overloading'. This would have been of material assistance to the accused in identifying precisely what misbehaving was alleged against him on each count in the indictment and therefore in organising his defence. The exact misbehaviour alleged on the part of the accused at each of the five specific locations is very clearly indicated in the complaint of "C.D." but despite this, each of the thirty two counts in the indictment does nothing more than recite that he either 'indecently assaulted "C.D." a female person' or 'had unlawful carnal knowledge of "C.D." a girl under the age of 15 years'. This court is satisfied that the strong disapproval of this form of ritualised and non-specific statement of individual counts in an indictment which follows from the judgments of the Court of Appeal of England and Wales in *R. v. Evans* [1995] Crim. L. R. 245 and *R. v. Terrance John Rackham* [1997] 2 Cr. App. R. 222 must apply with even greater force in this State by reason of the express provisions of s. 4(1) of the Criminal Justice (Administration) Act 1924 and Articles 38.1 and 40.3 of the Constitution.

28. This court is satisfied that the intention of the legislature in requiring that reasonable information be furnished in an indictment of the nature of the charge or charges proffered against the accused was obviously to ensure that an accused person did not suffer any material prejudice in the preparation and, additionally or alternatively, in the conduct of his or her defence by reason of a lack of specificity in the charges. This court is satisfied that the trial judge in the instant case ought to have acceded to the request by counsel for the accused and ordered that the indictment be amended so that each count indicated with as much particularity and specificity as the circumstances of the case would allow the nature of the misbehaving charged in each count on the indictment."

15. Counsel's application was that the trial judge should direct the prosecution to provide an amended indictment further particularising, in respect of each count, the specific incident of abuse in each bracketed time period that was said represent the offence to which the count related. He concluded his submission by observing:

16. Although counsel for the Director of Public Prosecutions sought to resist this application on the basis that the suggestion was impractical in the circumstances of the case, the trial judge was persuaded that there was substance to counsel for the appellant's complaint and that some action required to be taken.

17. He then ruled as follows:

18. It is now complained on behalf of the appellant that the trial judge was wrong in the approach that he took, and that he should in fact have acceded to defence counsel's request to direct the prosecution to further particularise their indictment or in default of doing so face having any inadequately particularised counts withdrawn from the jury in the course of the trial.

19. The submissions on behalf of the respondent regrettably have not engaged in any meaningful way with the complaint that is now being made.

20. The Court has carefully considered the issue and agrees that the trial judge's proposed solution to the problem was sub-optimal and that it would have been better if defence counsel counsel's application had been acceded to. However, we are not to be taken as saying that the failure to adopt the alternative approach necessarily rendered the subsequent trial unsatisfactory per se, or that it necessarily prejudiced the defence. In order to evaluate the impact of it, we have carefully reviewed the entire transcript. It is clear that at the end of the day, and in terms of the counts that actually went to the jury, neither the judge, nor the jury, nor the parties were left in any doubt as to what were the allegations that comprised the prosecution's case. The defence manifestly understood the case they were required to answer. The trial might have run more smoothly and efficiently if a better particularised indictment had indeed been preferred, but in circumstances where a solution to the perceived problem, albeit not the ideal one, was adopted by the trial judge in the legitimate exercise of his discretion, and it was one that did not in fact result ultimately in any unfairness, we are not disposed to characterise the trial judge's approach as having been erroneous in principle. We would therefore dismiss this ground of appeal.

Grounds of Appeal No (ii) (iii) and (iv) – issues arising from the opening.
21. The appellant makes a number of complaints about the prosecution's opening speech.

22. The first complaint relates to the fact that in opening the case to the jury, counsel for the prosecution, in attempting to comply with the trial judge's pre-trial ruling that he should indentify for the jury the specific alleged acts of indecent assault that the prosecution would be relying on, told the jury that they would hear certain evidence, namely:

23. While that summary was not the subject of any complaint in so far as it went, counsel for the appellant did subsequently complain that counsel for the prosecution had proceeded to lead evidence from the complainant of conduct, capable of amounting to indecent assault, other than that to which he had specifically alluded, namely that there had been digital penetration of the complainant by the appellant both at address no 1 and at address no 3.

24. It was not the case, however, that the defence were not on notice that the complainant had made such allegations to An Garda Siochána. They were contained in the complainant's second statement which was in the Book of Evidence. Counsel for the prosecution would have had no strategic or legal reason not to refer to them in his opening. It would have been entirely permissible for him to do so, and indeed desirable to do so having regard to the trial judge's pre-trial direction, and it is clearly to be inferred that the failure to do so was attributable to nothing more than oversight.

25. However, there was no objection raised at the time that this evidence was led in chief. Counsel for the defence did not ask for the jury to be sent out, nor did he ask for a discharge or for any other action to be taken by the trial judge. Rather, the complainant was cross-examined by counsel for the appellant about the frequency of instances of digital penetration and about the fact that they were not mentioned in the complainant's first statement to An Garda Siochána, but were mentioned for the first time in her second statement.

26. The first time a complaint was made that evidence that had not been mentioned in the opening had been led was at the close of the prosecution case on day 4 of the trial, when counsel for the appellant applied for a direction. Moreover, the complaint in that regard was not made on a stand alone basis or associated with any discrete alleged prejudice. Rather it was mentioned as part of the overall circumstances advanced in support of a *R. v Galbraith* based direction application which encompassed, inter alia, a renewal of the contention that, absent better particularisation in the indictment, it was difficult to relate individual counts to individual allegations of indecent assault.

27. The application for a direction was carefully considered by the trial judge and was granted with respect to twenty seven counts

on the indictment, with the remaining ten counts being allowed to go to the jury. There are separate grounds of appeal relating to the failure to grant a direction on those ten counts, which will be dealt with later in this judgment under their own heading.

28. However, while it is regrettable that counsel for the appellant omitted to specifically refer to digital penetration in his opening we are completely satisfied that the failure to do so did not significantly prejudice the defence, and that it ultimately had no implications for the fairness of the trail and has no implications for the safety of the verdict.

29. The second complaint relating to the opening relates to the trial judge's failure to discharge the jury because prosecuting counsel in opening his case referred to a "wrongdoing" and "a wrong", rather than to "an alleged wrongdoing" and "an alleged wrong", and further stated that the Director of Public Prosecutions had concluded that the case was a "strong" one when directing a prosecution. The appellant contends that the combined effect of these remarks was to represent to the jury that the strength of the case had been pre-determined, thereby usurping the function of the jury whose job it was to assess the evidence and determine whether the case against the accused had been proven beyond reasonable doubt.

30. The context in which this is said to have occurred can be gleaned from the transcript. Counsel began his speech by introducing the dramatis personae then present in court, and then went on to say:

31. This was the one and only reference to "a strong case". Prosecuting counsel, however, went on to explain accurately and correctly about the presumption of innocence, the burden of proof, and the standard of proof.

32. At the conclusion of the opening speech counsel for the appellant applied to have the jury discharged on the basis indicated. Prosecuting counsel was not prepared to accept that there was anything objectionable in his use of the words "wrongdoing" and "wrong" in the context in which they were used. However, with respect to his reference to how the DPP viewed the case, he stated:

33. The trial judge refused to discharge the jury stating:

34. Counsel for the appellant then indicated that he wished to have prosecuting counsel readdress the jury on the issue. Prosecuting counsel then did so stating:

35. We are completely satisfied that this minor issue was dealt with entirely appropriately by the trial judge and that it would have been wholly disproportionate and unnecessary for him to have discharged the jury. It is not disputed that what occurred arose through inadvertence and that it was not deliberate. It was quickly and fully corrected before any evidence was heard. Moreover, counsel for the prosecution had gone on to properly advise the jury about the presumption of innocence, the burden of proof, and the standard of proof. These important issues were revisited by him in his closing address, they were revisited yet again by counsel for the appellant in his closing address and finally they were fully addressed by the trial judge is his charge, as he was obliged to do. It is fanciful in the circumstances to contend that the trial was rendered unsatisfactory and the verdict unsafe. We dismiss this ground of appeal without any hesitation.

36. The third complaint relating to the opening relates to the trial judge's failure to discharge the jury because prosecuting counsel laid emphasis on the physical and mental health of the alleged injured as purportedly explaining her delay in reporting the alleged abuse.

37. Again, the transcript provides the context for the remarks now complained of. Counsel for the prosecution outlined in some detail for the jury the evidence the prosecution intended to lead from the complainant. Having set forth the chronology of the alleged indecent assaults, he then continued:

38. The appellant complains that this was an inappropriate pre-emption of an anticipated challenge to the credibility of the complainant by the defence. When a discharge of the jury was sought on that basis counsel for the prosecution responded:

39. The trial judge, in refusing to discharge the jury, ruled:

40. The matter did go to the jury and, as promised, the trial judge devoted a significant part of his charge to a delay warning.

41. We are completely satisfied that counsel for the prosecution did not stray beyond the bounds of propriety in outlining in his opening what evidence the prosecution would be relying upon, and what the prosecution case would be, concerning why there had been delay in reporting the alleged abuse. The trial judge was again right to refuse to discharge the jury. We therefore also dismiss this ground of appeal.

Grounds of Appeal No's(vii) (viii) (ix) and (x) - failure to grant a direction

42. At the trial, counsel for the defence relying on *R v Galbraith* (1981) 73 Cr App R 124 ; [1981] 1 W.L.R. 1039, and in particular the second limb of Lord Lane's statement of the principles applicable to how a judge should approach a submission of "no case", applied for a direction at the end of the prosecution case. He did so upon the following basis.

43. Counsel protested that the evidence that had been led by the complainant did not relate or fit to the counts on the Indictment. The complainant had given evidence of what had happened to her from the age of 6 to 15. Counsel said: *"They led evidence of the first year and they led evidence of the last year and then they gave us some floating evidence in between."* Objection was taken to the fact that this covered a very *"long spectrum of behaviour"* and it was submitted that the prosecution had not come up to proof in that regard. Counsel continued:

44. The actual evidence in relation to the various counts was the subject of much discussion and involved the replaying of the DAR in relation to the evidence regarding Count No. 25, and at the end, the trial judge relying on the principles set forth in *R v Galbraith* held that 27 out of the 37 counts should be withdrawn from the jury, and that only the remaining 10 counts should go to the jury.

45. The appellant has contended that a jury could not have distinguished between one count and another in respect of what had happened at address no 3 when the complainant was six years old. In reply to this the respondent has contended that that was not so, and that it is manifest from the verdicts actually delivered, which recorded convictions in respect of Counts 1 and 3, and not guilty verdicts in respect of Counts 4, 5, 6, 7 and 8, that the jury was able to distinguish between them. Moreover, there was clear evidence capable of supporting the guilty verdicts actually recorded. In particular the respondent points to the following evidence given by the complainant on day 2 of the trial (transcript ref p. 20, lines 3-31):

The respondent has submitted that this evidence showed that there was more than one incident of sexual assault at address no 3

when the complainant was six years old, and the jury were therefore entitled to convict on the sample counts laid as Count No. 1 and Count No. 3. Having carefully the arguments on both sides, and having reviewed the entirety of the complainant's evidence, including both examination in chief and cross-examination, we are satisfied that the appellant's complaints are not made out, and that there is no indication that the jury would have had difficulty in discriminating between the incidents alleged and relating them to particular counts, such as would have justified the trial judge in withdrawing the case from the jury. We therefore reject this ground of appeal in so far as it relates to Count No. 1 and Count No. 3.

46. A further complaint was made in respect of Counts No 35 and 36, which concerned alleged incidents of indecent assault, including oral sex, at address no 2 when the complainant was 14 - 14½ years old, that "as there was no concrete reference to frequency, it is respectfully submitted that the appropriate verdict must necessarily have been one of not guilty", and that therefore these counts should have been withdrawn from the jury and a direction granted based on the first leg of *R v Galbraith* i.e., insufficiency of evidence.

47. Counsel for the respondent rejects this complaint and says there was certainly sufficient evidence to justify allowing these counts to go to the jury.

48. The actual relevant evidence as disclosed by the transcript (reference day 2, p.27, l 1-25) was:

49. Prosecuting counsel did not pursue the issue of frequency further following defence counsel's interjection. Nevertheless, the respondent contends, this passage from the evidence gives a clear description of an incident of indecent assault involving oral sex at the location in question when the appellant was between 14 and 14½ years old, and that it had happened more than once. It was submitted that in those circumstances the judge was justified in allowing Counts No 35 and 36 to go to the jury. We agree with this submission and reject the complaint based on the trial judge's refusal to grant a direction in respect of Count No. 35 and Count No. 36.

50. Yet another complaint based on a failure to grant a direction was made in respect of Count No 25, which charged an offence of indecent assault between the 6th of December 1982 and the 5th of June 1983 at address no 3. The complainant would have been in 6th class at the time. The evidence offered in support of the charge was as follows:

51. Undoubtedly this was the most marginal of the counts that was allowed to go to the jury. In so far as the application for a direction was concerned, the focus of defence counsel's application was not on the sufficiency of the evidence with respect to timing or location (nothing was raised with respect to these issues), but rather on whether the witness, having recounted the discussion at school about the film which had apparently shown an incident of a man putting his hand inside a woman, i.e., digital vaginal penetration, had gone on to say to herself "What's being done to me is not right", implying the present tense, as opposed to "What's been done to me is not right", implying the past tense. Defence counsel contended that the witness had said the latter, whereas counsel for the prosecution argued that she had said the former.

52. The trial judge permitted the DAR (digital audio recording) record of that portion of the complainant's evidence to be replayed several times, both on loud speakers in court, and on head phones. He concluded that the witness had said "What's being done to me is not right". The following exchange then took place between defence counsel and the trial judge:

> *"You cannot simply throw it all up in the air and hope sufficient lands within the relevant periods and then ask a jury to convict. Not only can you not close a case in that way, you cannot open a case in that way and you furthermore cannot ask an accused person to stand trial in respect of an allegation which has been framed in that way. It is an antiquated way of drafting an indictment; it's a way we all love because it doesn't require us to consider what exactly we're alleging, but when the matter comes to trial it is a way which is inacceptable."*
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> *"JUDGE: I would accept the general premise that in the light of the age of the complainant in this case, particularly in the early years, that particularising the matters for the purpose of the indictment are a difficulty, but as Mr Hanahoe points out - and I agree with this proposal - that in your opening you must tell the jury what you say the specific act was.*
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> *MR BOLAND: What this --*
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> *JUDGE: You can't leave it up in the air, in my view, that it might have been touching, it might have been any of the other of the range of -- that in other words the jury, when they're being charged, must be in a position -- and indeed I was involved in a case of DPP v. DD down here where that particular issue arose - there has to be a specific act of indecent assault for the jury to consider, be it touching at one end of the scale or right through to penetration at the other end of the scale, but they can't just retire to consider there was some form of indecent assault, it must be specific. Now that involves, as Mr Hanahoe correctly states, in the opening and in the closing and in my charge to the jury that the jury must be satisfied as to the particular type of indecent assault.*
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> *MR BOLAND: Oh absolutely, yes, absolutely.*
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> *JUDGE: It can't be just left up in the air. Now, I don't believe it's necessary under all the circumstances of this case to set those out in the indictment, I have on difficulty with the period of dates being chosen, the book-ended dates as Mr Hanahoe referred to, that's common practice, he does it himself - he's nodding at me, for the transcript - and in relation to the location that will be a question of the evidence. If your location is too vague, Mr Hanahoe may be successful in an application for a direction, or in my charge to the jury I may have to -- in fact will have to charge them as to the precise location that these matters occurred, allegedly.*
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> *MR BOLAND: That's fine, Judge"*
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> *"She will tell you that the assault started up there …* [at address no 3] *when she was about 6 years old, and that her uncle used to masturbate in front of her and ejaculate in front of her and then those assaults continued in her own family house,* …[at address no 1] *… and indeed, there was also touching of her in that her uncle would come to her and put his arms around her and press her in to him so that her bum was against his groin and he would be pressing against her, and that continued throughout that time. Later, when she was about 14 or 15, the family leave* [address no 1] *and they go about a mile away to a new house [at address no 2], again a country area out in the country and she will say that the assaults happened there as well, and that indeed, in* [address no *2] they escalated, in the sense that they became oral sex in* [address no 2]*, so that he would kiss and lick her vagina, and that happened in* [address no 2]*'*

"Now, on the basis that you probably haven't been involved in a court case before, a criminal court case, I'm just going to outline briefly what happens. As the Judge has said, you are the judges here of fact, you will decide this case on the facts that you hear and that emerge in evidence from the witnesses that are called. You don't have to worry about the law; Judge Griffin is the authority on law; he will decide what the law is. Now, in the normal course, how a case comes to this court is as follows. Some wrongdoing occurs, and whoever the wrong has happened to will make, normally, a complaint to the gardaí. The gardaí will go out and investigate. They will take statements, they will look for evidence, CCTV, fingerprints or whatever it is, and they will prepare a case and send it to the Director of Public Prosecutions, and hence that well known phrase that you'll hear; 'A file has been prepared and sent to the DPP'. If the DPP then considers that the case is a worthwhile and strong case, it's sent forward into the District Court and ultimately arrives here in front of you."

"Well, Judge, in response. It's something unfortunate I said it was I don't think there's any objection to it being a worthwhile case, perhaps "strong" should not have been used, but everyone knows that all sorts of cases are sent forward to the DPP to be assessed, and only certain cases go forward, and I meant it in that context and it must reach a certain threshold. I shouldn't have used the word "strong", I accept that, but I think that can be corrected by yourself, Judge. I suppose "worthwhile" is really more it was the expression I was really trying to convey in relation to it."

"JUDGE: Very well. Mr Hanahoe, … . In relation to the unfortunate choice of words - I would assume that you accept they were not a deliberate choice of words - by Mr Boland, I take your point but I will not be discharging the jury, and I will give you two options. One is that I will ask Mr Boland to restate his opening by referring to the wrong as the "alleged wrong", and the second where he said "worthwhile and strong" I'll be asking him to restate "as a stateable case". However, it may well be that you would prefer that these matters are not raised with the jury to bring attention to them; that is a matter entirely for yourself."

"Members of the jury, I just want to correct something I said to you there at the beginning of my opening speech to you. I said that "normally, when a wrong occurs", and of course I should have said "when an alleged wrong occurs" because that feed in to what I say about the accused man is considered innocent here. So if an alleged wrong occurs, a case is sent forward to the DPP. And it doesn't have to be a strong and worthwhile case, it's just if it's a stateable case, if it reaches a minimum as a stateable case, then the DPP will direct that the case continues. So I just wanted to clear that to you, because it's not what I say is important really, it's the evidence and what the Judge will say to you in relation to the law …"

"... and she never really opened up about any of this, but there did come a time then in, I think it was 1997, when her daughter is being christened and there was a family christening party held in [a specifed location], in a soccer club there. Now at that, words were spoken and the family became aware that something had happened, and the following day, G.C. came down to the family home and there was a row, and from that point on, S.D.'s family had nothing to do with G. But again, she hadn't really opened up about this to anybody, didn't really open up to her parents, to her brothers and sisters. So it just continued on, and finally then, she did mention it to her GP, her family doctor, but again he advised her but she didn't want to open up, and you will wonder then how it was . So she felt she just wasn't strong enough to go and make any reporting of this to the abuse effectively finished when she was 15 because she said one day to G.C. when she said 'This has to stop, it just has to stop.' And indeed it did stop, but it wasn't until much much later that she revealed exactly what had been going on. And of course, one of the issues for you in this trial will be; why was it it took so long for all this to emerge? And her answer will be in the following terms; that she was married at 23, she had two young daughters, she was getting on with her life. And crucially, she suffered from bad health all throughout this time, you'll hear about that bad health, and it wasn't until she was almost 40, a long time after the abuse had ended, that she finally went to the gardaí and made a statement."

"In relation to the delay, I was just trying to I mean there are various issues that the jury will have to deal with. I just thought it was appropriate at this stage to tell them that there was a delay in the case and why it was, and just by way of background and explanation so they know where this case has come from and why. If the girl was abused from six to 15, after all, she's a teenager at 15, why it has now come, I mean, years later."

"JUDGE: Very well. Mr Hanahoe, I don't take any point in relation to delay because that, if this goes that far, will form a major part of my charge to the jury."

"The problem is compounded by the fact that the prosecution sought to call and did call a substantial amount of secondary evidence, under the doctrine of prior consistent complaint, albeit that it may not have been framed in those terms. And the important thing about that evidence is it is not evidence of the facts having occurred but it is merely evidence of the report having been made. But the problem with it is that is has now irretrievably prejudiced the jury, because how can a jury be asked to impartially deliberate on a fraction and I say less than 10%, perhaps less than 5% of the indictment as laid, in circumstances where they have heard evidence of complaints having been made in relation to the totality? And how can we now ask them to separate in their mind those two elements?

Q. Alright. Now, apart from the barn, did that happen anywhere else?

A. I can't remember that happening anywhere – anywhere else but apart from in there.

Q. Alright. How long did it last for? How long were you in the barn for, do you think?

A. Probably about 6, 7 minutes, like.

Q. Alright. Now, you said you were 6 years old at that stage; is that right?

A. That's right.

Q. Did that – did that ever happen again?

A. That particular incident, like, kind of.

Q. Yes of masturbation?

A. It did, but I think the first time was a bit kind of – because when this—the white stuff sprayed, I hadn't got a clue, like, what was after happening, but I probably – the second time it happened, it was, like, not that I knew what it was, but it was like it had happened. The first time, it was, like, do you know what is this, like.

Q. Alright ?

A. But I never asked him, and he never said what it was, like.

Q. Alright. But would it have happened again that year, we'll say?

A. Oh, yes, yes, definitely, yes.

Q. And would it have happened in the following years?

Mr. Colgan, sorry. These are leading questions, Mr. Boland knows.

Mr. Boland: Alright, alright.

Q. You said it happened when you were 6; is that right?

A. That's right."

Q. All right. Now, did matters progress then further in [address no 2]?

A. That's right, yes, yes.

Q. Well, just let the jury know what happened then?

A. I remember one day being in my green school uniform, and, like that, I remember I had had my periods and I said no. I said I have my period, and he said it doesn't matter and he still put his hand into my pants, and I was wearing the sanitary towel. And then, another time I remember, he bent down and he got on his knees and he put his head under my skirt and he had oral -- he put his tongue in my vagina.

Q. All right. Whereabouts in the house had that taken place?

A. That would have been in the sitting room, just up against the wall.

Q. All right. How old were you at that stage?

A. Fourteen, 14 and a half, like.

Q. All right. How long would -- how long did the first incident last?

A. Four or five minutes, and, as I said before, as long as he had got until somebody came or he heard somebody coming, and then he finished up his business.

Q. All right. You said you were wearing skirts at the time; is that --?

A. That's right.

Q. Could you see what he was doing?

A. The time with my uniform, I remember my skirt just fell and covered his head, like, so, like, he was there and he moved my legs with his head, like. And so he was under my skirt.

Q. All right. Now, that incident you describe, did that happen again?

A. It happened again, yes.

Q. Just once or more --

MR COLGAN: Again, leading questions."

"Q. And what class were you in then?

A. Sixth.

Q. All right. Now, during sixth class, what age were you then about approximately?

A. Twelve-ish, 12.

Q. All right. Would there ever be talk within the class about the facts of life or anything like that?

A. Yes, it was just -- that's right. It's like, you know, we lived in the country, like. My husband lived in Newbridge, so, like, you know, the different areas, like, but we -- we never given sex education or anything in school, never. But I remember one day we were in the classroom, and it was -- I was -- there was only about 12 in my class, like, kind of, but --

Q. And what class was this now, what year?

A. Sixth.

Q. Sixth?

A. And I remember the boys all talking about -- there was a film after being on the night before, and they were thinking it really funny, like, they were saying about what the man and the woman were doing, like, and all. Then all of a sudden, just something went like that in my brain and I just --

Q. Just take your time now because the judge is trying to write down what you're saying?

A. Yes, but something --

Q. The boys are talking about a film?

A. Yes. And, like that, they were just talking, like, what the man and woman were doing, like, that they were -- the man was on the top of the woman and he was putting his hand and all this inside her, and I just kind of thought then something's not right here, like, kind of, do you know? What's being done to me is not right.

Q. All right?"

"MR HANAHOE: Yes, Judge, I would simply say discretely in relation to count number 25 that it is clear from the DAR that it is utterly unclear and the acoustics are particularly poor.

JUDGE: I would agree with you on the DAR but on the headphones it's crispy clear, as far as I'm concerned.

MR HANAHOE: The difficulty, of course, is the jury will not have access to the headphones. The jury are relying on the evidence which they heard. And in that regard, where you have a dispute or a potential issue between been being the past tense and being being the present continuous, where two potential interpretations of what was said arise, one of which could reasonably be true, the jury are obliged to return a verdict of not guilty. And I would say that that

JUDGE: Well, my note I don't want to cut you off in your tracks, Mr Hanahoe, but my note will reflect the word being.

MR HANAHOE: Very good.

53. In our view there was, in the light of the trial judge's ruling, just enough evidence to allow count no 25 to go to the jury. We consider that the ruling was unassailable having regard to the careful review of the DAR record and the trial judge's view, having listened to the witness's evidence on headphones, that it was "crispy clear" what the witness had actually said. In circumstances where the judge would be reviewing the complainant's evidence, and would be in a position to remind the jury concerning what the witness had actually said in her evidence, we consider that the trial judge acted within his legitimate discretion in allowing count no 25 to go to the jury. We note, indeed, that at a later stage, in reviewing the evidence in the course of his charge, the trial judge told the jury:

"She said there was talk in the class about the facts of life but there was no sex education in the school at the time. And she said some of the boys were talking about a film that they'd seen the night before with a man and a woman and how to make a baby and she thought, "What is being done to me is not right." But, she didn't do anything about it."

54. We are satisfied in the circumstances that the complaint that the trial judge ought to have withdrawn Count No 25 from the jury is not made out.

55. Finally under this heading, we reject the complaint that it was impossible for the appellant to receive a fair trial in circumstances where he had been indicted on 37 counts, the case had been opened on that basis, and the prosecution had failed to lead any evidence in respect of 27 thereof. It frequently happens that certain counts are withdrawn from a jury in the course of a trial, and the fact that this happens does not require a jury to be discharged. While the appellant points to the great number of counts withdrawn from the jury in this case, it is clear from the fact that, in so far as the remaining counts were concerned, the jury were satisfied to only convict of some and to acquit on others, that they were not influenced by the earlier withdrawal of a large number of charges.

Ground of Appeal No (v) – allowing the prosecution to lead hearsay

56. In this ground of appeal the appellant complains that the trial was unsatisfactory and unfair because the prosecution were permitted to lead hearsay evidence from L.F. that S.D. had warned her as a child not to stay overnight with the appellant.

57. Counsel for the appellant made the following application in the absence of the jury on day 2 :

"MR COLGAN: Yes, Judge. At this particular stage, I think Mr Boland is going to want to recall a situation of a conversation between this witness and the previous witness.

…

MR COLGAN: And her evidence, I think, is going to be that on every Saturday G would call, G would walk in the backdoor and into the bedroom. I have no objection to her saying what she observed in respect of the matter, but clearly we're now going to on to say that I was -- "When I was around 11 or 12 years old, I was going to have a sleep in my granddad's house. S told me not to go. Myself and S had an argument, and S said G had touched her. She told me not to go up there. I didn't go up there that night. S didn't mention then for a long time. It was something that wasn't talked about." Now, I would say that clearly that's hearsay in respect of it. Mr G. C. wasn't present when it was said. It doesn't relate in any particular to any particular charge on the indictment because it doesn't say any detail as to how he touched her or what involved the touching took place. It could have been an innocent touching, it could have been playacting. It could have been anything from that point of view, but the jury would only take, I think, take the wrong meaning from it, that he touched her, that it was an inappropriate touching, it was an indecent. Clearly, it's not clear from the way it's set out in the book, and I'm objecting to this evidence being heard based on the basis that it is hearsay evidence and it doesn't relate in any particular count, or the state cannot say that it relates to any particular

count."

58. The trial judge did not invite a response from the prosecution, but rather commented:

"…the intended evidence, it would seem to me, is consistent with the evidence that S. D. gave."

59. The trial judge then added:

"JUDGE: You're correct in relation to hearsay, but no doubt Mr Boland will not adduce hearsay because the -- while both the parties that had this discussion were there, the accused was not.

MR COLGAN: Was not present.

JUDGE: But I don't have to teach a chicken how to suck eggs; you know how to get where you want to go without introducing hearsay, but I -- the evidence that appears to be intended to be given by this witness, that when she was 11 or 12, that effectively the first witness, Ms D, gave her a warning -- I can't see any difficult with that.

MR COLGAN: Gave her a warning, yes.

JUDGE: But there should be no hearsay.

MR COLGAN: Well, exactly, gave her a warning, I accept, not to go there.

JUDGE: Now, whatever --

MR COLGAN: Yes.

JUDGE: I don't want to put words in anyone's mouth but whatever --

MR COLGAN: Yes.

JUDGE: -- form of words is used to avoid hearsay.

MR BOLAND: But there was a conversation both parties, which is --

JUDGE: But not in the presence of the accused.

MR COLGAN: Not in the presence of Mr C.

MR BOLAND: No, that's true.

JUDGE: As a result of discussion, did something happen? That is usually the way out of hearsay. Any other points, Mr Colgan?

MR COLGAN: No, Judge"

60. Although the application was partially successful, counsel for the appellant nevertheless complains that the trial judge's ruling was legally flawed. He contends that the permitted evidence effectively amounted to a statement by conduct and that it was a non verbal form of hearsay.

61. Whether or not counsel is correct in this contention, it is now somewhat irrelevant in that the trial judge's ruling was overtaken by events in that the witness in fact gave direct evidence that the complainant had urged her no to go there, despite counsel for the prosecution's agreement and efforts not to elicit that evidence. It occurred in the following circumstances:

"Q. All right. I think when you were 11 or 12 was there talk of there being a sleepover up in --?

A. That's right, yes, in my granddad's house.

Q. [Address No 3]?

A. Yes

Q. All right. And I don't think you went there?

A. I didn't because --

Q. No, all right?

A. -- S. was pushing me not to"

62. Counsel for the appellant subsequently applied for a discharge of the jury. In response, counsel for the prosecution contended that, as the specifics of the conversation had not been stated, the hearsay rule had not been breached "in any serious fashion".

63. The trial judge concluded, and ruled:

"I don't see that as prejudicial under all the circumstances. It may be probative because Mr Boland, if he had gone on to say, well, what did she tell you, that then certainly would have been potentially prejudicial and definitely hearsay, so, under the circumstances of this, it would be flying in the face of reason to ask a jury to accept that two sisters, who clearly were very close to each other, did not have any discussion of any type, kind or description over the years. So, I won't discharge the jury on that basis, but in my charge to the jury I will be giving them all the usual warnings in relation to corroboration and matters such as that.

MR COLGAN: May it please the Court."

64. In argument before us, counsel for the prosecution acknowledged that it was unfortunate that the witness volunteered the detail in question before he could stop her, and that accordingly matters had not proceeded exactly in accordance with the trial judge's ruling. Nevertheless, he submitted, the prejudicial effect of the evidence was minimal in circumstances where no detail was given as to the actual conversation, where both witnesses who had been involved in the conversation were available for cross-examination and where in any case the evidence would have been admissible in any event as evidence of complaint in a sexual case adduced by the prosecution for the purpose of demonstrating consistency on the part of the complainant.

65. We consider that counsel for the respondent's submission exhibits a degree of confusion as to what exactly was the potentially objectionable nature of the evidence that the jury actually heard? Was it that it was hearsay, or was it that it was evidence of a complaint that breached the rule against self corroboration (sometimes called the rule against narrative), or both?

66. The main reason why evidence of oral complaint is not normally admissible in criminal cases is that it usually breaches both rules. Usually, though not invariably, the complaint is made other than in the presence of the accused and that renders it hearsay. Of course, if the complaint is made in the hearing of the accused it does not offend the hearsay rule.

67. However, whether or not an oral complaint breaches the hearsay rule, there is a much more significant justification for the routine exclusion of such evidence, and that is because it may have the effect of causing the jury to believe that the complainant's evidence is corroborated by the fact that he/she made such a complaint. The law does not allow a witness to self corroborate. An exception is made with respect to complaints in sexual cases, which very frequently occur in secret and are not independently witnessed. In such cases the issue as to whether the complainant can be regarded as reliable and credible tends to be absolutely central. In such cases the law allows evidence of complaint to be led by the prosecution, not for the purpose of corroborating the complainant, but solely for the limited purpose of demonstrating conduct by the complainant consistent with his/her testimony at trial. Where evidence of complaint is admitted for this limited purpose it must be accompanied by significant safeguards including the giving of specific directions to the jury by the trial judge concerning the very limited purpose for which the evidence might be used, and the fact that it cannot corroborate the complainant's testimony.

68. The impugned evidence is this case was, we believe, unquestionably hearsay. It clearly established that there had been a communication from the complainant to the witness, other than in the presence of the accused, "pushing" her not to stay at her grandfather's house overnight.

69. Did it also breach the rule against self corroboration? For it to have done so, it would have to have been evidence indicating that a complaint was made by the complainant to the witness and the nature of that complaint.

70. The reason for the complainant "pushing" or pressurising the witness not to stay overnight at the grandfather's house, namely the fact that the complainant had also told the witness that the accused "had touched her", was not disclosed to the jury. What the witness actually said did not therefore constitute evidence of complaint, and did not breach the rule against self corroboration.

71. While it was regrettable that a small amount of hearsay evidence was given by L.F. before the jury, we consider that it was not so prejudicial as to have justified the trial judge in discharging the jury. It was not led deliberately, and it was capable of being neutralised if the trial judge gave a suitable instruction to the jury in the course of his charge, which he duly did. The trial judge was correct not to discharge the jury.

72. We are not therefore disposed to uphold this ground of appeal.

Ground of Appeal No (vi) – evidence of complaints to the GP and Counsellor

73. This ground of appeal relates to evidence led by the prosecution concerning complaints made by the complainant to her General Practitioner and slightly later to a Counsellor. The essential point is that these complaints were not admissible under the exception which allows evidence of complaint to be given in a sexual case for the limited purpose of demonstrating consistency on the part of the complainant, because the complaints were made some years after the alleged abuse had occurred and therefore were not complaints made at the first available opportunity. Moreover, there was evidence that the complainant had complained to other persons some four or five years before she complained to the G.P., and subsequently to the Counsellor.

74. In response, counsel for the prosecution maintains that the evidence did qualify, that it was relevant to the issue as to why it had taken so long for the complainant to come forward, and that evidence of complaint in a sexual case was no longer strictly required to be "recent" in the literal sense in order to come within the exception. He submitted that recent jurisprudence suggests that the reasonableness of the conduct of the complainant must be taken into account, particularly where an appellant may not have come forward sooner due to inhibition or oppression arising from the nature of the offending conduct, and referred to Evidence (2nd Ed) by Declan McGrath in that regard, and in particular the case of *R v Valentine* [1996] 2 Cr App R 213 cited by the author (at para 3-175).

75. The following statement from the judgment of Roch L.J. in *R. v Valentine* was quoted with approval in this jurisdiction by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Murphy* (Unreported Court of Criminal Appeal, 13 November 2003):

> "The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity that presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity."

76. Roch L.J., had gone on to state:

> "We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them, that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may fell it quite impossible to tell their parents or members of their family"

77. We endorse and adopt that statement. The temporal proximity of the complaint to the conduct complained of is of less importance as an indicator of consistency than the context in which the complaint is made, though a complaint made closer to the index event may carry more weight as an indicator of consistency than a complaint made later. However, the precise weight to be attached to a complaint, in terms of possibly demonstrating consistency of conduct, will be a matter for the tribunal of fact, i.e., the

jury in a case such as the present.

78. We also note that this general approach has previously been applied in this jurisdiction in other cases such *as The People (Director of Public Prosecutions) v D.R.* [1998] 2 I.R. 106 and in *The People (Director of Public Prosecutions) v T O'R* [2008] IECCA 38.

79. In the present case an objection that the complaints to the G.P. and to the Counsellor were insufficiently recent to allow them to be led as evidence under the rule relating to complaints in sexual cases, was made by counsel for the appellant on day 3. It was submitted that, in addition, much of the proposed evidence of the witnesses relating to the complainant's medical and psychological condition and treatment was irrelevant to the issues in the case and was of such an emotive quality that its potential prejudicial effect outweighed its probative value.

80. In response, the prosecution contended the fact that she was attending her G.P for, *inter alia*, depression, and attending a Counsellor for therapy, was all bound up with the abuse she had suffered, and that these matters were relevant in terms of explaining her delay in formally reporting the matter to An Garda Siochána.

81. The trial judge allowed the witnesses to be called but showed sensitivity to the counter contention of the defence that the some of the proposed evidence was of an emotive quality and of questionable relevance. He therefore directed that only certain parts of the witnesses statements could be led. The permitted evidence did include the evidence of complaint.

82. Accordingly the G.P. testified (inter alia) *that "I have down her she disclosed she was sexually abused as a child up until the age of 16 by an uncle. I suggested to her that she should attend the Rape Crisis Centre"*. That was his only reference to the abuse.

83. When the Counsellor, who had begun working with the complainant in September 2010, was called to give evidence he testified (inter alia) to the following:

> *Q. All right. What did she disclose to you in those sessions?*
>
> *A. She disclosed that she had been referred by [the G.P.] as a consequence of being -- suffering sexual abuse by her uncle. It took a number of sessions before she disclosed her uncle's actual name was.*
>
> *Q. And when did she disclose the name?*
>
> *A. It was either July or August. I would need to check my notes but I think it was either end of July or early August in the session that she actually mentioned his name, G.*
>
> *Q. And what year was that?*
>
> *A. That's 2010 or 2011, sorry.*
>
> *Q. Eleven. When did she actually name the abuser?*
>
> *A. Yes, that was --*
>
> *Q. Oh, that was when she named him?*
>
> *A. That was when she named him.*
>
> *Q. Were you aware then that in early January 2011 she went to the gardaí?*
>
> *A. I was because she had talked about it in sessions and she was trying to build herself up towards going to make a statement to the guards.*
>
> *Q. Did she say when the abuse had started?*
>
> *A. She had informed me in sessions that it began approximately when she was five years of age and it continued until approximately 16 years of age.*
>
> *Q. And did she say where this abuse occurred?*
>
> *A. She informed me in sessions that it occurred in a number of places, her two home places, [address no 1, and address no 2], and also in her grandfather's place, where her uncle lived. She also -- can I just say as well, Judge, that she also informed me that on a number of family trips that she would have been abused as well."*

84. We are satisfied that the evidence that these witnesses actually gave before the jury concerning her medical and psychological state was both relevant and probative in terms of providing a possible explanation for the complainant's delay in formally reporting the matter. Moreover, to the extent that evidence was led from them concerning complaints made by the complainant, we are satisfied that in all the circumstances of the case those complaints, being the first disclosures made by her to professional persons outside of the circle of her family and friends, and in circumstances where, as the Counsellor put it, *"she was trying to build herself up towards going to make a statement to the guards"*, were made as early as reasonably possible in the circumstances of the particular case. We therefore consider that the trial judge acted within the scope of his legitimate discretion in admitting the impugned evidence, and we reject this ground of appeal.

Conclusion.

85. In circumstances where we have not been disposed to uphold any of the grounds of appeal advanced by the appellant, the appeal is dismissed.