THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

124/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J.C. (No. 1)

Appellant

Judgment of the Court delivered on the 14th day of November 2015 by

Mr. Justice Sheehan

1. On the 7th February, 2013, following a six day jury trial, the appellant was convicted on ten counts of indecent assault alleged to have occurred between 1988 and 1992 and three counts of sexual assault alleged to have occurred between 2001 and 2011.

2. The appellant was sentenced to ten years imprisonment with the final two years of that sentence suspended. He now appeals against conviction and sentence.

3. This judgment is concerned solely with the appeal against conviction.

4. In his written submissions, the appellant challenged his conviction on five separate grounds which were set out as follows:-

> 1. That the learned trial judge erred in law and in fact in refusing the application of counsel for the appellant at the outset of the trial to sever the indictment either wholly or in part due to the prejudicial affect of there being six complainants in the case.
>
> 2. The learned trial judge failed to properly or adequately instruct the jury on the question of corroboration in his charge. Without prejudice to the generality of this complaint, the learned trial judge failed to properly or adequately instruct the jury as to the meaning of corroboration and what, if any, evidence in the case was capable of constituting corroboration.
>
> 3. That the learned trial judge failed to properly sum up the evidence for the jury in the case. Having given a detailed and comprehensive summary of the evidence of each complainant and having highlighted details of the prosecution case, the judge erred in law in not summarising or even referring to any of the details elicited in cross examination of the prosecution witnesses and in failing to summarise adequately or at all any or any part of the case advanced by the defence.
>
> 4. The learned trial judge erred in law and in fact in failing to address the jury in relation to cross contamination between witnesses.
>
> 5. The learned trial judge failed to adequately warn the jury in the specific circumstances of this case of the care required and the dangers involved when considering cases of a sexual nature that go back a long time.

5. In the course of the oral hearing, Mr. McGrath S.C. for the appellant helpfully informed the Court that he was not proceeding with the corroboration point and went on to further limit his appeal when he stated that his main ground was that severance should have been ordered, that the second point concerned the trial judge's failure to properly summarise the defence case and that the third point concerned the failure of the trial judge to deal adequately with the issue of delay.

6. In order to consider these grounds of appeal it is necessary to set out the background to the offences.

7. The appellant was charged with ten counts of indecent assault and three counts of sexual assault. Counts 1 to 8 and 12 and 13 on the indictment all relate to complaints by the younger sister and nieces of the appellant's former wife and occurred between 1988 and 1992.

8. Counts 9, 10 and 11 relate to complaints of sexual assault by the appellant's son and daughter and these assaults are alleged to have taken place in 2001, 2002 and 2011 respectively.

9. The first complainant was EK, to whom counts 1 to 5 on the indictment relate. She is a younger sister of the appellant's former wife and told gardaí that on four occasions at the appellant's former family home and on another occasion while in his car, the appellant had made her put her hand on his penis. She alleged that this had occurred in the context of playing a game while looking for money in the appellant's pocket which had a hole in it, when at the appellant's home. In the case of the offence which took place in the appellant's car, it occurred in the context of him putting her on his lap to give her a driving lesson at a lake in the locality of the family home. On the last occasion he was alleged to have put her hand behind her back and forced her to masturbate him. The complainant EK said she was nine or ten years old when the first four counts occurred and the incident in the car occurred when she was eleven or twelve.

10. The second complainant was PW, who was a niece of the appellant's former wife. In her statement of complaint to the gardaí she

said that when she was seven years old, she asked the appellant for money while he was at home and that the appellant hid the money near his private parts and that she had to put her hand on to his penis. She also claimed that on one occasion the appellant took her and a friend who she was now unable to identify picking holly around Christmas time. At one point on that trip the appellant sent her friend away and took her over to a tree where he grabbed her hand behind her back and made her rub his penis. Counts 6 and 7 relate to PW.

11. The third complainant was SW, another niece of the appellant's former wife. In her statement to gardaí she alleged that the appellant had put her right hand behind her back while in the sitting room of his home when she was around six years of age and made her move her hand up and down on his penis. This relates to count 8 on the indictment.

12. The fourth complainant was AC, the appellant's daughter from his former marriage. She said in her statement that in 2001 or 2002 when she was staying with the appellant in the home he shared with his new partner and their child in a town some miles away, the appellant came into the bathroom while she was there and stood beside her, grabbed her hand and made her put it on his penis and made her move her hand up and down. She also stated that in 2011 there was an incident in the appellant's home in which the appellant attempted to put her hand on his penis. These complaints relate to counts 9 and 10.

13. The fifth complainant AC is the appellant's son and he alleged to gardaí that on one occasion while visiting his father at his new home he was in bed with his father who was dressed in a t-shirt and boxer shorts and that he remembers his hand was on his father's penis, and that he could not remember how it got there nor anything further.

14. The final two counts of the indictment related to the sixth complainant AE, who was also a niece of the appellant's former wife and who alleged that when she was three or four she was sent to ask the appellant if he wanted a cup of tea. She stated that when she asked him this while he was in the bedroom of his former marital home that he took her hand and put her hand on his penis. She further stated that when she was five years old the appellant took her hand and put it on his penis in the living room of his family home and that this only lasted a short time. This complaint was alleged to have occurred in the first time period namely, 1988 to 1992.

15. The complainants and their mothers gave evidence and there was also evidence of garda interviews with the accused including a statement in which it was alleged that the applicant had made a partial admission in relation to one complainant SW. In this regard, the prosecution contended that the appellant had admitted in a note to his wife that he had abused SW (the note in the meantime had been destroyed) but the appellant who also gave evidence stated in evidence that he had just done this as a means of precipitating a break in his then marriage to his wife IC.

16. Prior to the commencement of the trial, counsel for the defence made an application to the trial judge to sever the indictment and in so doing relied on the judgment of the Court of Criminal Appeal in *DPP v B.K.* [2000] 2 I.R. 199 and s. 6(3) of the Criminal Justice Amendment Act 1924, which provides:-

> "Where before trial or at any stage of a trial, the court is of the opinion that the accused may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in one indictment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in the indictment, the court may order a separate trial of any count or counts of such indictment."

17. The appellant submitted in the first instance that the counts, insofar as they related to separate complainants, should have been tried separately. Counsel then went on to say that even if the appellant was not entitled to have the counts severed in this way, that counts on the indictment when further analysed broke down into two separate tranches and the trial judge ought to have severed the indictment in that way.

18. In other words, the ten counts of indecent assault which related to his wife's younger sister and nieces and occurred mostly in the family home (two did not) over a four year period from 1988 to 1992 represented the first tranche and the second tranche comprised allegations of sexual assault by the appellant's son and daughter over an eleven year period at a later time namely, 2001 to 2011, these latter assaults occurring in the appellant's new family home.

19. To paraphrase counsel's argument, fairness requires that these two separate sets of sexual assault be tried separately. Counsel also submitted that the trial judge had erred in his ruling on this matter when he suggested that there was a striking similarity between the offences. At this point it is worth setting out in full the trial judge's ruling on the severance application:-

> "The authority being relied on by both the prosecution and the defence is the case of the *People at the Suit of the Director of Public Prosecutions v. B.K.* and in deciding whether or not an indictment should be severed, the grounds being put forward the principles are set out quite clearly at p. 210. The principles are that the rules of evidence should not be allowed to prevent common sense. Secondly, where the probative value of the evidence outweighs its prejudicial effect it may be admitted. Third, the categories of case in which the evidence which can be so admitted is not closed. Fourthly such evidence is admitted in two main types of case and it seems to me that what applies in this case is the second of these categories and that is when the charges are against one person only to establish that offences were committed. And in this case the evidence is admissible because there is an inherent improbability of separate persons making up exactly similar stories and it shows a practice which would rebut accident, innocent explanation or denial. The allegations being made against the accused are that he abused members of his extended family that is his extended family by marriage. They occurred for the most part in the residence of the accused at the time most of the counts appeared in the same boundaries of time and in particular the matters alleged are all quite similar. In other words, the allegation that the accused coerced or forced or made the complainant put the complainant's hand on his penis. And in my view the incidents may not have all been exactly the same, but there is a sufficiently striking similarity to allow the counts to proceed before the same jury and on the same indictment so I refuse the application to sever the indictment."

20. Counsel for the appellant criticises this ruling when he points out that it makes no reference to the submissions about the counts representing two separate sets of sexual assaults at two very different times. While acknowledging that a trial judge has a wide discretion in applications for severance, counsel also challenged the finding of striking similarity saying that the ruling of the court was effectively saying that a man who importunes a child to touch his penis no matter how extensive the period of time, no matter what the location is, the interests of justice require that those offences be tried together.

21. Counsel went on to submit that striking similarity involved an unusual modus operandi and that that was not what the case was here. Counsel for the appellant also relied on paras. 14.44 and 14.45 of O'Malley, *Sexual Offences*, 2nd Ed., (Dublin, 2013). In this context, counsel referred the Court to the judgment in *Attorney General v. Duffy* [1931] I.R. 144.

22. Counsel for the respondent contended that the trial judge was correct in refusing to sever the indictment and relied on the following cases: *DPP v. B.K.* [2000] 2 I.R. 199, *DPP v. B.* [1997] 3 I.R. 140, *DPP v. O.S.* (Unreported, Court of Criminal Appeal, 28th July, 2004), *Martin McCurdy v. DPP* [2012] IECCA 76 and *C.C. v. DPP (No. 2)* [2012] IECCA 86.

23. Counsel for the respondent contended that the trial judge did as he was required to do, namely, to have regard to the nature of each of the complaints and to consider the issue as to whether or not the fact of the multiplicity of complainants was relevant to show the inherent improbability that two or more people would make up similar stories was admissible to rebut accident or innocent explanation.

24. The respondent also made the point that the evidence of IC concerning her husband's admission that he had abused SW was relevant to all counts on the indictment and a compelling reason for not severing the indictment as this evidence was relevant to the appellant's access to his own children and also relevant as to how the extended family dealt with each thereafter.

25. In considering these submissions the Court notes firstly what O'Malley says at para. 14.43 in *Sexual Offences*, namely:-

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

26. Prof. O'Malley goes on to refer to a Canadian judgment where the statute law is broadly similar and notes that the Supreme Court in Canada has held that the overarching criteria are the interests of justice. In that case, the court mentioned the following factors as relevant in severance decisions:-

> "The general prejudice to the accused, the legal and factual nexus between the counts, the complexity of the evidence, whether the accused intends to testify on one count but not on another, the possibility of inconsistent verdicts, the desire to avoid a multiplicity of proceedings, the use of similar fact evidence at trial, the length of the trial having regard to the evidence to be called, the potential prejudice to the accused with respect to the right to be tried within a reasonable time and the existence of antagonistic defences as between co-accused persons . . ."

27. Prof. O'Malley also refers to an earlier judgment of the House of Lords in *R. v. Christou* [1997] AC 117, where the House of Lords had indicated that other relevant factors were:-

> ". . . how discreet or interrelated are the facts giving rise to the accounts, the impact of ordering two or more trials of a defendant and his family, on the victim and their families, on press publicity; and importantly whether directions the judge can give to the jury will suffice to secure a fair trial if the accounts are tried together. In regard to the last factor, two re-trials are conducted on the basis that the judge's directions of law are to be faithfully applied."

28. To this list of relevant factors, this Court also adds the need to ensure that justice is administered as speedily as possible in light of limited court resources subject always to ensuring that an accused person's right to a fair trial is not impeded. Had the trial judge agreed to the initial application this would have resulted in six separate trials. Cases relating to child sexual abuse are known to cause enormous stress to victims and their families and indeed to accused persons and their families. Delays in court proceedings add to that distress.

29. Apart from a general complaint of unfairness and the fact that the complaints spanned a 23 year period, the appellant did not advance any special reason for severance. For example he did not contend that he wished to give evidence on some counts and not on others. As the trial judge stated in his charge the essential issue for the jury in this case was the credibility of the complainants and to a lesser extent the credibility of the appellant who also gave evidence on his own behalf.

30. While the trial judge did not refer in detail to the appellant's submissions in the course of his ruling and while the prosecution does not seek to describe all complaints as having a striking similarity, it is nevertheless the case that the similarities were such as to properly allow the jury to consider the evidence in one case as supportive of that in another. The trial judge's ruling demonstrates that he approached the application for severance carefully and took into account the relevant legal principles. Indeed it could be said that severing the indictment would have resulted in the jury not getting the full picture. This is particularly relevant when one considers the final submission made on behalf of the respondent. While it did not form part of the trial judge's ruling it is germane that the evidence of the appellant's wife regarding his admission that he had abused SW is evidence that was relevant not only to SW's complaint but was also relevant evidence in respect of all other counts on the indictment. This Court holds that this piece of evidence provides strong support for the correctness of the judge's ruling. The Court therefore holds that the trial judge properly exercised his discretion when he refused to sever the counts and accordingly this ground of appeal fails.

31. The two remaining grounds of appeal relate to the adequacy of the trial judge's charge insofar as it related to putting the defence case fairly and in particular drawing the jury's attention to the inconsistencies that arose as a result of cross examination and to the failure of the trial judge to contextualise the delay warning.

32. In this case counsel for the prosecution's address to the jury was brief. While he acknowledged inconsistencies in the evidence and maintained that there was no motive for fabrication, he then went on to focus on the evidence relating to the letter or note written by the appellant to his wife in which he was alleged to have admitted assaulting SW. The brevity of prosecution counsel's address is illustrated by the fact that it comprises about two and a half pages in the transcript. Counsel for the appellant on the other hand addressed the jury at some length and his closing address comprised twelve pages in the transcript. Counsel for the appellant dealt in detail with the inconsistencies in the evidence particularly those that emerged in cross examination.

33. It is true that the judge's summing up of the defence case was limited. However in light of matters that the jury had just heard in closing speeches from counsel, it was sufficient for him to say the following:-

"The resume of the case is that first of all that these inconsistencies are of such a nature that they undermine completely the credibility of the witnesses. Mr. McGrath may have mentioned them, I am not going to go through them again, but that is the case made by the defence."

34. Later in his charge the trial judge repeated what he had said about the defence case being that the inconsistencies undermined the credibility of the prosecution and stated:-

> "The defence referred to – I am not going to go through each item that has been done by his counsel – except to refer in particular to AC's inaccurate recollection of the position of the bathroom in the apartment with the position of the sink and toilet. It is essentially the case for the defence that the three aunts and the six complainants have knocked their heads together to come up with a version of events including in particular to plug the holes in the case which have evolved in the course of the evidence being given."

35. Again when summarising the evidence in the case, the trial judge also summarised the appellant's evidence.

36. Following a requisition on delay, the trial judge read the charge in the JB case in full to the jury. Counsel for the appellant complains that the trial judge failed to relate this warning to the particular facts of this case. However, following his recitation of the charge in *JB*, the trial judge did go on to say:-

> "So that's the full quotation from that decision and I think you understand the point there. I would just like to add of course that any prejudice arising from such delay will be exponentially magnified in cases where there are multiple complaints as there are in this case. And on the question of delay you can take into account if there has been any explanation for the delay and if there hasn't been any explanation the implications of that".

37. The charge in the *JB* case deals thoroughly with the difficulties that can arise in old cases and this Court is satisfied that in light of the evidence no further treatment of this matter was required to ensure the jury were properly charged on this issue. Equally, this Court is satisfied that the defence case as well as the inconsistencies which arose in cross examination were sufficiently identified to the jury by the trial judge and as such no unfairness resulted to the appellant. Accordingly, the Court rejects these two final grounds of appeal.

38. Having already held that the trial judge properly exercised his discretion when he refused to sever the indictments, this Court accordingly dismisses the appeal against conviction.