THE COURT OF APPEAL

Record No. 170/2015

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

S. O'C

APPELLANT

JUDGMENT of the Court delivered on the 29th day of January 2019 by Ms. Justice Kennedy

Introduction

1. The appellant was convicted of fifteen counts of indecent assault contrary to Common Law and three counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 following a trial in the Circuit Criminal Court on the 12th May 2015. The appellant in this case appeals against conviction and sentence. However, this judgment is concerned solely with the conviction issue.

2. On the 1st July 2015, the appellant was sentenced to a term of imprisonment of one year on counts of indecent assault and for a period of three years in respect of counts of sexual assault, the sentences to be served on the lawful expiration of a sentence of ten years' imprisonment imposed in the Central Criminal Court on the 19th December 2014.

3. The appellant initially faced trial on fifty-one counts of indecent and sexual assault in respect of five complainants. These comprised thirty counts of indecent assault concerning the complainant, RQ, and alleged to have occurred between 1976 and 1978 when the complainant was aged between seven and nine years old. A further seventeen counts of indecent assault concerned the complainant, FR, between 1981 and 1988 when the complainant was aged between eight and fourteen years. Two counts of sexual assault concerned the complainant, NG, alleged between 1992 and 1994 when he was aged between ten and twelve years and one count of sexual assault concerned the complainant, DC, and was alleged to have occurred between 1993 and 1994 when he was aged between eleven and twelve years. Finally, one count of sexual assault concerned the complainant, SD, which was alleged to have occurred in 1994 when the complainant was twelve years of age.

4. On the 29th April 2015, at the commencement of the trial, the trial judge heard an application on behalf of the appellant to sever the indictment to the effect that the counts concerning each complainant be tried separately. The trial judge ruled that eight of the counts be severed on the indictment and that the remaining forty-three counts of indecent and sexual assault between the years 1976 to 1994 proceed to trial.

5. At the conclusion of the prosecution case, the trial judge withdrew from the jury counts 1-15 inclusive, counts 31-39 inclusive and count 42. The jury returned verdicts of guilty on the 18 remaining counts.

Background facts.

6. The primary evidence relied upon by the prosecution was that of the complainants. The appellant was a teacher in a primary school which each of the five complainants had attended. The first complainant in time, RQ, described in evidence that he attended the school where the appellant was a teacher and that during the period 1976 to 1978, he said he was indecently assaulted by the appellant. He was aged between seven and nine years. He described in evidence incidents which occurred in the classroom of this school and concerned circumstances whereby the appellant, while seated at his desk, with RQ standing, placed pebbles down RQ's trousers, fondled his genitals and nibbled his ear. Six counts on the indictment concerned a different location but similar actions; namely, while in a car in the Dublin mountains, with RQ on the appellant's lap, the appellant fondled his genitals. The remaining counts in respect of RQ concerned incidents at various sports events whilst in a motor car where the appellant sexually abused him in a similar manner.

7. FR described occasions between the years 1981 to 1998 when he was aged between eight and fourteen years. Nine of the offences alleged concerned incidents of a sexual character in a classroom and involved the appellant fondling FR's genitals. Further incidents of a sexual nature were alleged by FR to have taken place at the appellant's home which concerned incidents of a sexual nature which FR described as including sexual misconduct involving a young girl. The trial judge severed these counts in relation to the appellant's home from the indictment and therefore the remaining counts in respect of FR proceeded to trial, being ten counts in total which were alleged to have taken place in the school when the complainant was aged between eight and twelve years.

8. Concerning the complainants, NG, DC and SD; the offences of sexual assault concerning these complainants were alleged to have occurred between the years 1992 and 1994. One incident concerned the complainants, NG and SD, and was described as having taken place during a weekend trip to Galway wherein the evidence was that the appellant sexually assaulted both boys in each other's presence. The remaining count in relation to NG was alleged to have occurred between 1992 and 1993 in the school during lunch break when the appellant brought him to the end of the classroom, told him to unzip his trousers and pull down his underwear and then fondled his genitals. The incident in respect of DC was alleged to have occurred between 1993 and 1994, when the

complainant was eleven/twelve years of age, in the classroom during lunch break when the appellant put his hand down the front of the complainant's trousers and touched his genitals.

9. In the notice of appeal, dated the 2nd July 2015, the appellant has appealed his conviction on seven grounds. They can be summarised as follows : -

> (i) That the trial judge erred in refusing to sever the indictment and order separate trials in relation to each of the complainants and each of the alleged incidents.
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> (ii) The trial judge erred in refusing to discharge the jury after the complainant NG had given evidence.
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> (iii) The trial judge erred in refusing to direct verdicts of not guilty and,
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> (iv) The trial judge misdirected the jury in the manner in which he answered a question raised by the jury.

Grounds 1 & 2: The refusal to sever the indictment

10. At the commencement of the trial, the appellant sought to have the indictment severed in respect of the counts relating to each of the five complainants and in respect of each of the alleged incidents. It was argued that the trial judge erred in failing to sever the indictment in circumstances where it was contended on behalf of the appellant that the allegations made by the complainants were insufficiently similar to enable all matters to be tried together. It was submitted, inter alia, that there was insufficient nexus between the accounts of the complainants and that, consequently, the evidence relating to the counts in respect of each complainant could not be considered to be cross-admissible as regards the evidence of the other complainants. To paraphrase counsel's argument, it was contended that the incidents were alleged to have been committed at different locations, namely; in a school in Dublin, in a car in the Dublin mountains, in a car at sporting events and in a bedroom in County Galway. It was further submitted that the offences were alleged to have been committed during very different time periods extending from 1976 through to 1994.

11. The prosecution submits that there are features which are common to the offending conduct. Firstly, each of the complainants were pupils in the same school, the appellant was their teacher, albeit at different times, it was the appellant's place of work and where he held a position of responsibility for the pupils in his charge and the character of the offending was similar in each instance, involving the fondling/touching of the genitals. The incident in Galway involved two boys who were pupils in the school and the appellant was their teacher. They were on a trip to Galway with the appellant. The allegation concerned the sexual assault of the two complainants in the presence of the other.

12. In his ruling, the trial judge acceded to the application on behalf of the appellant in part, in that he severed eight counts on the indictment. These counts related to incidents in the appellant's home and which were of a somewhat different sexual character. However, he refused the application to sever the balance of the counts on the indictment and in so ruling the trial judge stated as follows: -

> "The judgment of Mr. Justice Barron which has been opened to me is clear and succinct. The passage that summarises all of the arguments and principles that need to be regarded to and because the very first one of them is this and it says:
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> > 'The rules of evidence should not be allowed to offend common sense. So where the probative value of the evidence outweighs its prejudicial effect, it may be admitted. The categories of cases in which the evidence which can be so admitted is not closed. And such evidence is admitted in two main types of cases; (a) to establish that the same person committed each offence because of the particular feature common to each; or (b) where the charges are against one person only, to establish that offences were committed. And in that later case, the evidence is admissible because there is the inherent improbability of several persons making up exactly similar stories and, secondly, it shows a practice which would rebut accident, innocent explanation or denial.'
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> So, the concept of an accused facing trial on complaints arising from different complainants isn't one that offends the law, no more than it offends common sense. What the judgment does is talk about and say to look for evidence being admissible on the inherent improbability of several persons making up exactly similar stories, on the one hand, or to rebut accident, innocent explanation or denial on the other.
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> In this case, the common features to which the prosecution points to and suggest indicate system arises from the fact that the appellant was in a position of responsibility, a teacher of each of his complainants, as alleged, that he took advantage of them in a similar way, primarily and mainly in the fondling of genitals apart from the conduct that is referred to in counts 40-47 and that if the offending did not take place in the classroom, it was in the motor car in a similar way. I am satisfied that those features that the prosecution have pointed to, do permit the trial of the accused to proceed in respect of each of the complainants."

13. Before this Court, in addition to highlighting the aforementioned matters, counsel for the appellant emphasised the time frame as being one of the reasons why the trial judge ought to have severed the indictment. This Court does not agree that this comes to the aid of the appellant in advancing the arguments. Indeed, we are satisfied that the disparity in years was probative evidence permitting a jury to assess the improbability or otherwise of a number of persons fabricating similar events over a period of time. Nor do we consider the fact that certain of the events took place in a motor car or in a house in Galway to be of great significance in the overall context of the allegations. In the instant case, there were many features common to the allegations of each complainant, and whilst there are dissimilarities, such as mentioned above, the similarities were extensive including, the ages of the parties, the fact that they were pupils in the school, the fact that the appellant was their teacher, the nature of the conduct involving, the touching of the genitals and the fact that the appellant was in a position of responsibility. For the matters to be tried together, there is no requirement for a singularly unique feature; each situation is highly contextualised and there is no requirement, for the counts in respect of multiple complainants to be tried together, that each allegation be identical in terms. In any given case, the complainants may not be of the same gender, but may be minors of a similar age, there may be sexual misconduct of a different character or there may not, but it is a matter for the discretion of the trial judge in each instance to assess if the sexual offending and the surrounding circumstances are similar in significant respects. What is required in order to establish system evidence is that there be a sufficient degree of similarity such as to allow a jury to consider the evidence in one case as being supportive of the evidence in another. In *B v. DPP* [1997] 3 I.R. 140 Budd J. referred to *DPP v. P.* [1991] 2 AC 447 and cited, *inter alia*, the following: -

> "It seems that the underlying principle is that the probative value of multiple accusations may depend in part on their

similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of multiple accusations is a coincidence in itself, which has to be taken into account in deciding admissibility."

14. This is apposite in this particular instance in that whilst the appellant argues that the disparity in dates points to a dissimilarity this Court, for the reasons stated above, disagrees with that contention. We are of the view that the disparity in dates was highly significant to enable the jury to consider whether it was unlikely that the appellant would find himself falsely accused by complainants making allegations spanning a period of time, where all the sexual offending involved young boys of a certain age and conduct of a certain character.

15. The trial judge's ruling demonstrates that he considered the application for severance very carefully indeed and was cognisant of and took into account the relevant legal principles. Accordingly, we are satisfied that the trial judge was correct to refuse the application to sever the indictment and correct to refuse to order separate trials and it follows that he was correct in refusing to sever each of the counts from the other. We therefore dismiss these grounds of appeal.

Ground 3: the refusal to discharge the jury

16. This ground is predicated upon the fact that the trial judge refused to discharge the jury after NG had given evidence of "several things" and "many things" happening during 6th class. It is argued that this was highly prejudicial and implied impropriety on the part of the appellant in respect of which there was no charge and of which the appellant had no notice.

17. This Court has had the opportunity of reviewing the transcript in relation to the words spoken by NG in the course of his evidence following which the witness immediately proceeded to describe the incident in Galway which involved both he and another witness, SD. The relevant portions of the transcript are as follows:-

" Q. Okay. But he was a teacher in the school. You knew of him?

A. Oh, yes, yes.

Q. Okay?

A. Well known teacher, yes.

Q. Did he become a teacher later on?

A. Yes, in my last year in school.

Q. So, in your sixth class, I suppose?

A. Sixth, sixth class, yes.

Q. Okay. And he was the same person who the incident that occurred, you described, in fifth class; is that right?

A. That's correct.

Q. So, you had him for a year?

A. Yes.

Q. Okay. And did anything happen during that period of time?

A. Several things.

Q. Yes?

A. There were many things. One point that I never forgot; he took me and three other boys away for a weekend to Galway.

Q. I see. So, there was you and how many other boys?

A. Three"

18. In *DPP v. Fahey* [2008] 2 I.R. 292 it was stated:

"…. the discharge of a jury should be the last resort and accomplished only in the most extreme circumstances: juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant or should not have been given before them."

We are absolutely satisfied that this portion of evidence was extremely brief and lacked detail. It was, in effect, entirely neutral and did not cause prejudice to the appellant. This ground therefore fails.

Grounds 4, 5 and 6: failing to direct the jury

Ground 4 – Inconsistencies on the evidence

19. The appellant contends that the trial judge ought to have directed verdicts of 'not guilty' in relation to counts 41 and 43 relating to the parties NG and SD and concerning a trip to Galway. It is argued that there were significant inconsistencies in the witnesses' testimony relating to these allegations. It is argued that the learned trial judge erred in law and in fact in failing to direct the jury to return verdicts of 'not guilty' in accordance with the principles laid down in *R v. Galbraith* [1981] 1 WLR 1039 and, in particular, pursuant to the second limb of that decision.

20. NG, in the course of his evidence, stated that on one occasion he and three other boys, including SG, travelled to Galway for a

weekend away. He was in 6th class, and the boys travelled in the appellant's car. He described that there were three bedrooms and that he and SD shared one bedroom. He said on the first night, having encouraged the boys to sleep naked, the appellant followed SD and NG into their bedroom and invited them into his bedroom and they did so. The boys were on the floor, NG said he was told by the appellant to stand up, which he did, and whilst standing naked the appellant held his genitals. He said that SD was beside him and he, the witness, was incredibly embarrassed. He said that he lay back down and the appellant asked him if he wanted to sleep on the bed with him and he refused. He said there was talk of masturbation and as to how it should be done. In cross-examination, the witness agreed that he had not been friends with SD over the years and that he had no recollection of the appellant placing his hand on SD's hand showing him how to masturbate.

21. In his direct evidence SD spoke of the same trip and the same arrangements regarding the bedrooms. He said that he and NG were naked, that he recalled the appellant asking NG to stand up and that the appellant commenced talking about masturbation and proceeded to masturbate himself and invited NG into his bed which NG refused. The witness said that he got onto the bed and commenced masturbating and that the appellant put his hand around SD's hand which was on his penis. In the course of his cross-examination SD was reminded that he had referred in his statement to a "masturbation workshop" and he agreed that that was the only way that he could describe it. NG made no such reference. Furthermore, it is submitted that whilst the evidence of NG was that there was discussion about masturbation that the witness was never shown how to do anything by the appellant. The appellant also called in aid the evidence of Mr. M., who was 99.5% that he shared a room with NG.

22. In his ruling, the trial judge refused to accede to the defence application and was of the view that it was for the jury to assess the evidence and to draw their own conclusions.

23. This Court has recently considered the principles in *R v. Galbraith* [1981] 1 WLR 1039 and the test thereunder. In *The People (Director of Public Prosecutions) v. J.R.M.* [2015] IECA 65, this Court considered the view regarding the second limb of Lord Lane's statements of principle in *R v. Galbraith* as representing authority for the contention that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, is vague or contains significant inconsistencies, as is asserted in the instant case. It has been emphasised by this Court that *R v. Galbraith* is not authority for that proposition. As Edwards J. said: -

> "What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution evidence contains inherent weaknesses or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, and unless a state of evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.
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> Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

In *The People (Director of Public Prosecutions) v. M* (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J., as she then was, in considering the principles in *R v. Galbraith*, stated: -

> "…. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury."

24. We have no hesitation in concluding that the inconsistencies relied upon by the appellant on the evidence of NG and SD were such which were entirely and properly within the remit of the jury, and the trial judge was correct in refusing the application. Any differences in the evidence of the witnesses were matters which the jury were fully entitled to consider.

Grounds 5 and 6 – Failure to direct an acquittal on the grounds of delay and missing roll books.

25. Counsel for the appellant submitted that the trial judge erred in failing to direct an acquittal on all counts due to missing roll books which would have confirmed whether the appellant was teaching the complainants at the time of the allegations. It was further submitted that the roll books were, in the words of Hardiman J., an 'island of fact', and the lack of the books caused specific prejudice to the appellant such as to render his trial unfair.

26. There was evidence in the trial regarding roll books, however roll books relating to the appellant were missing. It seems that the roll books were linked to a particular teacher by virtue of the handwriting. In the course of this appeal, it was confirmed that there was no issue but that the appellant was a teacher in the school, that he taught the complainants at various stages, that the complainants were pupils in the school during the time period specified on the indictment in each instance, that the appellant was a teacher in the school between 1972 and 1998 and that for a period he was assigned as a remedial teacher. The argument made was that the roll books would have demonstrated if the appellant was in fact the complainants' teacher at the relevant time on the indictment.

27. In his ruling on this application, the trial judge said the following: -

> "Turning then to the second ground of objection relating to fairness and the judgment in POC. The first relates to the roll books. It is established that in the evidence of the roll books relating to the entire time spent by each complainant at Scoil C have not survived the passage of time. Roll books were discovered stored in a room in varying degrees of decay and have been produced in respect of each complainant and allow for the calculation of the years of schooling of each of them from second to sixth class. Each complainant has given evidence of having the accused as a teacher for two years and they have not been contradicted or challenged on this evidence. It appears from the evidence that it was the general practice each teacher covered two academic years. The roll books are maintained by or were maintained by the teachers in each class. They are identifiable to a particular teacher by handwriting, and it appears that all those maintained by the accused during his tenure as a teacher in the school have not survived. It is accepted on the evidence that for some time the accused was a remedial teacher in the school and held those classes upstairs and away from the main rooms on the ground floor where the complainants alleged the school-based abuses took place. None of the accused was challenged in their evidence that they had the appellant for two years as a teacher. The accused does not ask the years involved -- does ask the years involved in the alleged misconduct when interviewed and was told that the dates would be established by other means at a later stage. The suggestion is made that if these books were available they might show that the accused was a remedial teacher for some if not all the time the complainants were at school. This is not the line of defence. The position of the accused is the actions simply did not happen and each of the complainants is lying. This does not meet the standard of POC one or two as representing a real risk of prejudice. The accused has not

> been hampered in his cross-examination of the complainants. He would be in a position from his own to instruct his lawyers of the years he worked away from the main classrooms and to challenge the account of each complainant on that basis alone and without any reference to roll books. This has not been done. For these reasons, it is not then proposed to withdraw the charges from the jury on this ground."

28. The test in *S.H. v. The Director of Public Prosecutions* [2006] 3 I.R. 575 requires that an appellant establish prejudice as a result of delay sufficient to give rise to a real risk of an unfair trial. The trial judge considered the matter carefully and was satisfied that no such risk had been demonstrated in this case.

29. When we scrutinise the undisputed facts, we are satisfied that the trial judge correctly exercised his discretion in refusing to direct the jury.

Ground 7: the trial judge misdirected the jury in reply to a question asked.

30. The jury indicated that they wished to hear the evidence regarding the allegations concerning the incidents in a car in the Dublin mountains. The complaint is made that the trial judge failed to give a full summary of the evidence. We have considered the transcript and it is clear to this Court that the trial judge provided an extensive summary to the jury. Furthermore, he asked the jury whether there was anything else to which the foreman replied in the negative.

31. We have no hesitation in dismissing this ground of appeal.

Conclusion.

32. We consider that the appellant's trial was satisfactory in all the circumstances. Accordingly, the appeal against conviction is dismissed.