THE COURT OF APPEAL

Birmingham J
Sheehan J.
Edwards J.

85/13

The People at the Suit of the Director of Public Prosecutions
V
L.B.

Appellant

Judgment of the Court (ex tempore) delivered on the 11th day of February 2015 by Mr. Justice Birmingham

1. On the 23rd February, 2013, the accused was found guilty of 22 counts of sexual assault. It is in the case that the judge had directed the jury to return a verdict of not guilty in respect of one count and that the jury acquitted the appellant on one further count. On the 7th March, 2013, he was sentenced to what was described as an effective sentence of eight years I will refer in due course to the sentence in more detail.

2. A number of grounds of appeal have been advanced in both written submissions and in oral argument. The area of most focus has been on the failure to sever the indictment that in a situation where there were four complainants. It is the situation that an application was made at the outset of the trial to sever the indictment. Consideration of the question of joint trials of multiple offences or whether separate trials should be ordered begins with the Criminal Justice Act 1924 and in particular the rules that are set out in the schedule therein relating to the procedures for the indictments. Rule 3 provides that charges for any offence whether felonies or misdemeanours may be joined in the same indictment if these charges are found in the same facts or form a part of a series of offences of the same or similar character. Rules 6(3) provides; when before trial or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offence charged in indictment, the court may order a separate trial of any count or counts of such indictments.

3. The issue has arisen for consideration quite frequently in recent times in the cases of alleged sexual offences and more particularly has arisen in cases where what is involved is alleged offences committed against children. The argument today has focused on the inclusion of two complainants RM and DC where only one count is alleged to have been committed and that to have been committed at a time unspecified during a lengthy window period. The question is posed whether the case is one which if tried alone would have resulted in a conviction and indeed the question is posed whether if that case was to be considered in isolation that a prosecution would have been directed and would have proceeded.

4. Then so far as the complainant DL is concerned, there are two counts that are in issue. There is what has been referred to as the Bingo Hall count and there is also a count relating to inappropriate sexual activity which is alleged to have occurred on a couch in the same location as other offences are alleged to have occurred, but the couch not featuring in the other offences.

5. The authorities establish that there is a line to be drawn between two types of evidence, sometimes referred to as systems evidence and on the other side of the line similar fact evidence. Though it must be said immediately, that the language is not always used with precision and sometimes those two terms are used interchangeably. What is clear is that there is a line to be drawn and what is equally clear is that it is not always going to be easy to identify on which side of the line a particular case falls.

6. The case at hearing is one where the similarities of the accounts of the complainants are really striking both in terms of how the opportunity for abuse was set up, how the children were in effect groomed using the attraction of the computer and computer games and then the way in which the assaults were actually perpetrated, placing the child on the knee, fondling the genitals and so on.

7. The prosecutor summarised what each complainant had to say and that summary is quite instructive and bears repeating. In the case of DL her evidence was that the reason for visiting the home where the accused was, was to visit the mother of the accused who used to give them tea and cakes. She goes on to refer to the fact that they were invited to play computer games. She goes on give the fact that the door to room was closed by the accused. She refers to sitting on the accused's lap and the fact that her vagina was rubbed and she says underneath her underpants.

8. In the case of the complainant GD, she says that the point of contact as it were and the reason for visiting the house where the accused was, she refers to the invitation to play computer games, she refers to the door being closed by the accuse, she refers to sitting on his lap and she refers to her vagina being rubbed underneath her underpants.

9. In the case of RMcD, the reason for visiting the house where the accused was was to visit his parents, again she speaks of being invited to play computer games, again she mentions the door in the room, though that was not really probed to any great extent in her case and she refers to sitting on the appellant's lap. But she does say that her vagina was rubbed and in her case outside of her underpants.

10. In the case of CMcD the fourth complainant, the reason for visiting the house was to meet the accused mother and his parents, again she refers to the tea and cakes, which was a feature of the occasion and again refers to being invited to play computer games, again speaks of the door to the room being locked by the accused, again speaks of sitting on the appellant's lap and again speaks of attempts to rub her vagina, in her case under her under her underpants..

11. The court is not persuaded that the points in relation to RMcD or DL are good. In the case of RMcD, yes there is vagueness as to the date of the offence and as to the age that she was when it occurred, but her account of how it occurred mirrors closely that of her co-complainants. In the case of DL there is first of all the Bingo Hall issue. If the Bingo Hall stood alone, but it does not, there might be substance in the complaint. But the evidence was that matters have the same starting point and the same starting place as other complainants, indeed the identical starting point and identical complaints. In the case of the couch, the sexual activity is not of such a different character that it required to be severed.

12. In the courts view the trial judge approached this issue in a careful responsible manner. The court is not at all convinced that the exercise in subjecting the transcript to very close analysis supports the proposition that has been advanced, that he had applied the wrong test.

13. This was a case where it was clearly appropriate that there should be a joint trial. Failing to order a joint trial or failing to permit the evidence of the four complainants would have meant, to use the language of the case of DPP v. B.K, that the jury would not get a full picture. This was classically a case warranting a joint trial. Indeed if this was not a case for a joint trial it is hard to conceive of a case where such a trial would ever occur.

14. The next ground of appeal relates to a failure to discharge the jury. The circumstances in which this ground is advanced are these. An issue arose leading to an application to discharge the jury during the evidence of complainant DL. Ms. L said that when she went to the accused's mother, that three people whom she referred to as G, T and M would usually be with her and others. She stated that there would be three or four of them. She stated that she recalled CMcD being there, a cousin of the complainant GD. She then went on to say:-

> "Yes we would all go into the sitting room and he used the close the door behind us and there used to enough chairs just for the children and there used to be no seat for him and he used to make one of us sit at the back on top him on his lap and he used to put his hand down our pants."

15. Then the witness spoke in some general terms and in terms which are certainly open to the implication that the appellant was abusing all or certainly most of the children present and was doing so in rotation. Where she said:

> ". . . and then he would be rubbing it for a while, but then he would slowly like move into inside my pants and just rub it there for ages like, until you got your go on the computer and we would all switch like in a clockwise way."

16. Further on she said:

> "Like it would happen until like you would be asking for your go on the computer and he would either give to you straightaway or he would make you wait like, ten minute or up to half an hour on his lap and then would change for the next person. Once you got your go on the computer the next person would switch and would have to go on his lap then again."

17. There are a number of points to be noted. First of all these comments or observations were not led or adduced by the prosecution. If they are to be interpreted as establishing that the witness was of the view and this seems a reasonable interpretation that Mr. B had been abusing children other than the complainants, the question arises is what is the significance of this. DL believed and indeed from her perspective she knew that she had been abused. It must be that she believed that her co-complainants had also been abused. It would scarcely be surprising that she would believe that they were not the only ones. It is necessary to consider the fact that uninvited this complainant strayed outside the terms of her statement and what the significance of that is.

18. The prosecution case was that Mr. B had abused four children. Evidence of similar activity involving other children would not have had any significant effect. How would the jury view the accused? Well if it is the situation that DL was a credible witness, a witness who could be relied on, then these remarks added nothing to the case. If she was an incredible witness or a witness about whose credibility there was doubt then the fact that she was certainly on one view broadening the allegations added nothing. The trial judge was clearly correct to reject the application to discharge the jury.

The amendment to the indictment

19. The amendment in question was one that related to the date that the offences occurred and only to the date the offences occurred. The count, in respect of which the application was made, was count 24, which related to complainant GD. Her evidence at trial was that the abuse occurred during the time that she was eight years old and the indictment was amended to reflect this.

20. It is as I have already indicated the situation that the amendment related only to dates and thus falls quite clearly within the principles that have been established by cases such as *Dossi* an old English case going back to 1918 and the more recent case of *DPP v. Michael Anthony Walsh*. What those cases say and what is clearly established is that it has long been the law that a date specified in indictment has never been critical unless of course it relates to an essential element of the offence such as the fact of establishing that a person is under a particular age, for example if it is a question of sexual activity without consent or something of that nature. This was not a case where it was being suggested that there was a moment in time when the complainant and the accused would not or could not have been in contact with each other and that the amendment was in some way undercutting a defence that was being advanced. Nothing of this sort was an issue. In those circumstances the court is of the view that the amendment was a proper one.

21. Another ground then relates to the failure to provide, what was described as a warning relating to the evidence of children. It is the case that in the past, evidence given by children required cooperation but, that requirement has at the instigation of the Oireachtas ceased to be part of our law. The critical fact here is that those who gave evidence were not, at the time they gave evidence children. This was a question of adults giving evidence and that is sufficient to dispose of this point. Insofar as the concern might be that they were giving evidence about matters that had occurred well in the past and that there might be doubts about the accuracy of their recollection or their ability to deal with points of detail or anything of that nature, those were points that were required to be dealt with and were dealt with by way of a delay warning.

22. The position therefore is that the court is satisfied that none of the grounds that have been advanced are made out and the court will dismiss the appeal against conviction and will affirm the conviction. The court now turns to the question of sentence.

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23. The court has just dismissed the appeal against convictions and turns now to the question of the appeal against sentence. The sentence under appeal it will be recalled was an aggregate sentence or effective sentence of eight years imprisonment. The position is that the trial judge was called on to sentence in respect of 2 counts of sexual assault on CMcD, 1 count on RMcD, 17 counts on GD and 2 counts on DL. The trial judge approached this by setting out to structure his sentence and he did so, in the first instance in relation to counts 2 and 4, which related to DL imposing a sentence of two years imprisonment. The sentences in each case being concurrent. He then turned to count 5, which related to RMcD and in that case, he imposed a sentence of two years imprisonment but consecutive to the sentence that he had imposed to count 2. Count 6 and 7 related to CMcD and again the sentence was one of two years imprisonment and in this instance the sentences while concurrent to each other were consecutive to count 5. In count 8, which related to GD it was one more a sentence of two years and in this instance it was consecutive to the sentence that had been imposed on count 7.

24. In the Circuit Court the plea in mitigation focused on the fact that there had been cooperation with the gardaí throughout the investigation, that the appellant was the primary carer for his elderly parents and the fact that it was a matter obviously of considerable significance that there were no previous convictions, his involvement in the community, his work record, the fact that he had built an accountancy practice and he was set to lose that as a result of the inevitable incarceration and the fact that he was and continued to have the support of his family who would be there for him upon release. The matter of course that was not available to him by way of mitigation was that there had not been a plea of guilty, he had exercised his right to contest the trial and that was his right, but it did mean that what would otherwise have been a very valuable aspect of mitigation did not feature in the case.

25. From the point of view of the perspective of the injured parties, these are obviously serious offences. But from the perspective of society, these are very serious offences as well. The victims were very young. There was breach of trust and one has to have regard to the systematic nature of the offender and the fact that the children were subject to grooming.

26. The appeal against sentence today really focuses on two issues. The decision of the trial judge to make the sentences consecutive and we have sought to explain that what he did was he imposed a sentence of two years imprisonment in respect of each of the four complainants, but each complainant was consecutive to the other complainants making the total of eight years. Secondly it is said that the sentence that was arrived at, the aggregate sentence failed to have regard to the totality principle.

27. The court has commented on the seriousness of the offences and it is the view of the court that faced with offences of this seriousness involving four such young injured parties at the time of the offending that the trial judge was within his rights and it was a matter for his discretion as to whether the sentences should be consecutive and was within his rights to conclude that consecutive sentences were appropriate. So far as the question of totality is concerned, the court has to have regard to other sentences that have been imposed in similar cases and other cases that have been dealt with by this Court of Appeal in recent times. It seems to the court that by reference to other sentences, that the sentences imposed in this case were somewhat out of line and indeed out of line to such an extent that an error in principle is identified. The court therefore will proceed to set aside the sentences imposed in the Circuit Court and to substitute the sentences that it at this point in time now regards as appropriate. In doing so the court will maintain the structure of sentence identified by the sentencing judge. Therefore what the court will do is in respect of counts 2 and 4 in the indictment which relate to complainant DL and where a sentence of two years had been imposed by the trial judge, the court will substitute for that figure of two years a sentence of eighteen months imprisonment. In respect of count 5 which related to RMcD and where again the sentence of the trial judge was two years, the court will substitute a sentence of twelve months imprisonment, but as the trial judge did, the court will make that sentence consecutive to the sentence to be served in respect of counts 2 and 4. In respect of counts 6 and 7 where the trial judge had imposed consecutive sentences of two years imprisonment, that is to say consecutive to count 5, the court will substitute for that sentence of two year a sentence of eighteen months imprisonment. in the case of count 8 in the indictment which relates to GD, where the trial judge had identified two years as the appropriate sentence, the court conscious of the fact that the abusing of this victim was the most systematic and intense of all the abuse that occurred leaves in place the sentence of two years imprisonment. The effect of all of that is that the effective sentence of eight years imprisonment imposed by the trial judge is now reduced to six years imprisonment. The court will go further and will suspend the final twelve months of that sentence on condition that the accused seek an opportunity within the prison system to participate on the sex offenders programme and if necessary that he will seek a transfer to another prison for that purpose, that he will participate in that programme, that he will commit himself to that programme and that he will satisfactorily complete it. Subject to those conditions the final year of what is now in effect a six year sentence will be suspended on the accused entering into a bond to keep the peace and be of good behaviour during the balance of his time in custody and following his release from custody and of course the condition being that he participate on the sex offenders programme that the court has referred to. It is understood that the programme is entitled the "Better Lives Programme".