THE COURT OF APPEAL

NO REDACTION NEEDED

[239/19]

The President

McCarthy J

Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

A.C.

APPELLANT

JUDGMENT of the Court delivered on the 1st day of April 2021 by Birmingham P.

1. Following a trial in the Dublin Circuit Criminal Court in May 2019, the appellant was convicted by a jury of 20 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990. Subsequently, he was sentenced to an effective aggregate term of seven years imprisonment. He has appealed against both conviction and sentence. This judgment deals with the conviction appeal only.

2. The trial related to alleged offending between 1st September 1993 and 1st September 1996 in the victim's family home in the Ballymun area of Dublin. The complainant was a young boy of school-going age at the time of the alleged offending. The appellant is the brother of the partner of the complainant's father.

3. Some 20 grounds of appeal were formulated, but as counsel for the appellant made clear at the start of the appeal hearing, the grounds can really be condensed down to two central propositions: (i) that the complainant's evidence was so discredited that the trial judge ought to have granted a direction and instructed the jury to find the accused not guilty; and (ii) by reason of the delay that occurred before the matter came on for trial, that the then accused now appellant was denied access to identifiable islands of fact so that his trial was unfair, was not a trial in due course of law and should have seen the trial judge staying the proceedings. In summary, the appellant's position is that there should have been a directed verdict of not guilty in accordance with the second limb of R v. Galbraith [1981] 1 WLR 1039, or the trial judge should have stayed the proceedings, or

directed a verdict of not guilty in accordance with the principles set out in The People (DPP) v. P.O'C. [2006] 3 IR 238. To put the issues raised in context, it is necessary to refer to the factual background of the trial.

Background

4. The complainant was born in 1982, and would have been between 11 and 13 years of age during the period referred to in the indictment.

5. The sister of the appellant lived with her partner, who was the father of the complainant. Both suffered from alcoholism. As a result, the family home was a somewhat dysfunctional one. At the trial, the complainant gave evidence that the appellant came to stay at the family home, having been released on temporary release from prison where he had been serving a sentence. That the appellant had come to stay in the family home following his release was supported by two of the complainant's siblings: a brother and a sister.

6. The brother gave evidence that he remembered that after he moved out, his brother, the complainant, started sharing a bedroom. At trial, there was evidence from the complainant that he had attended a local national school and that he had been in a special class which had both boys and girls in it, which was not the norm, with a named teacher. The complainant's evidence was that at a particular stage, he shared a room with the appellant and that there were bunkbeds in it. He told the jury that when he was in the top bunk, the appellant would be in the bottom bunk and would put his hand into the complainant's pyjama bottoms. The complainant alleged that the accused would molest him, would masturbate him and would sexually assault him. The complainant said that because of this, he experienced difficulties sleeping and he remembered the teacher of the special class putting him to sleep in a corner on occasions. This issue of being put to sleep in class, or being allowed to sleep in class, is relevant to one of the so-called 'islands of fact'.

7. The complainant's evidence was that the sexual assaults, which had continued for some two years and occurred well over 20 times, came to an end when the appellant broke his leg and could no longer walk up the stairs.

8. The first person that the complainant spoke to about what had occurred was his sister. There was uncertainty at trial as to whether this was in 2003 or 2007, given that the complainant and his sister both had different recollections in that regard. While his sister was the first person he told, the complainant said that there was an occasion when, after an act of abuse, he went to the bedroom where his father was sleeping, but his father sent him away in a brusque manner. The complainant did not make the case that he ever told his father what had happened. Again, the question of contact between the complainant and his father is relevant to one of the issues identified as an island of fact.

9. The first complaint to Gardaí was made in 2016. The Garda investigation commenced and the appellant was interviewed under caution, at which stage he categorically denied the allegations which he categorised as lies.

10. The cross-examination of the complainant was both robust and forensic. As it was put during the course of the appeal hearing, the defence put some points on the board. As is usual, much of the cross-examination was directed towards establishing divergences between the account of events given in court and the account given to other individuals on previous occasions. In addition, the complainant committed to the proposition that he had no previous convictions. However, later in his evidence, he accepted that he did have a previous conviction for possession of a knife, though he indicated that the item he was in possession of was not, in fact, a knife, but a tin of CS gas. Later again, he accepted that he also had a conviction under the Misuse of Drugs Act 1977, though he maintained that the drug was cannabis and that the quantity very small. Following the close of the prosecution case, counsel on behalf of the then accused made what was, in effect, a hybrid Galbraith/P.O'C. application. While reference was made to inconsistencies in the prosecution evidence, the divergences identified included whether the abuse occurred in circumstances where the appellant made his way upstairs for this purpose, or whether the abuse occurred in circumstances where the appellant was occupying the lower of two bunkbeds. There was also an issue as to whether the bunkbeds were or were not mahogany.

11. In response, the prosecution placed particular emphasis on the case of DPP v. M [2015] IECA 65, referring to the judgment of Edwards J., which emphasised that it was for the jury to assess the evidence, even if it contained weaknesses or inconsistencies, and stated that a conviction would be set aside only if the evidence was so infirm that no jury would be able to convict upon it.

12. The trial judge dealt with this aspect as follows:

> "Regarding conflicts of evidence or issues of reliability of witnesses[,] these are matters which have been aired before the jury and are open to further ventilation and comment. It is my view that these are matters for the jury to weigh up and decide what weight to attach to the evidence of the complainant having had the opportunity to assess the credibility and reliability of the complainant and the other witnesses. The Court accepts that the credibility of the complainant is in issue but on the central allegation made[,] the surrounding facts have support from other witnesses. The nature of the actual allegation is that there is rarely a witness to the alleged event.
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> When considering Galbraith and the Court's duty in that regard[,] it appears to the Court that notwithstanding the issues of credibility pertaining to the complainant which have been aired before the jury[,] the evidence before the jury at this stage taking it at its height is such that a jury properly charged could properly convict the accused. The central allegation made by the accused as set out in the indictment has been supported by evidence given and has some supporting evidence regarding

surrounding issues. Matters such as inconsistency or vagueness are matters for the jury."

Discussion

13. This Court begins its consideration of this Galbraith aspect by observing that the trial judge who observed the witnesses give their evidence, and in particular, had an opportunity to observe the direct evidence and cross-examination of the complainant, is in a better position than the members of this Court to assess the state of the evidence as of the close of the prosecution case. An appellate court should pay considerable attention to, and afford considerable respect to, the views of a trial judge in that regard. In this case, we have read the testimony of the complainant, and while it is undoubtedly the case that the defence had some successes in the course of cross-examination, we are not of the view that this was a case that should have been withdrawn from the jury. On the contrary, in our view, to do so on the basis of inconsistencies or perceived unreliability would have seen the trial judge usurping the function of the jury.

14. We turn now to the P.O'C. aspect which, as we have indicated, was the main focus of attention in the trial court.

15. The appellant contended that he was being denied a trial in due course of law by reason of the passage of time between the alleged offending and the date of complaint and of trial. The appellant identified a number of so-called 'islands of fact' which cannot be tested. These were:

    (a) The alleged reaction of the father of the complainant telling him to F-off cannot be tested or verified as his father died in 2002.

    (b) The lack of sleep and, as a result, having a pillow in class to enable the complainant to sleep. His class teacher was unavailable.

    (c) The fact that the appellant was signing on at a Garda station which was disputed by the defence.

    (d) The date that the appellant sustained a leg injury.

The Father

16. This issue arose when the complainant said that on one particular occasion, he tried to wake his father and his father told him to F-off. One cannot lose sight of the fact that the evidence was that the father was an alcoholic – there was evidence of him going on 24-hour drinking sessions and there was reference to the fact that he could be heard snoring loudly through thin walls. We add to this evidence that the complainant was, at least for a period, afraid of the dark, and it is easy to imagine that an effort to wake the father might

have been unsuccessful, and that an unsuccessful attempt at being awakened would not have registered with the father. Again, it needs to be appreciated that it is not suggested by the complainant that he actually told his father what was happening.

The Teacher

17. Again, this has to be viewed in context. By any standards, the family home was a highly dysfunctional one and it would not be surprising had a child's sleep pattern been disrupted. It would not seem particularly unusual that a child whose sleep pattern was disrupted would be tired in school the following day, and it seems hard to see why this would register particularly with the teacher. Had contact been established with the teacher, and whether the teacher could or could not remember the child being sleepy in class, does not seem to advance matters significantly.

Signing On

18. The complainant's recollection is that following the appellant's release from prison on temporary release, he was required to sign on for a period. The appellant does not accept that was so, and at this remove, the book maintained at a Garda station for signing on purposes is not available. Again, the question of whether there was or was not a signing on requirement seems altogether peripheral. In passing, it might be noted that it emerged at the sentence hearing that the appellant had 385 previous convictions, though it is necessary to add that 302 of those were public order matters. Therefore, it would not be surprising if, at some stage in his career, he was required to sign on.

Records Relating to A Leg Injury

19. This issue arises in the context where the complainant's evidence was that the abuse, which he said happened over a period of the order of two years, came to an end when the accused suffered a leg injury which meant that he could not access the upstairs of the house. Medical records as to when the injury was sustained were not available. The appellant says that if it was the situation that records would have established that the leg injury was sustained very soon after his release from prison, then this would have meant that there was no window of opportunity for abuse to occur. This argument is put in very speculative terms. It is not actually suggested that the leg injury occurred immediately after, or very soon after, the appellant's release from prison, but the suggestion is put forward on the basis that it is possible, and if that was the situation, it would be significant.

Conclusion

20. Overall, it seems to the members of this Court that the matters pointed to as islands of fact do not have, either individually or collectively, the significance contended for by the defence. We do not believe that it has been established that the absence of evidence on the topics identified has deprived the appellant of a realistic opportunity of an obviously useful line of defence. In the circumstances, we are quite satisfied that the judge was entitled to reject the P.O'C. application.

21. In summary, we have not been persuaded that the trial judge should have acceded to either the Galbraith limb or the P.O'C. limb of the application. We have not been persuaded that the appellant was denied a trial in due course of law, or that the trial was unfair or the verdict unsafe.

22. Accordingly, we dismiss the appeal.