THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 160

Record Number: 111/19

Birmingham P.
McCarthy J.
Kennedy J.

APPROVED

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

J. MCG

APPELLANT

JUDGMENT of the Court delivered on the 18th day of June 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. On the 22nd March 2019, the appellant was found guilty of 11 counts of indecent assault contrary to Common Law as provided for by section 62 of the Offences Against the Person Act 1861 and 7 counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 in respect of four complainants. On the 10th May 2019, the appellant received a sentence of 13 years' imprisonment with the final 12 months suspended.

Background

2. By way of background, the offences took place between 1984 and 1993. Three of the four complainants are siblings and the fourth complainant, AD, was a childhood friend of GB and PB. The appellant was a second cousin of the mother of the siblings and was

regarded as a family friend. At the time of the offending the appellant was employed in fruit and vegetable distribution and the complainants worked for him at various stages in some capacity.

3. The appellant was found guilty of ten counts of indecent assault in respect of PB, related to events which took place during 1985 and 1989 when PB was between 14 and 18 years of age. PB described a particular occasion on which he was babysitting in the appellant's sister house and the appellant gave him a glass of Coke laced with alcohol before proceeding to assault him in the bathroom. The assaults also took place at the appellant's home in Dublin and at a caravan park in Wexford. The assaults comprised of acts of masturbation, anal penetration and oral sex.

4. The appellant was found guilty of six counts of sexual assault in respect of GB, who is the younger brother of PB, between 1990 and 1993. The assaults took place at two locations in Dublin where the appellant was living at the times involved. The assaults often involved the presence of alcohol and comprised of acts of masturbation in the appellant's bedroom where the appellant would get into bed with GB and masturbate the complainant before proceeding to masturbate himself.

5. The appellant was found guilty of one count of indecent assault in respect of AD, between 1984 and 1986 when he was between 13 and 14 years of age. The complainant gave evidence that he was working for the appellant at the time and went on a trip to the caravan park in Wexford with PB and another individual. AD went to the campsite bar and had several drinks before returning to the caravan in a state of intoxication. He got into bed and the appellant was in bed beside him and began to touch his genitals, AD pushed his hands away, but he continued to touch his genitals inside his underwear and gyrate against AD's back.

6. The appellant was found guilty of one count of sexual assault in respect of KN, between 1991 and 1993 when she was between 22 and 23 years of age. KN is the older sister of GB and PB. At the time, KN was working for the appellant in a clerical role. The appellant and KN attended a shop opening together and KN consumed alcohol which led to the appellant offering her a lift home and he proceeded to bring her to his house on the basis that he didn't want her mother to see her in that state. KN gave evidence that she went to sleep in a bedroom in the appellant's house and awoke to the appellant spooning her from behind. She could feel the appellant's penis against her, and he attempted to pull her underwear to one side so that he could insert his penis into her vagina. The appellant also attempted to unclip her bra. Despite her protestations, the appellant kept trying to open her legs and insert himself inside her until eventually he rolled off and went to sleep.

7. PB gave evidence that he made statements to Gardaí in this matter on 4th of August 2016, having previously spoken to members of his family including KN and GB on the preceding day and at a family wedding the week before. GB also made a statement to the Gardaí on 4th August 2016 and KN made a statement on 17th August 2016. AD was contacted by Gardaí on 14th August 2016 for the purposes of investigating the complaints made by PB and he indicated that he wished to make a complaint in respect of the appellant and did so on 17th August 2016.

Grounds of appeal

8. The appellant puts forwards eight grounds of appeal:-

(1) That the trial judge erred in refusing the application to sever the indictment and in allowing system evidence to be adduced in relation to all complainants.

(2) That the trial judge erred in refusing an application for a direction on all counts on the basis of delay and that the concern was evidenced by the particular verdicts returned by the jury.

(3) That the trial judge erred in failing to adequately emphasise the effects of delay on the evidence to be considered by the jury.

(4) That the trial judge erred in raising the issue of sample counts in her charge to the jury when the trial had been prosecuted on the basis of specific counts.

(5) That the trial judge erred in charging the jury that the system evidence relied on by the prosecution was capable of being corroborative of each complainant's account.

(6) That the verdict returned by the jury in relation to count number 25 was repugnant to the evidence available to the jury to consider.

(7) That the trial judge erred in refusing an application to discharge the jury and in allowing the jury to consider system evidence with regards to the first complainant in counts number 16, 18, 19 and 20, which related to the Wexford location, in circumstances where verdicts of not guilty were directed by the trial judge in relation to all counts relating to that location and the second complainant, those counts being counts 38-47.

(8) That the trial judge erred in refusing the application to discharge the jury by the defence on the basis that the defendant was prejudiced by the compounding of the following issues:

(i) The refusal to sever the indictment, and

(ii) That the jury had heard a significant amount of evidence which related to counts that would no longer be considered by them as the trial judge had directed verdicts of not guilty, and

(iii) That the majority of the remainder of counts to be considered by the jury were amended to allow the issue of whether the complainants were under 15 years or over 15 years to be considered by the jury.

9. The submissions filed on behalf of the appellant address grounds (iii), (iv) and (v) together and grounds (vii) and (viii) together. Considerable emphasis was placed on ground (i) in oral submission, whilst Mr Greene SC for the appellant indicated that he was not advancing any particular criticism of the delay warning which is the subject of ground (iii), but that there was a concern for the overall safety of the conviction.

Ground 1- Failure to sever indictment

(1) That the Trial Judge erred in refusing the application to sever the indictment and in allowing system evidence to be adduced in relation to all complainants.

10. An application was made to sever the indictment and allow the appellant to be tried separately in respect of each of the complainants. Counsel for the appellant argued before the trial judge that while there were certain apparent similarities between the counts relating to each complainant, this commonality was not sufficient to amount to system evidence and furthermore, was not sufficient to outweigh the prejudice present as a result of the multiplicity of counts, the possibility of cross-contamination and the issue of delay.

11. In refusing the application to sever the indictment the trial judge noted the following:-

> "Matters which the Court notes are one, the similarity of the ages of the boys at the time of the alleged offending, 13 and 14. And secondly, the locations of the alleged abuse, in addition to all the other matters that I've already referred to. While there is obvious difference between the case of [GB and PB] and that of KN in terms of her gender and the alleged nature of the sexual assault, the issues of similarity would appear to outweigh them in terms of one, the position of employer/employee, two, the family friendship with the accused, three, the use of alcohol in the context of alleged subsequent offending, four, the alleged abuse occurred in the accused's family home along with that of the two boys as alleged by Ms KN and her two brothers. Further,

there is also a similarity in time of alleged offending between Ms KN which was January '93 to October '93, and GB which is allegedly January '91 to September '93.

The dissimilarities are, therefore, in my view not sufficient to bring it outside the alleged system of offending or would justify the indictment being severed. Therefore, while the facts are not identical, the case law has held they need not be so. In all the circumstances, I am satisfied that there is contained in the allegations sufficient evidence of a system of evidence in this case which permits the complaints to be heard together in the context of the allegations made which are such at this time."

12. The appellant submits that in a multi-complainant case there comes a point where the sheer weight and number of allegations causes the force and probative value of allegations given to fall away and be replaced by a wholly prejudicial state of affairs. Moreover, that the prejudice was compounded by delay and the familial connection between three of the complainants.

13. The respondent says that the trial judge was correct in her ruling and, as conceded by the appellant, there was a clear commonality of features between the complaints.

14. The respondent refers to *The People (DPP) v. D. McG* [2017] IECA 98, where the Court of Appeal cited the following extract with approval when dealing with an appeal regarding the trial judge's refusal to sever the indictment: -

'In his textbook Sexual Offences (2nd Edition), Prof. O'Malley noted the following:

"The one recurring term 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 be seen that justice has not been done, or unless compelled to do so by some overwhelming fact." (ref. R v. Flack [1969] 1 WLR 937)"'

15. The respondent submits that the decision was made by the trial judge in the exercise of her lawful discretion and it is submitted that there is no indication that justice has not been done and there is no overwhelming fact, such that the decision should be overruled. Further, the jury were directed appropriately regarding the issue of possible collusion in order to ensure they were satisfied there was no such collusion between the complainants.

The Application for Severance

16. The 49 counts on the indictment concerned offences of indecent assault/sexual assault and related to four complainants. Mr Greene SC, on behalf of the appellant, moved an application to sever the indictment and permit the appellant to be tried separately in respect of each of the complainants.

17. In moving the application, Mr Greene outlined the background to the case with reference to the content of the book of evidence. The appellant was involved in a wholesale green grocery business and each of the complainants were connected to him through employment in that particular business.

18. Firstly, insofar as PB is concerned, he contended that the appellant sexually abused him in a variety of locations when he was aged between 14 – 18 years of age. The nature of the sexual activity involved was that of masturbation, oral and anal penetration. The use of alcohol was a feature of the abuse.

19. GB is PB's brother and he contended that the appellant had sexually assaulted him when he was aged between 14 – 16 at various locations and that the acts were those of masturbation. Alcohol was a feature.

20. AD was a friend of PB and contended that he was abused in a caravan park in Wexford where he was present with PB. He was aged 13 or 14 years of age and the abuse involve the touching of his genitals. Alcohol is a feature.

21. Finally, KN is a sister of PB and GB. Her allegation concerned an incident of sexual assault which involved attempted the journal penetration when she was 22 or 23 years of age. Alcohol also featured.

22. Mr Greene relied upon the decision of *The People (DPP) v. BK* [2000] 2 I.R. 199, and referred, *inter alia,* to the following: –

> While there may be cases where the trial judge may be able to charge a jury so that an accused is not unfairly prejudiced where evidence admissible on one count is inadmissible on another, in most cases the real test whether several counts should be heard together is whether the evidence in respect of each of several counts to be heard together, would be admissible on each of the other counts.
>
> For such evidence to be so admissible, it would be necessary for the probative value of such evidence to outweigh its prejudicial effect. In practice, this test is applied where there is a similarity between the facts relating to the several counts."

23. Mr Greene argued at trial that there was no coincidence in terms of time between the allegations made by PB and GB and that the allegation made by KN was of an entirely different character, being that made by an adult woman in a work environment and in the context of the situation of a social event. Moreover, it was said that there was a single allegation made by AD, rather than a series of allegations.

24. It was said that where there are a number of complainants that the number of allegations may give rise in itself to a wholly prejudicial state of affairs.

25. In his initial application for severance, Mr Greene touched on the possibility of cross-contamination.

26. Mr Greene acknowledged that there were features of commonality regarding the allegations but contended that there existed a very obvious prejudice in circumstances

involving a multiplicity of counts at a remove of time and in circumstances where the modus operandi involved was not in reality indicative of system.

27. The application was refused by the trial judge who noted, *inter alia*, the connection between the three family members, the age of the boys at the time, the nature of the allegations, the employment connection and the use of alcohol. She acknowledged the obvious difference between the allegation of KN and that of the males, given the obvious gender difference but was satisfied that there was sufficient nexus between the allegations.

28. In written and oral submissions before this Court, the arguments advanced were similar in terms.

The Law

29. In the well-known decision on this topic, Barron J. in *The People (DPP) v. BK* [2000] 2 I.R. 199 conducted an extensive review of the Irish cases and the jurisprudence from other common law jurisdictions and summarised the principles:-

> "A number of principles emerge from these cases.
>
> (1) The rules of evidence should not be allowed to offend common-sense.
>
> (2) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.
>
> (3) The categories of cases in which the evidence which can be so admitted, is not closed.
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> (4) Such evidence is admitted in two main types of cases: -
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> (a) to establish that the same person committed each offence because of the particular feature common to each; or
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> (b) where the charges are against one person only, to establish that offences were committed.
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> In the latter case the evidence is admissible because: -

(a) there is the inherent improbability of several persons making up exactly similar stories;

(b) it shows a practice which would rebut accident, innocent explanation or denial."

30. In his textbook *Sexual Offences* (2nd Edition), Prof. O'Malley noted the following:-

"The one recurring term 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 be seen that justice has not been done, or unless compelled to do so by some overwhelming fact.' (ref. R v. Flack [1969] 1 WLR 937)"

Discussion

31. In the present case there are indeed similarities in the allegations made against the appellant by the four complainants. It is correct to say that there are aspects to the allegations which are not precisely similar, but there is, in our view, a sufficient nexus between the allegations to render the evidence of each complainant cross-admissible.

32. We consider the fact that the abuse occurred in the situation where the appellant provided employment to each of the four complainants a significant feature common to all. This was not a situation of the abuse of persons on a random basis. The complainants were only accessible to the appellant by virtue of the fact that he was in a position of dominance in that each of the complainants were employed by him. It is without doubt that the allegations made by the three males had significant features common to all.

33. Firstly, and obviously, the three complainants were male, secondly, they were teenagers and thirdly, the nature of the abuse was similar in all instances.

34. Certainly, in the case of KN, there were dissimilarities. Those dissimilarities included that KN was older than the other three complainants, and of course, KN is female. The latter

explains the dissimilarity in the nature of the sexual assault. However, there were many features which were common in the instance of the three males and KN.

35. KN was also employed by the appellant and, significantly, was dependent upon him for her livelihood, where she was finding it difficult to obtain employment and had recently lost other employment. This placed her in the same category as the three teenage boys in that each of them was dependent upon the appellant. The abuse of KN did not come about on a random basis but came about due to the fact that she was known to the appellant through her employment by him. This is precisely the same in the instance of the teenage boys.

36. Furthermore, it appears that the appellant was an "uncle" type figure in the B family. A further feature of commonality is that the abuse in each instance took place in the context of the use of alcohol leading to a situation enabling the appellant to abuse each of the complainants.

37. Reliance is placed on the fact that there were multiple complainants and consequently multiple allegations. In those circumstances, as stated above, it is contended that the probative value of the evidence of each complainant falls away and is replaced by a wholly prejudicial state of affairs.

38. We are not at all persuaded by this line of argument. The probative force of the evidence in each case is one of degree and one to be determined at the discretion of the trial judge. The evidence in any given case, of a multiplicity of complainants may be admissible where there is an inherent improbability of several complainants fabricating similar allegations.

Conclusion

39. We are not persuaded that the trial judge fell into error in refusing to sever the indictment. There were many features common to all four complainants. In the instance of

the siblings, there was the close family connection and the fact that the appellant was viewed as an "uncle" type figure in the family situation. Not only was there this familial connection, but also in the instance of the siblings and AD, there was the element of economic control as the appellant employed all four complainants at various times. Access to the complainants was therefore not random but came about as a result of the employment situation.

40. Whatever dissimilarities there may have been in the allegations, those are not readily apparent in the context of the three teenage boys but are certainly more discernible in the case of KN.

41. We do not consider the gender difference to be decisive. That in and of itself of course gives rise to a distinction in terms of the nature of the abuse but again we do not consider this to be material. Perhaps the greatest dissimilarity could be said to arise in terms of age as KN was certainly older than the three teenage boys. But the counterbalance to this stems from the fact that in each and every instance, each complainant was not selected at random by the appellant but access was gained and control exerted over each complainant by virtue of the employer/employee situation. Thus, there was an economic "hold" over each complainant.

42. The use of alcohol to engineer a situation enabling the appellant to overcome resistance on the part of each complainant is a significant feature common to all.

43. Whilst it is correct to say that there were some dissimilarities in the allegations made by the complainants; those were not at all significant in the case of the three males. The only differences in those allegations concerned the fact that AD was not related to the appellant and that there was one instance of abuse.

44. There were certainly disparities in the context of the allegation made by KN and the teenage boys, but there were many features common to all complainants.

45. We consider the fact that the appellant employed each of the complainants to be an important common feature. There was, as a consequence, an aspect of economic control and dominion. These incidents of sexual abuse came about as a result of that very specific circumstance. These were not random individuals.

46. Moreover, alcohol featured in all the allegations and is also a significant element of commonality; the use of alcohol led to intoxication giving rise to the incidents of abuse. We are satisfied that the refusal to sever the indictment was properly made within the discretion of the trial judge.

47. Accordingly, Ground 1 is dismissed.

Ground 2- Delay

(2) That the Trial Judge erred in refusing an application for a direction on all counts on the basis of delay and that the concern was evidenced by the particular verdicts returned by the Jury.

48. An application for direction was made by counsel for the appellant during the trial and the appellant referred to the death of a number of potential witnesses who, it was argued, would have relevant information pertaining to the counts in question. In refusing the application the trial judge reiterated that she would give a delay warning to the jury and stated as follows:-

> "I have considered the submissions and the delay and the case law and the actual circumstances surrounding the allegations made and the witnesses missing. In that context, I note that there is available to the defence a witness who can also give evidence regarding the rules in Mr McG's parental home which will aid him regarding the allegations which occurred in his family home, to a certain extent. I appreciate the submission and the reference to case law that speaks of the importance of a witness such as a parent where there is an allegation of abuse occurring in a family home.

However, it is not possible to say that they would have had specific knowledge of the event itself or the night in question as alleged before this Court. This also applies to the accused's brother who has suffered a brain injury in recent times. There were three brothers who slept in a room, I'm told, in the room in question, so regarding the issue of the layout of the room or the rules regarding others staying over, this can be obtained from the other brother or, indeed, the sister who I believe is in a position to give evidence in relation to this matter. There has been no evidence or no one has suggested that the missing witnesses were present on the particular night in question or could give specific evidence in relation to the specific issue in question. Similarly, in relation to Ms L, the evidence is that there were many people present on the nights in Wexford and some of those who were present in the caravan or the van itself have been present and given evidence in court.

Regarding FG, the evidence he had to give has been placed before the jury via the prosecuting garda which there is no doubt, is helpful to the accused. I am satisfied that the gardaí made reasonable efforts to locate, I think, Mr PD was the gentleman in question, but to no avail. I am satisfied that his nor the other's absence has not met the required threshold that specific prejudice can be demonstrated by virtue of their absence, as a result of which the accused would suffer from an unfair trial."

49. The appellant submits that the issue of delay was a live issue during the trial. In this regard the appellant points to the verdicts of not guilty returned by the jury in respect of two counts concerning PB where a witness was available to give evidence when the appellant moved out of the family home and into his own accommodation, which was at least 1-2 years after the date of the allegation, and the defence was in a position to call evidence from two sisters of the appellant to give evidence that no one ever stayed over when their parents were still alive as they were traditional and there simply was no room.

50. The respondent submits that the appellant has failed to meet the test in *SH v. DPP* [2006] 3 IR 575, as he has not established prejudice sufficient to give rise to a concern that such delay created a real risk of an unfair trial. The respondent submits that the trial judge carefully considered the potential effect of such delay as had occurred and concluded that it could be adequately addressed by means of a detailed delay warning.

51. In relation to the missing witnesses, the respondent submits that these witnesses were peripheral to the issues to be decided by the jury and the respondent refers to *Ó'C. v. Director of Public Prosecutions & Ors* [2014] IEHC 65, where O'Malley J. stated that it was not permissible to speculate on the evidence that any witness might have given and that it was necessary to establish a real prospect that any missing witness, or evidence, might have been of assistance to an accused

52. In respect of the acquittal of the appellant on counts 9 and 14, it is submitted by the respondent that the acquittal does not demonstrate any prejudice caused by delay. It demonstrates the careful consideration the jury gave to each count, where they acquitted on some counts and convicted on others.

Discussion

53. In summary, the argument is advanced that due to the passage of time the appellant was prejudiced in his defence. It was contended, *inter alia*, that the absence of a number of witnesses required the judge to stop the trial. Specifically, insofar as PB was concerned and the allegations in the family home, the inability to call the appellant's brother as a witness due to a brain injury, and the fact that Mr McG's parents had passed away.

54. Insofar as the caravan park is concerned, the appellant says that an individual with whom he socialised there was unavailable. KN's then boyfriend, it appears, was also unavailable.

55. O'Malley J. in *Ó'C. v. Director of Public Prosecutions & Ors* [2014] IEHC 65, stated that it is necessary to establish a real prospect that any missing witness might have been of assistance to an accused. It is not permissible to speculate on the evidence that any witness might have given. She said:-

> "The question is, I consider, whether there is a real possibility that the missing material would reveal immaterial inconsistency which would be of benefit to the applicant."

56. In *The People (DPP) v. CC* [2019] IESC 94, the Supreme Court considered the appropriate approach to be adopted by the trial judge on foot of an application to stop a trial where the inherent jurisdiction of the court is invoked. This involves an assessment by the trial judge whether the trial is fair and just given the passage of time and whether as a consequence the accused has been deprived of a realistic opportunity of an obviously useful line of defence. Clarke C.J. said.:-

> "In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations. First, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.
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> 9.3.If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she

will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.

9.4.In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.

9.5.Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity."

Conclusion – Ground 2

57. It is readily apparent that the trial judge in the present case engaged with the evidence in the trial and also considered the materiality of the potential evidence of the missing witnesses.

58. The trial judge considered the materiality of the missing witnesses, the availability of other witnesses and concluded, properly in our view, that there was no risk of an unfair trial which could not be avoided by directions of the trial judge.

59. Accordingly this ground fails.

Grounds 3, 4 & 5- Judge's charge

(3) That the Trial Judge erred in failing to adequately emphasise the effects of delay on the evidence to be considered by the jury.

(4) That the Trial Judge erred in raising the issue of sample counts in her charge to the jury when the trial had been prosecuted on the basis of specific counts.

(5) That the Trial Judge erred in charging the jury that the system evidence relied on by the prosecution was capable of being corroborative of each complainant's account.

60. These grounds are concerned with the judge's charge. Ground 3 was not pressed in oral submissions, rather Mr Greene emphasised his concern with the overall safety of the conviction. Ground 4 concerns references to sample counts and ground 5 relates to references to system evidence as capable of being corroborative.

61. In written submissions the appellant focuses substantially on ground 4 relating to the trial judge's reference to sample counts.

62. During the course of her charge, the trial judge referred to certain of the counts as sample counts. This was raised by counsel during the lunchbreak and the issue of whether the counts were sample or specific was canvassed before the trial judge. It was conceded by counsel for the respondent that all of the counts would be referred to as specific counts and the trial judge went on to address the jury and state that the counts were to be regarded as specific counts.

63. The appellant submits that the reference to sample counts being raised for the first time during the judge's charge raises problems in how the jury were to consider the evidence of

the complainants and GB in particular. Mr Greene indicated that he had significant concerns in respect of the fairness of the trial and applied to the judge on several bases to discharge the jury. This application was refused.

64. In oral submissions, Mr Greene emphasised the concern that there was confusion as to how this issue was to be addressed by the trial judge. He says that ultimately counsel for the respondent indicated that:-

> "I'm quite happy to accept the count in respect of [GB] can be described to the jury as not being a sample count, Judge."

65. The judge ultimately addressed the jury on the issue of sample/specific counts in the following terms:-

> "And members of the jury, when you rose to go to lunch, counsel took the opportunity to engage with me with regard to my description of the charges where I distinguished between them being sample and specific. So, can you now write this down so that you're all very much aware of the fact that I accept what counsel have told me, which is that they're all specific charges. No distinguishing feature, all specific charges, okay. Right, so I'm just now going to continue where I left off."

66. Mr Greene says that while the judge attempted to address the problem, her remarks did not ameliorate the difficulty.

67. The respondent submits that there was no confusion on the part of the jury that the counts were all specific rather than sample counts. Indeed, there were no questions from the jury on this issue during their deliberations. Further, it is submitted that the appellant has not identified any prejudice or confusion as a consequence.

Discussion

68. Insofar as ground 5 is concerned, it is said that the trial judge erred in charging the jury that the system evidence was capable of corroborating each of the complainant's accounts. Mr Greene, in oral hearing accepted that the issue of whether such evidence may in law be capable of amounting to corroboration is a matter for discussion at the conclusion of the evidence. Such evidence may be cross admissible in terms of the dicta in *The People (DPP) v. BK* [2000] 2 I.R. 199 in order to demonstrate system or to rebut accident, innocent explanation or denial or may have a corroborative effect.

69. As stated by Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76:-

> "Accordingly, it seems that evidence of multiple accusers may be admissible or "cross-admissible" on ordinary principles in order to show system or rebut accident. It may, if the accusations are accepted as being independent of each other, also have a corroborative effect. Such evidence may in certain cases exhibit both of those characteristics, quite separately. It is very important that the law of evidence should be realistic according to the ordinary instincts of mankind. This aspect is very well put by Budd J. in *B. v. D.P.P.* [1997] 3 IR 140 at p. 157/8 where he said;
>
> "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",
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> 27.In our view, this statement of Mr. Justice Budd is sound law and sound common sense, which we would disregard at our peril. The learned judge was not, of course, ignorant of the risks of collusion or contamination because he also said:- "Whether the accounts of each of several complainants are corroborative and also the

risk of collusion, as or by conspiracy or where one witness has been unconsciously influence by another, may well be relevant factors at the trial".

28.At a trial, of course, it is for the trial judge to determine, and instruct the jury, whether particular evidence is capable of being corroborative. It is then for the jury, having been so instructed, to decide, as a matter of fact, whether the evidence is actually corroborative in the circumstances of the particular case. This latter decision will naturally involve various factual issues including, in an appropriate case, the question of conspiracy or contamination."

Conclusion – Grounds 3, 4 and 5

70. In oral submission on behalf of the appellant, Mr Greene does not seek to criticise the terms of the delay warning given by the trial judge but says that there must be a concern for the safety of the conviction. Insofar as the description of the counts as sample counts rather than specific counts, we are entirely satisfied that this did not impact in any manner, so as to render the trial unfair to the appellant. In our view, it has not been possible for the appellant to identify any issue of real prejudice caused by this reference. Moreover, in her charge to the jury, the judge made it crystal clear that the counts were to be considered as specific counts.

71. On a reading of the judge's charge, it is apparent that she treated the issue of cross-corroboration with exceptional care. She repeatedly cautioned the jury on issues of collusion and contamination between witnesses, she advised them at some length on the appropriate approach to system evidence and with her directions, we find no fault.

72. It is well settled that a jury will only be discharged as a last resort. This was not one of those cases in our view.

73. We are not persuaded that the cumulative issues raised in grounds 3, 4 and 5 give rise to a concern as to the overall safety of the convictions and accordingly, these grounds fail.

Ground 6- Count 25

(6) That the verdict returned by the jury in relation to count number 25 was repugnant to the evidence available to the jury to consider.

74. Count 25 on the indictment was initially preferred as follows:-

" JMcG , on a date unknown between the 18th day of January 1991 and the 30th day of September 1993 both dates inclusive, at [ ], sexually assaulted GB...."

75. During direct examination, GB gave his date of birth, and referred to being brought to a pub in Dublin by the appellant to watch football. On the first occasion, he recalled watching a qualifying football match.

"I remember there was two games on. England were playing Poland, from what I remember, and then the second game, the Republic of Ireland were playing, but I can't remember, I'm not sure who they were playing at the time.''

76. He said that he thought the incident was "close to summertime.", and stated he was drinking pints of Heineken and that he was aged "13, 14."

77. Count 25 on the indictment, as initially preferred related to date when the complainant was aged between 14 and 16 years old. The trial judge amended the indictment to reflect the complainant's evidence that he was aged 13 or 14 years at the relevant time. The amended count referred to a period between the 18th day of January 1991 and the 14th November 1991.

78. On the application to direct the jury to find the appellant not guilty of the counts on the indictment, it was said that the respondent had failed to address the issue of consent with either PB or GB. The significance being that the counts on the indictment, it is said, straddled the age line between 14 and 15 years of age. Therefore, it was contended that count 25 was preferred without reference to s. 14 of the Criminal Law (Amendment) Act 1935 which

provides that consent shall not be a defence to an offence of this nature, where the child is under 15 years.

79. The appellant submits that the trial judge in attempting to reflect the evidence as fairly as possible, made it impossible for the jury to consider the possibility of the football matches having occurred on a date other than the 13th November 1991 when there was evidence that the match described by GB could have occurred on the 13th November 1991, May 1993 or September 1993.

80. It is said that this gave rise to yet another shifting of the goalposts in the trial. The trial judge, it is argued, removed an island of fact from the jury's consideration and consequently, impinged upon the appellant's potential to defend himself.

81. The respondent submits that the jury heard the evidence of GB and clearly accepted that he was sexually assaulted when he was 14 years of age after an evening in a pub watching football. During his evidence, the witness was clear that he was not 100 percent sure of who was playing on the night in question and that he thought the football match occurred during the summertime, but he was not sure.

82. It is submitted that the appellant is arguing that the decision on this count was perverse and in *The People (DPP) v. Alchimionek* [2019] IECA 49, it was confirmed that the jurisdiction to quash a jury verdict on appeal on the grounds that it is perverse is a truly exceptional jurisdiction.

Discussion

83. Following submissions, the trial judge reviewed the evidence, and said:-

> "Therefore, to allow for the indictment to closely resemble the evidence that I have before me, count 25 will be a specific count, and it will be amended to end on the 14th of November 1991. I am amending the indictment on this charge because there is evidence to support the charge."

84. No issue is taken with the power to amend the indictment to properly reflect the evidence, rather it is said that to do so, removed from the jury's consideration an important element, that being the reliability of the date of the first allegation by reference to the three possible dates of the football match and the complainant's evidence that he thought the incident occurred on an evening around summertime.

85. Section 6(1) of the Criminal Justice (Administration) Act, 1924 provides:-

> "Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice..."

86. Therefore, there is a broad power to amend an indictment and such amendment may be made at any stage of a trial so long as the amendment does not cause any injustice to the accused person.

Conclusion – Ground 6

87. In the present case, the defence was not one of consent, the appellant contended that the incidents of sexual assault as alleged simply did not occur.

88. There is no doubt but that the judge was entitled to amend the indictment in terms of s. 6 of the 1924 Act and was entitled to do so at the conclusion of the evidence. The question is whether this amendment, in removing the latter two dates of the football match, caused an injustice, so that the judge ought not to have made the amendment.

89. We are not persuaded that the amendment caused an injustice to the appellant. Whether such an injustice will be caused by an amendment is something which a trial judge must consider with great care. Obviously, the timing of an amendment is important, as the earlier an amendment is made, the less the likelihood of an injustice. Having said that, an

amendment to an indictment may be made at any stage of a trial, the essential consideration being that of justice.

90. It is important to note the evidence given by the witness; he said that the first event took place when he was aged 13 or 14 years old. Given his date of birth, the trial judge, in our view was correct to place an end date on count 25 to reflect the period before he turned 15 years old. To do otherwise, was to fail to properly reflect the evidence. This amendment did not remove from the jury's consideration that the witness contended the relevant football match took place on three possible dates, which of course left open the possibility that the witness was incorrect in his evidence that he was under the age of 15 at the relevant time.

91. The amendment of the indictment did not in fact remove the evidence regarding the possible dates of the match from the jury's consideration. We can see no error in the trial judge amending the indictment and accordingly this ground fails.

Grounds 7 & 8-Failure to accede to application to discharge the jury

(7) That the Trial Judge erred in refusing an application to discharge the jury and in allowing the jury to consider system evidence with regards to the first complainant in counts number 16, 18, 19 and 20, which related to the Wexford location, in circumstances where verdicts of not guilty were directed by the Trial Judge in relation to all counts relating to that location and the second complainant, those counts being counts 38-47.

(8) That the Trial Judge erred in refusing the application to discharge the jury by the Defence on the basis that the Defendant was prejudiced by the compounding of the following issues:

(i) The refusal to sever the indictment, and

(ii) That the jury had heard a significant amount of evidence which related to counts that would no longer be considered by them as the Trial Judge had directed verdicts of not guilty, and

(iii) That the majority of the remainder of counts to be considered by the jury were amended to allow the issue of whether the complainants were under 15 years or over 15 years to be considered by the jury.

92. At a point in the trial, the trial judge directed verdicts of not guilty on certain counts, including several counts relating to GB and assaults concerning a location in Wexford. A number of counts relating to PB and assaults which took place in Wexford remained before the jury. Counsel for the appellant took issue with this and raised the concern that when considering cross-corroboration, the jury would look to the Wexford charges in relation to GB, even though the jury had been directed to enter a verdict of not guilty on those counts. The trial judge then made it clear that she would direct the jury that they could not have regard to those Wexford charges when dealing with the issue of corroboration.

93. Following a lunch break, counsel for the appellant then made an application to discharge the jury on the basis of the prejudice purportedly caused by the Wexford charges.

94. The trial judge refused this application and reiterated that she would address the jury. She went on to do so in the following manner:-

> "Members of the jury, I'm going to ask you for your attention also in relation to this matter for fear that there be any misunderstanding in relation to it. You are aware that there have been a number of counts on the indictment which I have directed the accused not guilty on. The accused is innocent regarding those charges. Therefore, it is not open to you to use the charges on which the accused was directed not guilty, the charges of which he is innocent, in any manner whatever that would prove averse to the accused, for example, when considering the allegations left before you. So, you

are to remove those counts from your minds, other than to keep to the forefront of your mind that the accused is innocent of those charges and therefore they cannot provide support for any charge left on the indictment."

95. The appellant submits that the concerns outlined by defence counsel at the beginning of the trial during the application to sever the indictment, of the serious potential for unfairness, had crystallised in the latter stages of the trial. It is submitted that the prejudicial effect on the appellant of the compounding of issues clearly outweighed the tendency or presumption of continuing with the trial.

96. Furthermore, it is said that the amendment to counts on the indictment, coupled with the refusal to sever the indictment, which in turn caused the jury to hear evidence in respect of counts on which the judge directed verdicts of not guilty compounded the prejudice to the appellant and ought to have led to the jury being discharged.

97. The respondent refers to *The People (DPP) v. MD* [2018] IECA 277 where the Court of Appeal rejected a similar argument of prejudice made by the appellant in that case, at para. 52:-

> "We have no hesitation in dismissing this ground of appeal. It is a normal hazard of a criminal trial based on an indictment involving multiple counts, that some counts may end up being withdrawn from the jury, while others proceed to the jury for their consideration. Whenever this occurs the jury will usually have heard at least some evidence relating to the counts on which there were directed acquittals. It is well established that juries are robust and are in general well capable of following the instructions and directions of a trial judge, and of disregarding evidence in relation to counts no longer before them. In the present case the trial judge correctly told the jury that they had to decide the case on relevant evidence, and that while they could draw inferences they should not speculate. He also reminded them that they were to record

verdicts of not guilty by direction of the trial judge on the counts that he was withdrawing from them. It is true that he did not instruct them in express terms that they should not have regard to evidence adduced in support of the charges in respect of which there was to be an acquittal by direction. While it might have been better if he had done so, we are nevertheless satisfied that viewed in the round his instructions to the jury were sufficient and adequate to dispel any concern about possible prejudice to the accused by virtue of the jury having heard such evidence"

Discussion and Conclusion

98. We have carefully considered the transcript of the judge's charge. In addition to directing the jury on the fundamental legal principles, it is difficult to envisage how the judge could have made it any clearer to the jury that they were not to consider counts on which she had directed not guilty verdicts when examining the balance of the counts on the indictment. We do not see any reason why the jury would have chosen to ignore her directions.

99. In the ordinary run of trials involving multiple counts or indeed multiple complainants, a situation may develop where it is necessary to direct verdicts of not guilty on some counts, whether in relation to one or all complainants. A situation may also arise where it becomes necessary for a judge to amend counts on the indictment. This simply cannot have the effect of prejudice of the kind alleged leading to the discharge of a jury. Time and again, it has been said that juries are robust, they are instructed to take legal direction from a trial judge, and invariably do so.

100. It is, as said in *The People (DPP) v. MD* [2018] IECA 277:-

"...[A] normal hazard of a criminal trial based on an indictment involving multiple counts, that some counts may end up being withdrawn from the jury, while others proceed to the jury for their consideration."

101. We have no hesitation in dismissing these grounds of appeal. The trial judge charged the jury with scrupulous care and in some detail.

Decision

102. The appeal against conviction is dismissed.

Isobel Kennedy

26th June 2020