UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 210

Record Number: 26/19

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

M.J

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice McCarthy on the 30th day of July 2020

Introduction

1. On the 4th October, 2018 , the appellant was convicted on five counts of indecent assault against Mr L.J.C between the 1st May, 1978 and the 31st August, 1978 at an address in County Mayo. The appellant now appeals against conviction.

2. The complainant was born on the 25th February, 1967 and the appellant on the 11th August, 1957. The mothers of the complainant and the appellant were friends, having worked together in England where the complainant resided with his family. The offences occurred at the appellant's home whilst Mr C was temporarily staying there between the

dates aforesaid. The injured party's maternal grandmother was ill over time. Because of the necessity for the complainants mother to look after his grandmother, Mrs C took up the offer made to her by the appellant's mother to send her son to Ireland for the summer. His evidence was that he was brought to Ireland, which he had never visited before, by the appellant's brother Mr L.J who resided in England. They travelled by ferry and then went on to Mayo. The appellant's brother stayed for a number of nights and then returned. It is not in dispute that the appellant's brother was present at the trial and available to give evidence.

3. The complainant gave evidence about the accommodation in the house. He said that he had his own bedroom . He had been enjoying his time there and would get up early and help on the farm; he spent a great deal of time with the appellant in doing so. He described the appellant as friendly at first, but he then started to come into his room at night when everyone else in the house had retired to bed. Initially, the appellant merely spoke to him and brought him sweets but he then began to sexually abuse him by rubbing his penis on the outside of his clothes and that developed to the point where the appellant was doing so inside them. The complainant said that this happened often; the appellant progressed to requiring Mr C to masturbate him and to perform oral sex on him. The complainant said that it would occur late at night; he would hear the appellant's car pulling in after he had been visiting a public house (as he understood to be the case) and the latch of the kitchen door opening; he then "knew what was coming". Mr C said that the abuse occurred 'quite often' and happened more and more often until it was 'every night'. He said he was told by the appellant not to tell anyone what was happening, and he did not. His own father, he thought, would have "gone crazy" if he had known what had occurred. He said that he did not like doing it, and that sometimes he would be under the blanket and would wet his

fingers and use his fingers instead to make it appear to be oral sex. It always happened in the complainant's bedroom.

4. The complainant described an incident which occurred when he was on a tractor with the appellant(who was driving) when the appellant swerved the vehicle in order to hit a sheepdog, which was killed. He said that the remembered the appellant laughing as the dog died. The complainant said "from that point on, I hated him" – he was deeply upset. The dog came from the household of immediate neighbours, the family of one Mr J, who operated a dairy farm. Mr C said that both he and the appellant had worked on neighbouring farms, by which we understand to mean those two, though the appellant denied that he had done so. The incident involving the dog had a marked effect on the complainant.

5. Mr. C's parents came over to Ireland to collect him and bring him home. They had never been to Ireland before. They stayed in the complainant's bedroom for one night. During that stay, the appellant brought the complainant to the living room, late at night, which he had not done before. He said that the appellant "wanted to play games", that he was undressed, "stood on his head on the couch" and made the complainant masturbate and perform oral sex on him. Mr C said that then it was his "turn" to stand on his head naked, and the appellant then behaved in the same way towards him. He said that the appellant did this on another occasion, and after that, his mother asked the appellant "why are you going into his (the complainants) room?". He said that his mother sensed that things were not right. The complainant and his parents then left and stayed elsewhere in a hotel .

6. The complainant gave evidence to say that his life took a" downward turn" after this. He struggled with drug and alcohol abuse and his relationships suffered. He said that he decided to "get some help" and undertook a five month residential treatment

programme with an organisation known as the Drug and Homeless Institute ("DHI") at Frenchay Mews, Somerset, to deal with his drug addiction - he was 27 or 28 at the time and it was after a marriage breakdown. It was there that he initially spoke publicly about the alleged abuse in or about 2007 in a group therapy session of some eighteen people, nine of whom revealed that they had been the victims of sexual abuse. He said that that at the end of one's period of therapy in the institution in question all of one's notes were destroyed. After this programme, Mr C said that he was doing well for 18 months or so until he suffered a relapse. He returned to the DHI and asked for counselling, and was referred to 'Kinergy Counselling Services", an organisation which aims to help adults who were abused as children. On an occasion when he was in a licenced premises he overheard of the appellant, M.J. that he was working with vulnerable children. He then decided to make a formal report to the UK police on 26th March 2016. He went to the station, made a statement, and the matter was reported to Gardaí in Ireland. Mr C was brought back to Ireland, where he made a formal statement of complainant to Sergeant Ryan in a Garda Station on the 9th of June 2016.

7. Detective Garda Pauline Golden gave evidence to say that she and Sergeant Ryan met with the appellant at his home on 7th September 2016 to inform him that they were investigating serious allegations against him and advised him to obtain legal advice. On 15th September 2016, the appellant presented voluntarily at Claremorris Garda station where is was interviewed. The appellant denied the allegations put to him but asserted the positive proposition that the only occasion on which the complainant had visited the house was in the company of his parents when they were visiting. The appellant was charged with the offences on the 1st May 2018.

Grounds of Appeal

8. A number of grounds of appeal were advanced in the Notice of Appeal; however all but one was abandoned and the sole ground relied upon is that:-

> "the learned trial judge erred in law in fact in failing to accede to a defence application to direct [that] the accused [be found] not guilty on all counts on the indictment in circumstances where a manifest unfairness had arisen, in real prejudice presented to the accused in receiving a fair trial in accordance with his constitutional entitlements, the said unfairness presenting in the following circumstances."

9. At the close of the prosecution case an application was made to the trial judge to withdraw the case from the jury on the grounds that the appellant faced a real risk of an unfair trial due to lapse of time and in the alternative certain alleged failings by the prosecution in the investigation of the offence by virtue of the jurisdiction elaborated in *DPP v P O'C* [2006] 3 IR 238. What is in debate here accordingly is whether or not the judge was correct when he refused the application.

10. It was submitted that Mr. and Mrs. J senior who had died in 2017 and 2009 respectively would have been in a position to give evidence as to whether or not the complainant had, in fact, come to Ireland on his own and stayed with the family or on the contrary stayed in the house only with his parents when they visited Ireland on holiday, and, further, would have been in a position to say whether or not their son L.J.C had brought the complainant to Ireland or the length of time for which he might have stayed at home before returning to England. It was further submitted that they might also be able to give evidence about the length of the complainants visit, if he in fact so visited as alleged. In addition, it was contended that they could have given evidence as to the internal layout of the family home including the sleeping arrangements. Exceptionally in this case evidence is available in the form of plans prepared by a Garda Walton and a Mr Barnicle,

consulting engineer, the latter called on behalf of the appellant at the trial, showing the layout of the house. This was described in evidence (and we do not have the benefit of the plans) as showing a property which had three bedrooms, living room, sitting room, a kitchen and a bathroom. On his instructions Mr Barnicle said that the next two extensions had been built to the house as it originally stood, one in 1978 (he was not instructed as to when) and another in 1983. These were merely his instructions, of course, and not evidence of those facts. The complainant had drawn a sketch of the house for the gardai but there is no evidence as to what it shows compared to the plans professionally drawn up.

11. Counsel for the appellant Mr. Murphy characterised the appellant's parents as the "primary witnesses that are not available to the accused in defence of these allegations are his mother and father". It was also contended that the paucity of records from either of the two organisations from whom the complainant had received treatment (including counselling) undermined the appellant's capacity to test the credibility of the complaints made. For the sake of completeness we refer to the fact that counsel for the appellant at the trial referred in submission to an allusion in the complainant's evidence to the fact that he had a relative who was a doctor who had supposedly spoken to him about treatment "in the context of a potential prosecution": it is hard to see the significance of that evidence having regard to the vague or inchoate nature thereof .

12. As to Mr. L.J.C, Mr. Murphy, at the trial, conceded that for the duration of the trial he was present in court. He asserted that:-

> "… The members of the jury are aware of the contents of the statement made to the Gardaí, they are fully aware of the fact that from his point of view, he has no recollection of bringing a young [L.C] to Ireland in 1978".

There is no evidence, of course, to the latter effect. It was sought to cross-examine the complainant by reference to the latter supposed fact but of course that is a different thing.

13. There was conflicting evidence as to when the appellant had first made a disclosure of the fact of the abuse. In cross-examination his mother said that she had thought that her son had told both his wives about the abuse, but she qualified that by saying that:- "Apparently he told me it was only after he had been to rehab", where he had spoken of the topic, that he had disclosed the matter to his wife or wives (the appellant had been divorced and re-married) She said that she would have thought they would have known. She also gave evidence to the fact that he had told her in or about 2003 that he had been abused but he said it was only after he left Frenchay Mews that he did so. She gave evidence also of the fact of her mother's illness and death, the fact that her son travelled to Ireland with L.J.C and her own subsequent visit to collect her son and holiday in Ireland for the first time.

14. In the ordinary course of events notes or information were or was sought to be obtained from both of these organisations, but when enquiries were made by the Somerset and Avon police (the relevant English force) about Frenchay Mews, it was found that it was closed and no records from it accordingly were available, but since participants such as the complainant were required to destroy the notes which they had made at the end of their stay; whether or not any relevant records could have been obtained from the Drug and Homeless Institute there is highly debatable. In any event, limited records pertaining to 2013 were obtained from Kinergy Counselling Services, but it appears that these are incomplete (in the sense that they do not extend to the entirety of the complainant's interactions with it). Detective Garda Golden had in fact spoken by telephone to an unidentified person in that organisation for the purpose of seeking to obtain records . There is no reason to suppose that responsible persons in the latter organisation might have failed to cooperate *bone fide* in the provision any material which could reasonably have been within their power of procurement. The records were sent by email to the Gardaí by Mr. C;

Mr. Murphy suggested that this was untoward and was relevant to his application for a direction but we cannot see how this could be so.

15. Previous authorities as to stopping a trial due to prejudice caused by lapse of time have been overtaken by the decision of the Supreme Court in *The People (DPP) v. C.Ce* (Unreported) 19th December, 2019. That was a case where the members of the court were in agreement as to the principles applicable to applications of the kind in question here, though the Chief Justice and Mac Menamin J. were in a minority in their conclusion that, on the facts, the appeal ought to be allowed. Though four judgments were delivered treating of the issues we think that it is of assistance if we refer to that part of the judgment (at para. 5.22) of Clarke C.J. where he refers to the role of the trial judge in the following terms:-

> *"Ultimately, the trial judge must determine whether the trial meets the standard of a fair trial. It is important to emphasise that a fair trial does not necessarily have to be a perfect trial. Almost all trials may potentially run without some possibly relevant evidence being available. The question whether a trial is fair does, as the Court of Appeal considered [in the instant case] require an overall approach. If a theoretical possibility that some tangentially material piece of evidence is not available were to render a trial unfair, it would be difficult to envisage many cases in which there could ever be a fair trial. Something more substantial is required in order that a trial can be considered to be unfair. In such cases which turn on a contention that there is evidence which has become unavailable by lapse of time, it is necessary to look at the case in the round, to have regard to the likelihood to have evidence favourable to the defence being genuinely lost by reason of the lapse of time and also to have regard to the role which that evidence might reasonably*

have been expected to play at the trial, in the light of the prosecution case as it actually appeared at the trial"

Later, (at para. 5.27) he referred to the fact that: -

"It is for the accused to persuade the trial judge that, having regard to the prosecution case and such evidence as there may be as to the likely content of any missing evidence, it has been established that the accused has, by virtue of lapse of time and in the light of that missing evidence, lost the real possibility of an obviously useful line of defence."

and furthermore he said (at para. 5.29) that:-

"… No trial is perfect. There will always be the possibility that other material evidence could have been gathered. In addition, evidence which was gathered may not be available at the trial for a range of reasons… If it were to be the case that the absence of any evidence which might have been present in a theoretically perfect trial could lead to a trial being considered unfair, then it would follow that very few trials could be conducted. As analysed earlier, the extent to which prejudice to the defence has been demonstrated to have had a potentially material effect on the trial is a matter which requires to be assessed by the trial judge in the light of the range of factors which I have sought to identify."

16. Clarke C.J. summarised the approach which ought to be taken by a judge on such applications in the following terms:-

"9.2 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.

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.

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."*

In accordance with these principles, which are in accordance with the judgments of his colleagues, we turn then to an analysis of the evidence to decide whether or not the learned trial judge was right in the manner in which he exercised his discretion.

17. We cannot see any fault on the part of the Gardaí, whether themselves or by the agency or with the assistance of the English police, in the manner in which they sought to obtain any records material to the complainant's allegations. Nor do we think that any fault could attach to the Gardaí or the English police because records or a statement had not been obtained from the unidentified medical relative of the complainant. That figure's involvement appears to have been minimal and informal. It seems hard to believe that there might have been in existence any records held by him, whoever he was, and, without more, we cannot say that there is any reality in the idea that his absence in some sense is as a result of some culpable act or omission of the investigating authorities.

18. The Gardaí, with the assistance of the English Police seem to us to have performed their investigative task in obtaining potentially relevant documents in what we might describe as the ordinary way, and with due diligence. It is not usual, for example, or considered necessary, unless there is reason to suppose a want of *bone fide* cooperation, for Gardaí to attempt to obtain relevant records potentially in the hands of third parties by, say, seeking warrants or ultimately orders from the trial court, even if that were possible. The complainant had given, again in the ordinary course, written permission to seek out and obtain copies of relevant material. He himself apparently transferred or caused to be transferred the records from Kinergy Counselling Services directly to the gardai and it is

suggested this is untoward. It seems to us that that cannot give rise to any doubt or difficulty. There is no reason to suppose that he has not acted *bone fide*.

19. It is undoubtedly the case that the appellant's parents would have been in a position to give evidence as to both the sleeping arrangements generally in the house and when and with whom the complainant had visited it. In particular, it seems reasonable to conclude that they would have been in a position to give evidence as to whether or not the complainant had come to their home with one of their sons and stayed there for a period during the summer of 1978 or merely visited them for the first time with his parents. There does not appear to have been any controversy at the trial as to the accommodation available in the premises and accordingly, insofar as they would have been in a position to give evidence upon that topic it is of no significance – the premises was a bungalow with three bedrooms, one of which was a converted sitting room , whatever its state now. That is all. It is not in debate that the appellant's grandmother was resident in the premises in the summer of 1978 but it is not suggested that any delay in the prosecution is a factor giving rise to her absence (she died many years ago). It was never suggested that the appellant's parents would have been in a position ,of course, to give any evidence as to whether or not the crimes in question occurred having regard to the surreptitious circumstances in which they were committed. One simply cannot speculate as to whether or not they would have given evidence favourable or not to the appellant on the other aspects. There may well be cases, of course, where one can say with reasonable confidence what a given witness would say; for example, such a witness might have made a statement to the Gardaí preceded by a declaration of the kind contemplated by the provisions of section 21 (1)(b) of the Criminal Justice Act, 1984, or given evidence on deposition (an example taken by Clarke C.J. as relevant in deciding what a witness might say or its consequences) and there might be no reason to suppose a want of reliability or credibility on the part of such a

person. In *C.Ce*. itself the putative deceased witness could properly have been viewed, or at least reasonably suspected to have been, an accomplice and if called, it was contended, it would have been necessary to warn her about the potential for self-incrimination and her rights accordingly and any statement made by her to the Gardaí would or at least should have been under caution; these would, by definition, be relevant factors in deciding on the availability, is a matter of reality, of the "missing" evidence or the consequences for the accused of its absence. All these factors may be relevant but not either cumulatively or in themselves sufficient to discharge the onus of proof on an accused to show the absence "…. the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence". However, this is not a case where one can draw any conclusions. As pointed out by the Chief Justice some degree of speculation may be inevitable when seeking to assess whether a potential witness could give material evidence of assistance to an accused but here we cannot begin to form any view as to what their evidence might have been.

20. Two actual or potential witnesses whose evidence was directly relevant to the facts in issue were of course available from the time in question, namely, the complainant's mother Ms B.C and the appellant's brother Mr. L. J. Mrs. C was in a position to give evidence on important aspects of the case -she gave what appears to have been coherent testimony of the fact that due to her mother's illness Mrs J. invited her son the complainant to Ireland for a period during the summer of 1978, that he was taken there by the appellant's brother and that she and her husband travelled to Ireland on holiday, visiting this country for the first time, in order to bring him home. All we know of Mr. L.J is that counsel said that he was present at the trial and that he had said in a statement to the Gardaí that he did not remember bringing the complainant to Ireland. Even if we ignore for a moment that what was said by counsel is not evidence and proceed upon the basis that he indeed made a

statement and did not have a relevant recollection, he was not called in circumstances where the want of recollection, if in fact there was such, might well itself have had evidential value, and in any event one might add that the fact alone that a witness says he cannot recall an incident (if that is what indeed he said when he made a statement), even though it may be a consequence of lapse of time, does not render a trial unfair. Infirmity of memory is not confined to cases of the present kind: the courts can guard against any unfairness to accused persons in all cases like the present by giving appropriate warnings to juries, *inter alia*, about the difficulties of defending these cases, including difficulties attributable to poor memory of long past events. Loss of memory in itself on the part of an actual or potential witness due to lapse of time is perhaps an example of circumstances in which an imperfect trial may proceed. One might add that if an individual says he does not recall a particular event (or words to similar effect) he might be telling untruths (we speak in principle here) or otherwise unreliable. On any view, his presence would surely have diminished any difficulty caused by the absence of now deceased persons.

21. At one point (in the course of cross-examination), counsel for the appellant asserted that Garda notes indicated that the aforementioned neighbours were approached in the course of the investigation, and that one neighbour supposedly indicated he had no recollection of the incident, if it occurred, relating to the death of the dog. This is not evidence of the latter or indeed of any fact. Such persons could legitimately have been approached by the appellant's solicitor. If, for example, such a person were able to recall the killing of the dog it might well be of assistance in pinning down the period when the complainant was in Ireland or, indeed, if there was in truth no recollection of the event that itself might be of evidential value (a topic to which we have referred above in respect of another potential witness). We make this point not of course because there is any basis for

reaching a view as to what their evidence might have been but rather the point, which we consider relevant, that an avenue of investigation, at least, existed which was not pursued.

22. As to the absence of records we think that, firstly, insofar as evidence is available, it indicates that relevant records may well, and indeed probably did not, exist from the time of the complainant's attendance at Frenchay Mews and insofar as Kinergy Counselling Services are concerned, one can only speculate as to the extent to which records might be missing or the extent thereof. They might or might not have formed a basis for cross-examination of the complainant as to, say, consistency. In any event, of course, the records were not admissible as evidence and if propositions were put to the complainant under cross-examination based upon what counsel had learned from them were the complainant, for example, to deny that he had given certain versions of events, to, say a given counsellor the records would not have afforded a basis for contradicting him since they were not his creation; save in the case of any which might have existed in Frenchay Mews other than those which he himself had destroyed if they existed – something which is entirely speculative. We cannot see how any supposed absence either because they have not been furnished or destroyed of records whether on a freestanding basis or associated with the fact that the appellant's parents are deceased could give rise to any meaningful prejudice of a kind which would render continuation of the trial unfair.

23. We do not here set out in extenso what the trial judge said when ruling on the application but it is plain that he gave it thorough consideration and elaborated extensively on his approach, having taken time to consider it after the submissions had concluded.

24. The trial judge on applications of this kind will effectively find himself or herself performing the exercise elaborated by the Chief Justice, making a judgement on the facts. We do not think in the present case that he fell into error in the manner in which he

exercised his discretion. Applying the principles elaborated, accordingly, by the Supreme Court we are not persuaded that the absence of the deceased parents whether alone or coupled with the speculated absence of material of a documentary kind has "deprived the accused of a realistic opportunity of an obviously useful line of defence" .

25. We have not been persuaded to uphold the ground of appeal and we accordingly dismiss it.