THE COURT OF APPEAL

Record Number 108/19

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

A. C.

APPELLANT

Judgment of the Court (*ex tempore*) delivered on the 25th day of February 2020 by Mr. Justice McCarthy

1. This is an appeal against the appellant's conviction at Dublin Circuit Criminal Court on the 22nd January, 2019 on 156 counts of indecent assault on J.K. between the 1st January, 1982 and the 25th August, 1996. The complainant was born on the 29th August, 1979 and the appellant was born on the 8th December, 1966. They are cousins. There were regular overnight visits by the appellant to the complainant's home at weekends over the period in question and the offences occurred on a large number of occasions in such circumstances.

2. The offences occurred from the time, when the complainant, as she described it, was not tall enough to touch the floor when sitting on a bed, and continued until she was five or six. She recalls that on her fifth birthday in particular she went to a back bedroom upstairs where her two brothers were asleep. The appellant was in a sleeping bag on the floor and the appellant beckoned her into the sleeping bag. Her evidence was that when she got in, he was erect and he put his penis between her legs and moved around quite a bit, throwing her out quite suddenly. She could not say how many times this happened, but it was a pattern when in the house at the weekends and in the summertime. It happened from the time when she was two or three years of age.

3. The appellant regularly brought her into the en-suite toilet attached to what was described as the garage bedroom, sat her on the toilet and put his penis in her mouth. Generally, this would happen when her brothers would be playing; they might want go to a local garage to get cigarettes but the appellant would convince them to go to a shop further up the road or would offer to babysit the injured party. When performing these actions he would tell her just to do it a 'little bit' - meaning to open her mouth and take more of his penis and he would keep his hand on the back of her head. Her memory was that the windowsill and the door handle were higher than her. Her evidence was that she was maybe three, four, certainly five. She was six or seven when it had stopped.

4. Evidence was adduced by the complainant *inter alia* to the effect that she had spoken to her mother of the offences in the following terms: -

> *"When I was around ten in 1989 my Aunt M. had a baby girl E. She was making A. [the appellant] the godfather. I panicked and told my mum and dad what he had done to me. I told them he had touched me. I never went into the detail."*

The complainant's mother E.K. said that:-

> *"I remember when J. was about eight years old. We were in the garage bedroom. I was making the beds. I can't remember how J. told me of what exactly she said but she told me that her cousin A. had been touching her and had got into the bed with her. I tried to question her. My husband came home so I stopped talking about it."*

It was submitted that this evidence was inadmissible to show the complainant's consistency on the basis of the special rule that recent complaints made by a complainant in a sexual offence case are admissible to demonstrate it and that the judge ought to have directed the jury to acquit.

The appeal

The grounds of appeal are as follows:-

i) The learned trial judge erred in law and in principle in incorrectly admitting evidence under the doctrine of recent complaint;

and;

ii) The learned trial judge erred in law and in principle in refusing the defence application for a directed verdict of not guilty on all counts at the close of the prosecution case.

5. A number of authorities were relied upon by the appellant in support of the proposition that what was said by the complainant to her mother was inadmissible including The *People (DPP) v Murphy* (Court of Criminal Appeal, November 13th 2003) and *R v Valentine & Ors.* [1996] 2 Cr App R 213 to which we refer hereafter.

6. *Valentine* is quoted from the judgment of Roch L.J., with approval by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Murphy* (Unreported, Court of Criminal Appeal, 13 November 2003) where he said:-

> *'The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity that presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity.'*

and he went on to say:-

> *'We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them, that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may fell it quite impossible to tell their parents or members of their family',*

The Court in *Murphy* held:-

> *"We endorse and adopt that statement. The temporal proximity of the complaint to the conduct complained of is of less importance as an indicator of consistency than the context in which the complaint is made, though a complaint made closer to the index event may carry more weight as an indicator of consistency than a complaint made later. However, the precise weight to be attached to a complaint, in terms of possibly demonstrating consistency of conduct, will be a matter for the tribunal of fact, i.e., the jury in a case such as the present."*

7. Much reliance has been placed by the appellant on *The Director of Public Prosecutions v. Gavin* [2000] 4 IR 537. In that case, the complainant gave evidence that he accompanied a friend and fellow wedding guest to his hotel bedroom. His evidence was that he removed his jacket, shoes and socks, went to bed and fell asleep. He woke up at in or about 5.30am to find the appellant in bed behind him and pushing up against him. The appellant was wearing a pair of underpants together with the complainant's shoes and socks, but no other clothing. His underpants were pushed down his thighs somewhat. The complaint made to Gardaí, which at trial was admitted, was that the complainant was in bed and awoke to find a man in the bed and the man had a hand on his groin. In the course of giving the reasons of the Court of Criminal Appeal for quashing the conviction, McGuinness J. stated as follows:-

> *"The complaint does not meet the primary criterion of being consistent with the complainant's evidence at trial. We do not accept the contention of the prosecution that it is sufficiently consistent both because both descriptions are of sexual assault. The description of a hand on the groin is crucially difficult from the account given by the witness at trial. It is plain that the evidence does not meet the primary criterion of demonstrating consistency should it have been admitted at all, I think not."*

The point of relevance there of course is the extent of the discrepancy between the purported consistent version of events given at an earlier stage and what was actually said in court.

8. Each case of the present kind must to be determined on its own facts in accordance with the legal principles which we have elaborated. As has been said repeatedly in modern decisions one does not address the matter in a mechanical fashion by reference to lapse of time only. The fact of the matter is that much more comprehensive or elaborate

information was given subsequent to the occasion when the complainant spoke to her mother. That is in no sense inconsistent with what she said to her mother. For a complaint to be admissible it is not necessary that the entirety of a complainant's version of events must be retold to the recipient of the complaint, but rather that anything said is not positively inconsistent therewith. Any other approach would not be in accordance with common sense and it is of course one of the fundamental rules of the law of evidence that its application should not violate it.

9. We think accordingly that the evidence was rightly admitted.

10. The trial judge dealt with the application for a direction as follows as follows:-

> *"All right, okay. Well I've considered the authorities; Galbraith, Shippey, and M, which is the latest from Mr Justice Edwards. As regards what Ms [K] said in her direct evidence, she said it was a pattern when at home at weekends or summer times, and she said they were the five friends and "I wouldn't be believed," that's how she was referencing those. There was detail as regards the allegations, both in the bedroom and on the en suite and there was some evidence of how she remembered when it happened, as regards photographs she looked at subsequently.*
>
> *So going back to M and that case held that: "A case is not withdrawn simply because the prosecution's evidence contains inherent weaknesses or is vague or contains significant inconsistencies. The prime consideration is that there should be an assessment of the facts discernible from the evidence, even where it contains such qualities, unless the state of the evidence is so infirm that no jury properly directed could convict upon it. Accordingly, the fact assessment should take place unless it was unfair to do so. And the Court of Appeal held that it was implicit that withdrawal of a case should be an exceptional measure, and to which resource should only be had for the purpose of avoiding a manifest risk of wrongful conviction. Therefore, a case may only be withdrawn from consideration where the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable that no properly directed jury could convict. Therefore, the Court has a discretion to withdraw the case in order to direct verdict, but only where the state of the evidence would render it unfair to proceed." I've considered the authorities and considered the evidence in the case. I've considered the evidence in particular of the complainant, and I think this is a proper matter to go to the jury and I refuse your application."*

The application was of course made by reference to the principles elaborated in *R v Galbraith* (1981) 73 Cr App R 124; [1981] 1 W.L.R. 1039, which has been long approved in this jurisdiction. The most recent authority on the topic is that of this Court in *DPP v M* [2015] IECA 65 where, Edwards J. held:-

> *"..the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith*

represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.

48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, <u>unless</u> the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

11. Mr. Greene SC did not abandon the second point in his grounds of appeal to the effect that a directed acquittal ought to have been given by the trial judge having regard to the state of the evidence at the end of the prosecution case. He did not, however, emphasise it. We do not think that this is a case where the learned trial judge ought to have directed an acquittal. There was ample evidence upon which a jury could properly convict. Discrepancies in the evidence or matters of weight are classically matters for the jury to resolve. The Court must always be aware of the provisions of the Constitution to the effect that a trial by jury must take place in respect of all serious offences and it must not usurp that power.

12. This ground of appeal therefore fails.

13. We accordingly reject this appeal on both grounds.