THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[23/2019]

Neutral Citation Number: [2021] IECA 120

The President
Woulfe J.
Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PROSECUTIONS

RESPONDENT

AND

TF

APPELLANT

JUDGMENT of the Court delivered (*via* electronic delivery) on the 19th day of April 2021 by Birmingham P.

1. On 26th October 2018, the appellant was convicted of all counts on an indictment which had contained five counts of sexual assault contrary to s. 2 of the Criminal Law **(**Rape) (Amendment) Act 1990 and one count of indecent assault contrary to common law. The appellant has now appealed against conviction and against the severity of a sentence of six years and six months imprisonment imposed on one count, with concurrent lesser terms in respect of the other offences.

Background

2. There were two complainants in this case, X and Y. Of the six counts on the indictment, four were alleged to have been perpetrated against one complainant, X, and one count of sexual assault and one count of indecent assault perpetrated against the second complainant, Y. The offences were laid as having been committed between 1989 and 1996. Both complainants were born in the same year, in 1982. They are cousins and grew up in Belfast. The accused was a neighbour of Y's family, in the sense that he lived on the same street and he was a friend of Y's father. Y was the godson of the appellant. X was a frequent visitor to Y's family home and from that, came to know the appellant and had visited him in his home.

3. A sister of the appellant owned a caravan that was located at a caravan park in Donegal. The appellant visited the caravan with his friend, Y's father, and the two boys. The offences involving X were allegedly committed when he was between the ages of 9 and 14, and the two offences against Y occurred, in one instance, when he was aged six, and in the other, when he was aged between 9 and 11. Significantly, and slightly unusually, in the case of counts two and six on the indictment, the allegation is that both boys were together and at trial, each gave evidence of having their penis fondled in the presence of the other boy. There was also evidence at trial of activity in the nature of grooming. Both boys were provided with alcohol by the appellant after the father of Y had gone to bed. X was interested in cars and on one occasion, it is alleged that the appellant sat him on his lap in the driver's seat of the car, let him take the steering wheel and then proceeded to sexually assault him.

Grounds of Appeal

(i) The trial judge erred in law and in fact in ruling that the statement made by X to his wife, Z, in 2010 was the first reasonable opportunity for X to make a complaint, and erred in law in allowing Z to give evidence of the complaint.

(ii) The trial judge erred in law and in fact in ruling that the prosecution was allowed to lead evidence from X to the effect that the reason for his delay in making the complaint was because he had spent years suffering from mental health issues.

First Ground of Appeal Against Conviction

4. Before dealing with the first ground of appeal which is, in essence, the substantial ground, it may be of assistance to note that the trial, which resulted in a conviction on 26th October 2018, was the second occasion on which the appellant had stood trial. The relevance of the earlier trial, which took place in March 2018, is that during it, counsel on behalf of the prosecution raised the question of whether the complaint evidence would be admissible. She did so when referring to the fact that the courts have been more forgiving towards delay on the part of child complainants, and complainants with allegations to make about what happened to them during their childhood, when it comes to allowing trials to proceed, even when there is a significant gap between the alleged offending activity and the trial. Counsel queried whether this would allow complaint evidence to be given even if the complaint was made some distance in time from the offending alleged, and whether the forgiveness which was afforded to allow a trial to proceed would extend to allowing complaint evidence. The issue having been raised, there then followed some discussion involving the trial judge and counsel on both sides but the discussion was essentially inconclusive in circumstances where the jury was discharged and the matter came back for retrial.

5. Counsel on behalf of the prosecution returned to the issue in the course of the retrial. On the opening day, having adverted to the fact that she had previously canvassed the issue in March 2018, counsel confirmed that she was seeking leave to call Z, wife of X, to give evidence to the effect that in 2010, X told her that he had been sexually abused by the appellant. Counsel said that she intended to rely on a judgment of this Court in the case of

DPP v G.C. [2017] IECA 43 in support of her application. Counsel asserted that the judgment was authority for the proposition that in order to be considered admissible, the timing of the complaint does not necessarily need to be in the immediate aftermath of the incident. Counsel for the then accused (not the same counsel who appeared before the Court of Appeal) pointed out that the circumstances in *G.C.* were entirely distinguishable from the facts of the present case because in that case, there had been expert evidence from the complainant's general practitioner and counsellor to the effect that the complainant's medical and psychological state provided an explanation for the complainant's delay in reporting the matter. In contrast, he said, in the present case, there was no expert opinion about the medical or mental state of X and/or to what extent that might have contributed to the delay in making the complaint.

6. It should be noted that in the trial court, there was no real dispute between the parties about the legal principles that would determine the admissibility of the proposed complaint evidence. Rather, there was a fundamental disagreement about how those agreed principles were to be applied. In truth, the same situation has prevailed before this Court where counsel for the prosecution, in written and oral submissions, has accepted that it is settled law that there are four conditions of admissibility that have to satisfied before complaint evidence can be admitted *viz:*

(i) the prosecution is for a sexual offence;

(ii) the complaint was made at the first reasonable opportunity after the commission of the offence;

(iii) the complaint was voluntary; and

(iv) the complaint was consistent with the evidence of the complainant.

Counsel points out that the appellant's complaint before this Court was that the second condition was not met. The defence position is that the complaint to Z in 2010 was not a

complaint made at the first reasonable opportunity. Lest there be any uncertainty about this, the written submissions state in terms:

> "It is not disputed that this [the requirement that the complaint be made at the first reasonable opportunity] remains a necessary prerequisite to admissibility".

7. While there may be no major dispute between the parties as to the legal principles applicable, it must be said that the context in which it arises is an unusual one. Historically, the doctrine of recent complaint was linked with the concept of raising a hue and cry. Older cases often concern complaints made within a very short time indeed of the alleged incident, and the issue would often turn on whether the complainant was required to make their complaint to the first person encountered, or whether they were justified in waiting until they were happier to speak to someone they were more comfortable in confiding in, such as a relative or very close friend.

8. When the issue of complaint evidence was raised, the jury was asked to retire and the judge then heard the application from the prosecution to lead evidence from X about the first complaint he made in 2010 to his wife, Z, and the evidence of Z about the complaint that was made to her. In the course of his direct evidence on the *voir dire*, which took place on 24th October 2018, the following exchange took place between prosecuting counsel and X:

> "Q. [Prosecution Counsel]: Mr [X], you told the jury that you didn't tell anybody at the time and you've explained why. Can you explain then, first of all, who was the first person that you did tell?
>
> A. My wife [Z].
>
> Q. Your wife [Z]?
>
> A. Yes.
>
> Q. And when did you tell her?
>
> A. In 2010.

Q. And can you explain why it took you till 2010 to tell?

A. I basically just tried to put it at the back of my head and just try and get on with my life and basically my – [Z] was pregnant with our first child.

Q. Well, I don't need to know that, but I want to know how were you between the abuse happening and before you told [Z]?

A. I had mental health issues."

At that stage, it was indicated that this was as far as the prosecution intended to bring the evidence. The complainant was then cross-examined by defence counsel as follows:

"Q. When did you become aware that [Y] had made the complaint?

A. Early 2000s. I'm not sure of the exact year.

Q. And you put that down to the time that he told his parents, is that right, in the early 2000s?

A. Yes, that's correct.

Q. And you became aware of that. And did you at that stage not tell anybody in the early 2000s when you became aware of that?

A. No, no.

Q. Well, why was that?

A. After [Y] had come out to his parents my mother approached me in tears and asked me, "Did anything happen to you?" I said: "No", and the reason why I said "No" was because my aunt […], which is [Y's] mother -- when [Y] said that he'd been abused by [the appellant] she came to stay with us, she was suicidal. My mother and father had to stay with her around the clock.

Q. Had to stay with who now, had to stay with who?

A. [Y's] mother because she was suicidal, they had to stay at her bedside because she was saying that she was going to kill herself because she was so traumatised over the news about [Y].

Q. You say in your statement: "I don't remember how long ago this was, but my mother did approach me in tears and asked if anything had happened to me, I denied it then and still don't want my parents to find out"?

A. Correct.

Q. So you haven't told your parents?

A. No."

9. At a later stage in cross-examination, defence counsel put to the witness:

"Q. [Defence Counsel]: There was nothing to prevent you making a complaint about this in the early 2000s to the guards, is that right?

A. Sorry?

Q. There was nothing to prevent you making a complaint about this in the early 2000s, the early noughties?

A. No.

Q. There was nothing to prevent you doing that?"

10. The complainant was then re-examined as follows:

"Q. In relation to that, Mr [X], so there was nothing to prevent you, can you explain why you didn't make a complaint in the early noughties?

A. I just wanted to get on with my life. I just wanted to, you know, like, at that stage, you know, it's always in your head, you know. You never forget it, it's there all the time, you just try and move on the best you can until it came to a point where it just isn't possible.

Q. And how were you health-wise in the noughties?

A. I had a lot of mental health issues.

Q. In the absence of the jury now, you can tell us a little more about that?

A. Can I basically say?"

At that stage, there was intervention from defence counsel as follows:

"[Defence Counsel]: I wonder have we any medical evidence to support what we're going to hear? I've no objection otherwise, but.

[Prosecution Counsel]: I don't think you need medical evidence for a witness to…

[Defence Counsel]: But we do.

[Prosecution Counsel]: This is in the absence of the jury, Judge.

[Defence Counsel]: I know it's in the absence of the jury but we need some medical support for what the contention is, there could be --

JUDGE: Well, why is he not entitled to say it?

[Defence Counsel]: Oh no, he can say it but there may be medical issues for other reasons is what I'm suggesting, I don't know, we haven't seen any medical report. I'll reserve my position, I should be able --

JUDGE: You can reserve your position.

[Defence Counsel]: I should be able to cross-examine because this has been brought up, something new has been brought up by my friend.

Q. [Prosecution Counsel]: Well, it's arising out of the question was there any reason why you didn't report the matter in the early 2000s and I'm just pursuing that. So, can you just tell us a little bit about your health issues at that time?

A. Basically it was all lots of different -- I was on anti-depressants from when I was 16, on anti-psychotic medication called Seroquel.

Q. And how does that medication, how did it leave you feeling?

A. Basically like a zombie, like --

JUDGE: Basically what?

A. Like a zombie, like, just very tired all the time, no energy. It was just -- it's a very, very --it's a horrible drug.

Q. [Prosecution Counsel]: And did you have any other health issues? How were you able to cope in work and that sort of thing?

A. I basically struggled to hold down jobs, so was in and out of jobs for years until eventually settled down and I didn't get my degree until I was almost in my thirties.

Q. And I think we've heard that [Y] had tried to commit suicide at some stage; is that correct?

A. That's correct.

Q. And how did you feel then?

A. When -- I was absolutely devastated, absolutely devastated. And, you know, that's all I can say.

Q. Well, I just really want you to confine yourself -- sorry, perhaps I asked the question in the wrong way Mr [X], to the reasons why you didn't go to the [G]ardaí or report or tell anybody until 2010?

A. It was mainly, it was a few different, one was because of my mother, I didn't want her going through what [Y's] mother went through. That's basically it, I just tried to get on with my life but it just wasn't as easy as that."

11. Having heard argument on the issue, the judge ruled as follows:

"I'll deal with the issue in relation to the admissibility of the recent complaint contended for on behalf of the prosecution that evidence ultimately to come from the wife of the complainant. The law in relation to this issue has recently been clarified significantly in the decision of the Court of Appeal in *DPP v. GC* and the judgment

delivered on the 21st of February 2017 and where the Court followed the statement of Lord Justice Roach in *R v. Valentine*. The relevant paragraphs have already been opened in the course of the *voir dire*, appearing at paragraph 75 and 76, and with further remarks made by the Court of Appeal in paragraph 77 on those extracts. And, having regard to the propositions established in that authority, it seems to me that in this case, on the evidence that I have heard, the complainant has given evidence which I accept, insofar as the *voir dire* is concerned, firstly, that as an explanation as to why he kept it to himself, that he just tried to get on with his life until it became impossible; that being when he ultimately made the disclosure to his wife. Secondly that as far as the other complainant in the case, his cousin [Y] was concerned, that he was watching the state in which he was in, that he was suicidal at one time, was having severe mental health issues and he didn't want to aggravate that situation. And, perhaps more importantly, when [Y] made his disclosure to his family, and particularly his mother in or about 2000 on the evidence that I've heard, he was acutely aware of the fact that his mother became suicidal in reaction to that, to the extent that the complainant's own parents had to go over and stay with her to look after her. And either expressly or implicit in the complainant's evidence was that he had a fear that if he was to reveal these matters himself, that it might have the same effect on his mother. And, he also has given evidence that he was struggling with his own mental health issues. He hasn't gone as far in his evidence to relate them or to say that they were caused by what he is complaining of; although I note what he says in his statement of evidence in that regard without saying any more on it and the defence are on notice of that. It seems to me that applying the principles established in *GC* on the particular facts and circumstances of this case, that I am satisfied that in all those

circumstances, that the complaint made to his wife in 2010 was the first reasonable opportunity that the complainant had to make his statement.

So, I will deem admissible on that basis the evidence contended for in relation to the evidence of [Z, wife of X], the report to her and her evidence as regards what was stated to her which has been adverted to by [prosecution counsel]."

12. Following the trial judge's ruling, it was agreed that the complainant would be led as follows:

"Q. Now, I think you also explained in your statement that it has taken you a long time to come forward and make a complaint as you'd spent years suffering from mental health issues; is that right?

A. That's correct. Yes.

Q. And the jury will hear that you made that statement in July 2015. I think you also told the [G]ardaí that your wife, [Z], was the first person that you ever told about the abuse that you suffered and you told her in 2010; is that right?

A. That's correct."

13. As already indicated, it does not appear to be in dispute between the parties, but rather there is express agreement between them on the fact that a requirement for admissibility is that the complaint should be made at the first reasonable opportunity. In this case, there was a specific finding by the trial judge that the complaint to Z, wife of the complainant, in 2010, was the first reasonable opportunity.

14. The question of whether a complaint is at the first reasonable opportunity is discussed in McGrath on *Evidence*, 3rd Edn., (Roundhall, 2020) at para. 3-200. There, it is stated:

"It is evident from the case law that, although the lapse of time between the alleged commission of the offence and the making of the complaint is very important, this test is not merely a temporal one but is based on a consideration of the reasonableness of

the conduct of the complainant having regard to all the circumstances. Furthermore, it is not necessary that the complaint be, literally, the first complaint made." (footnotes omitted)

The author goes on to quote from Roch LJ, who, in *R v. Valentine* [1996] 2 Cr App R 213, commented (at pages 223-224 of the judgment):

"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."

15. Commenting on this judgment, the author of McGrath on *Evidence*, at para. 3–203, states:

"In recent times, greater judicial awareness of the factors such as shame and guilt that may inhibit a complainant from making a complaint even to a trusted friend or close relative has led to an acceptance that a complainant may have made a complaint at the first reasonable opportunity even if there has been a significant lapse of time and the complainant has not availed of an opportunity to complain to a family member or friend." (footnotes omitted)

16. The author then quotes again from Roch LJ who observed at page 24 of *Valentine*:

"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 feel it quite impossible to tell their parents or members of their family."

It should be noted that the requirement that the complaint be made as soon as could be reasonably be expected was removed in England and Wales by s. 112 of the Coroners and Justice Act 2009, with the timeliness of the complaint now going to weight rather than admissibility.

17. The same approach is evident in the case of *DPP v. J.T.* (1988) 3 Frewen 141, where what was in issue was a complaint made by a girl with an intellectual disability to her mother in respect of sexual abuse by her father, which complaint was held to be admissible, even though it was made somewhere between three months and eight years after the commission of the alleged offences.

18. In *DPP v G.C.* [2017] IECA 43, one of the grounds of appeal related to evidence led by the prosecution concerning complaints made by the complainant to her general practitioner and, at a slightly later stage, to a counsellor. The essential point made was that those complaints were not admissible because they were made some years after the alleged abuse had occurred and therefore were not complaints made at the first available opportunity. This Court dealt with the issue in these terms (at paragraph 84):

> "We are satisfied that the evidence that these witnesses actually gave before the jury concerning her medical and psychological state was both relevant and probative in terms of providing a possible explanation for the complainant's delay in formally reporting the matter. Moreover, to the extent that evidence was led from them concerning complaints made by the complainant, we are satisfied that in all the circumstances of the case those complaints, being the first disclosures made by her to professional persons outside of the circle of her family and friends, and in circumstances where, as the Counsellor put it, *'she was trying to build herself up towards going to make a statement to the guards'*, were made as early as reasonably possible in the circumstances of the particular case. We therefore consider that the

trial judge acted within the scope of his legitimate discretion in admitting the impugned evidence, and we reject this ground of appeal."

19. In the present case, this Court is satisfied that the trial judge gave careful consideration to the circumstances in which the complaint came to be made and to the background against which the complaint was made. We are satisfied that the trial judge was entitled to conclude, in light of the information put before him, that even though the complaint to Z was made many years after the events were alleged to have taken place, that it was in fact made at the first reasonable opportunity. Therefore, we dismiss this ground of appeal.

20. We simply wish to add that had we been persuaded that the judge's decision was not a legitimate exercise of discretion and that he was in error, we would have had to consider whether this was a case with a *proviso.* On one view, the complaint evidence was of limited probative value, though one cannot ignore the fact that the prosecution felt it was of sufficient value to press for its inclusion, but it seems to us that the complaint to Z was sufficiently close in time to the formal complaint to Gardaí that it did not really serve to change the dynamics of the case. There will be occasions in what might be described as historic sex cases where a complaint is made at a very considerable remove from the time of the alleged offending, but the fact of the complaint is, nonetheless, of very considerable significance in the context of the issues as they emerge at trial. We are thinking of situations where it is suggested that the complaint is being pressed because of malice or ill-will on the part of the complainant arising from a particular event occurring within the family. In such circumstances, if the prosecution is in a position to point to a complaint made before that event had occurred, that would have the potential to be very significant evidentially.

Second Ground of Appeal Against Conviction

21. The second ground of complaint was:

> "That the learned trial Judge erred in law and in fact in ruling that the prosecution were allowed to lead evidence from Mr [X] to the effect that the reason for his delay in making the complaint was because he had spent years suffering from mental health issues".

It must be said that this ground was not pressed with any vigour and understandably so, and it should be noted that we deal with it now only for the sake of completeness. The original suggestion had seemed to be that the complainant was, in effect, allowed to give expert evidence about his own health and to attribute the delay in making a complaint to the difficulties that he says he experienced.

22. We do not believe there is any reason why someone cannot speak about their own health. While it goes without saying that they may not be in a position to offer a formal detailed diagnosis, we cannot see any reason why a witness cannot say, "I was experiencing mental health difficulties over a particular period", or, "I was experiencing restricted mobility". To the extent that the appeal ground remains live, we dismiss it.

Sentence Appeal

23. The sentence in this case was one of six and half years imprisonment imposed in respect a count involving oral sex (count 5 on the indictment) and lesser concurrent terms in respect of the remaining counts. The judge felt that in a situation where the accused had contested the case, and indeed, when it was being indicated that he did not accept the verdict of the jury, that the mitigating circumstances were few. However, the judge referenced the fact that the accused had no previous convictions, that he was 68 years of age at the time of sentence, and so prison was likely to be more difficult for him than for a younger man. The

judge also referenced his work record as a bus driver in Northern Ireland, driving a bus in Belfast throughout the Troubles.

24. The appellant contends that insufficient attention was paid by the trial judge to such factors as were present by way of mitigation, including his previous good character, his work record and lack of previous convictions. It was also pointed out that the sentence for a man of the appellant's years is a very significant one to impose on somebody who has never previously experienced incarceration. In response, it is said on behalf of the Director that the sentence imposed fell well within the margin of appreciation of the trial judge and that this was very serious offending committed against two young boys. The offending had very serious consequences for the injured parties and the judge might have considered resorting to consecutive sentences.

25. For our part, we have not been persuaded that there was any error of principle here. This was serious offending which was always required to be met with a significant sentence. The mitigating factors were, as the judge commented, few, and to the extent that there were mitigating factors present, they were recognised by the trial judge and credited. We have not been persuaded that the sentence imposed fell outside the available range.

26. We therefore dismiss the appeal.