THE COURT OF APPEAL

Record Number: 131/2021

The President.
Kennedy J.
Donnelly J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT

- AND -

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APPELLANT

JUDGMENT of the Court delivered on the 14th day of November 2022 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. The appellant was convicted of two counts on a six count indictment, namely, count 3, a count of rape and count 5, a count of sexual assault. The dates on the indictment regarding the count of rape concerned a date unknown between the 24th November 1995 and 17th January 1998, when the appellant was aged between 12 and 14 years old. This appeal concerns the conviction on count 3 only, with the focus on the doctrine of doli incapax, specifically, whether the respondent had adduced evidence to rebut the presumption of incapacity to commit a crime given the appellant's age. It was accepted by the respondent at trial that the doctrine applied.

Grounds of appeal

2. The appellant initially appealed his conviction on the following sole ground:

> *"The learned Trial Judge erred in law and in fact in including the facts concerned with Counts 1 and 2 in his charge to the Jury despite having previously withdrawn those counts from the jury."*

3. However, it transpired at oral hearing that the appellant was seeking to rely on an additional ground; that the judge erred in failing to direct a verdict of not guilty on count 3 on the indictment, and, following application to which there was no opposition, he was permitted by this Court to argue the additional ground. Two issues are for consideration: firstly, that the judge erred in failing to grant a direction of not guilty on count 3 and, secondly, that he erred in directing the jury that it could rely on the facts surrounding

counts 1 and 2 when considering the doctrine of doli incapax referable to count 3. Although in truth, if the trial judge was correct in leaving count 3 for the jury's consideration, then it seems to us that part of that consideration would have to be informed by what occurred relating to counts 1 and 2. Therefore, the focus of this judgment rests with the refusal by the trial judge of the application to direct count 3. In order to place that issue in context, it is necessary to outline briefly the relevant material relating to counts 1 and 2.

Factual background

4. The appellant is the older brother of the complainant. The offending related to counts 1, 2 and 3 is alleged to have occurred between the 24th November 1995 and the 17th January 1998.

5. Counts 1 and 2 relate to an incident in the bathroom of the family home. An older brother, approximately 16 years old or thereabouts entered the bathroom first with the appellant coming in after him. The complainant described incidents of a sexual nature with both brothers participating. The relevant portion of the evidence for the purpose of this appeal is as follows:

"A. They both left the room, the bathroom, together, and I just cried, I think, for ages afterwards and just left the bathroom and went to bed.

Q. And was anything said?

A. Nothing. No, nothing.

Q. And when they came in and started doing us (sic) what was your reaction?

A. They never said anything anytime. Like, the only time [older brother] after said shush or stop was when I was crying downstairs. They never said anything that day either in the bathroom. They literately (sic) didn't even speak. It was evil.

Q. How were you during all of it?

A. At the time, I don't -- I don't think there was emotion at the time in the middle of doing it, that there was none. Afterwards, I don't know, I cried and I cried. I just wanted someone to come home."

6. She then gave evidence regarding the next incident, the subject of count 3, which related to an incident in the boys' bedroom. The complainant described that the appellant called her upstairs, and once in the bedroom he pushed her down onto the bed, pulled her legs and tried to penetrate her with his penis, hurting her. The complainant pleaded with the appellant to stop. Her evidence in this respect is as follows:

" A. He went to put his penis inside my vagina, and I know it hurt. I remember crying, stop, please stop, because it was really, really sore.

Q. Yes?

A. And I remember just saying, "Please stop."

7. At this point, it appears the incident was interrupted by the complainant's older sister who grabbed her from the bed, and the complainant recalled that the appellant said: "it's not, it's not, it's not", being, if accepted by the jury, evidence of the appellant's reaction to the interruption.

Background giving rise to the appeal

8. On the 28th April 2021, an application was made by counsel for the appellant to have counts 1, 2 and 3 withdrawn from the jury. Initially, the relevant time frame for each count was between the 24th November 1995 and the 11th January 2001 but the indictment was amended so that the timeframe preferred was between the 24th November 1995 and the 17th January 1998, the end date reflecting that the child of an older sister had not been born when the events the subject of the counts occurred.

9. Counsel for the appellant applied for a direction on counts 1, 2 and 3 on the indictment on the basis of insufficient evidence to rebut the presumption of incapacity to commit the offences alleged. The common law position at the time of the allegations was that a child between the ages of 7 and 14 was presumed to be incapable of having the capacity to commit a criminal offence but that that presumption could be rebutted. Whilst counts 1, 2 and 3 referred to the offending occurring on a date unknown when the appellant was aged between 12 and 14 years, and over 11 months of that was at a time when the appellant was 14 years old, the respondent was not in a position to prove that the offending occurred when the appellant was 14 years and therefore the Director accepted that the doctrine of doli incapax applied.

10. The trial judge found that counts 1 and 2 should be taken together, given that they share the same factual matrix, and that count 3 be considered separately. He granted a direction on counts 1 and 2 on the basis that there was no evidence before the jury to enable them to determine the issue of capacity on the part of the appellant aside from the conduct constituting the offending itself.

11. However, the judge refused the application concerning count 3 as he determined that the jury were entitled, if they accepted the evidence, to take account of three strands of evidence to enable them to determine whether the appellant held the necessary capacity regarding that offence. Those three strands included the complainant's distress in the aftermath of the incidents in the bathroom; (which incidents were the subject of counts 1 and 2), that the complainant was called to the privacy of the bedroom by the appellant, and so the jury could infer an element of planning on his part and thirdly, the appellant's reaction to his older sister's arrival during the alleged incident, from which the jury could infer that the appellant knew his conduct was gravely wrong and not simply mischievous.

12. It should be noted at this point that at no stage did anybody involved in the trial contend that the appellant was not aware of the complainant's distress concerning the incidents

involving the older brother and the appellant in the bathroom. However, this point was canvassed by counsel for the appellant on appeal, contending that, on the evidence, the complainant was only distressed after the incidents and not during and so the appellant could not have been aware of her distress to inform him that the conduct was gravely wrong.

Submissions of the appellant

13. The appellant sets out the relevant law in this area. As per *R v Gorrie* (1919) 83 JP 136, in order for the presumption of doli incapax to be rebutted it must be proven that at the time the child committed the offence, they knew what they did was gravely or seriously wrong. *Gorrie* was adopted in this jurisdiction in *KM v Director of Public Prosecutions* [1994] 1 IR 514.

14. *KM* concerned a 13-year-old male appellant. The appellant had uttered threats to the complainant in the event that she report his offending to anyone. It is submitted that this is a very clear demonstration of a person having an appreciation or understanding that what they were doing was seriously wrong. In this way, the appellant distinguishes the instant case from KM as evidence of this nature was not present in the instant case.

15. *Criminal Law in Ireland, Cases and Commentary* (2nd Ed) by Campbell, Kilcommins and O'Sullivan is cited in this regard; *"as emphasised in Runeckles, the nature of the crime in and of itself is not sufficient to prove that the child in question knew the difference between right and wrong."*

16. Applying the principles of *KM* to the instant case, the appellant submits that insofar as counts 1 and 2 are concerned there were no words or conduct on the part of the appellant demonstrating that he knew that something was seriously wrong or mischievous and that this was accepted by the trial judge.

17. It is said that the judge erred in refusing the application regarding count 3 as there was an absence of evidence to demonstrate that the appellant appreciated the conduct was gravely wrong, in other words, there was insufficient evidence to rebut the presumption of incapacity.

18. It is submitted that the admission of evidence in respect of counts 1 and 2, so that it could inform the jury's assessment of the appellant's capacity, was "wholly speculative." The appellant says that it appears that the reasoning of the trial judge was premised on the notion that being in the company of his older brother during the offending which is the subject of counts 1 and 2 could have potentially influenced his ability to comprehend what he was doing was seriously wrong in respect of count 3.

19. It is pointed out that there was no further or additional evidence to indicate that the presence of his brother contributed to the appellant's understanding of serious wrongdoing. Further, the appellant questions that if such a fact did not provide independent evidence in respect of counts 1 and 2, how it could be transformed into such evidence by the time of the commission of the incident giving rise to count 3. However,

we note from the judge's ruling that he considered that it was the distress arising from the bathroom incidents which was relevant, i.e. that the jury could draw the inference that it would have been obvious to the appellant that she was distressed as a result of those incidents.

20. Turning then to the distress of the complainant and the intervention of the older sister, it is submitted that these factors cannot be invoked as evidence of the mind of the appellant or his state of knowledge or understanding prior to the commission of the offending contained in count 3, either. The appellant contends that such distress on the part of the complainant only manifested after the relevant offending commenced as it occurred at the very end of the incident due to the abrupt entry into the bedroom of their older sister. Therefore, it is submitted that at the time he had embarked on the offending contained in count 3 there was no action or reaction, by word or deed, which would have indicated to the appellant that he was engaging in activity that was seriously wrong. The appellant reinforces this submission by reference to the evidence of the complainant where she stated that the only time the appellant's older brother said anything was when he told her to stop crying in the aftermath of the offending but crucially, it is pointed out that this did not take place in the presence of the appellant.

21. As regards the "planning element" the appellant submits that the characterisation of this factor as independent evidence is too tenuous to indicate any awareness or contemplation of serious wrongdoing. It is said that such a factor, in isolation, is insufficient and requires the support of additional independent evidence.

22. It is submitted that it is highly likely that the appellant would have been prejudiced by the judge's ruling that the jury could consider the facts surrounding counts 1 and 2 when considering count 3 in circumstances where counts 1 and 2 had been withdrawn from the jury. Further, it is said that any assessment of the probative value of allowing the jury to consider these facts is strongly outweighed by its prejudicial effect.

23. It is the appellant's position that the reasoning in respect of count 3 was flawed and inconsistent in circumstances where the appellant being in the company of his older brother during the commission of the offending which is the subject of counts 1 and 2 was taken to militate against such knowledge and understanding.

Submissions of the respondent

24. The respondent accepts that on the evidence adduced at trial the jury could not have been satisfied beyond reasonable doubt that the appellant was over the age of 14 during the period in which the offences contained in counts 1, 2 and 3 were alleged to have been committed and it is accepted that under the doctrine of doli incapax, it was for counsel for the Director to rebut the presumption beyond reasonable doubt. It is accepted that in order to rebut the presumption of incapacity the prosecution would have to adduced evidence that would satisfy the jury beyond reasonable doubt that the appellant knew what he was doing was seriously or gravely wrong.

25. It is argued that the judge was entirely correct to refuse the application concerning count 3 and in so doing identified evidence, which, if accepted by the jury, was evidence from which the jury could draw certain inferences. Specifically, if accepted, that the appellant was present during the incidents in the bathroom and was aware of the complainant's distress thereafter. It is pointed out that at no stage in the proceedings did any party consider that a possibility arose that the appellant was unaware of her distress and the trial proceeded accordingly. The respondent relies on the element of planning as referred to by the trial judge.

26. As regards the intervention of the appellant's older sister and the timing of same, the respondent submits that it is not the intervention upon which the jury could rely but rather the appellant's response to his sister's intervention. In particular, it is submitted that it is the protestations of the appellant "it's not, it's not" which is indicative of awareness on his part that he had done something seriously wrong.

27. Insofar as the original ground of appeal is concerned, the respondent says that the judge gave a "reasoned and correct consideration" of the issues arising and one which accords with jurisprudence and that no objection was raised by the appellant regarding the trial judge's intended approach to instruct the jury that they could rely on the complainant's distress after the events the subject of counts 1 and 2, if they were satisfied beyond reasonable doubt that those events occurred.

28. It is the respondent's position that the evidence referenced by the trial judge in his charge to the jury was compelling evidence of the appellant's awareness that his conduct was seriously wrong. It is submitted that the evidence was such as could satisfy a jury beyond reasonable doubt as to the appellant's state of mind at the time of the offending concerned.

29. Further, it is submitted that it is notable that despite the defence raising a number of requisitions, none related to what the trial judge told the jury regarding the evidence they were entitled to consider in relation to count 3.

Discussion

30. In his text on *Sexual Offences*, 2nd ed. Prof. O'Malley at para. 3-60 succinctly states the position concerning capacity to commit a crime and says on the doli incapax doctrine:

> *"Until quite recently, Ireland retained the common-law ages of criminal responsibility under the so-called doli incapax doctrine, a child under the age of seven years enjoyed a conclusive presumption of incapacity to commit a crime, while a child aged between seven and 14 years enjoyed a rebuttable presumption to the same effect. Having the necessary capacity, or the "mischievous discretion" as it was sometimes known, was not to be equated with the mental element of the relevant offence, nor was its presence automatically proved by the conduct constituting the offence charged. Rather, the prosecution had to rebut the presumption at the outset by showing that the child knew that the conduct was gravely or seriously wrong, as opposed to being merely naughty or mischievous."*

31. Turning then to the failure to grant a direction on count 3, the first matter for consideration is whether there was evidence upon which the jury could act to rebut the presumption of incapacity to commit a crime. The trial judge distinguished the evidence on counts 1 and 2 from that concerning count 3 and clearly stated his reasons as follows:

> *"My view of the situation is substantially different on count 3, and I'm also of the view that in relation to count 3 that a jury are quite entitled, if they decide beyond a reasonable doubt that [the appellant] accompanied [the appellant's older brother] in relation to the earlier incidents, which were the subject of count 1 and 2, but that is a factor that they can take into account as independent evidence because [the complainant's] evidence was clear that she was particular (sic) upset by this incident, that she was crying, and it would have to have been obvious, or certainly the jury could draw the inference that it to have been obvious even to [the appellant] at his age that this was a matter that caused great distress to his younger sister.*
>
> *The other element of the evidence which, in my view, the jury are entitled to consider, apart from the nature offence, as well is that [the complainant's] evidence was that she was downstairs and that she was called up by [the appellant] and that he was alone in his bedroom, and, in my view, that -- the jury can draw the inference that that is -- certainly that there was a planning element involved on [the appellant's] intentions at that particular time. And of course the third element is [the complainant's] own evidence as to what happened when [older sister] came into the bedroom and the -- [the appellant's] reaction to that. Now, again these are dealt with by the Court on the high water mark of the prosecution evidence that the jury may or may not accept [the complainant's] evidence. But it's not correct for the defence to say that that evidence can be dismissed because [older sister] didn't give the evidence. I mean, that's a matter for the jury. It may well be that they consider that it's weak evidence and they can't rely on it.*
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> *So, in my view, there are three separate independent pieces of evidence that the Court can rely on in court (sic) number 3 which would indicate that [the appellant] knew exactly that what he was doing was a very serious matter, and that count 3 therefore can be left with the jury."*

Distress

32. It is now argued on the part of the appellant that the evidence did not disclose that the appellant would have known that his sister was crying relentlessly following the assaults in the bathroom. This is said notwithstanding that no such argument was advanced before the court of trial. There is no suggestion whatsoever arising from a consideration of the transcript that any person involved in the trial took this view, on the contrary, counsel on both sides and the trial judge proceeded on the basis that the distress was apparent to the appellant.

33. The judge, however, was careful in how he approached the issue of distress as can be seen from the extract quoted above, where in assessing the available elements of the

evidence regarding the appellant's capacity, and in particular the incidents in the bathroom, the judge said:

> *"because [the complainant's] evidence was clear that she was particular (sic) upset by this incident, that she was crying, and it would have to have been obvious, or certainly the* ***jury could draw the inference that it to have been obvious even to [the appellant] at his age that this was a matter that caused great distress to his younger sister.****" (our emphasis).*

34. As said, no issue was taken that there was evidence of distress following the bathroom incident, the trial judge charged on this basis saying:

> *"….the previous incident in the bathroom. If you decide that that happened and it was truthful on [the complainant's] evidence, she said that she was very very upset by that, so you're quite entitled to draw the inference that [the appellant] would have known that she was very upset about particular incident, even though at the time that he might have taken the view that it was just a naughty or mischievous incident."*

35. No requisition was raised on that issue. Therefore, it seems that all parties considered the distress following that incident to be relevant.

36. In order to rebut the presumption of incapacity to commit a crime where the prosecution accepted that it could not prove that the offending occurred after the appellant turned 14 years, and so was under 14 years at the relevant time and therefore doli incapax applied, it was necessary for the respondent to demonstrate that the appellant knew at the time of the offending that his conduct was gravely, seriously wrong.

37. The direction by Slater J. in *Gorrie* was cited with approval by Morris J. in *KM*. In the former case, Slater J. advised a jury trying a 13-year-old boy that they must be satisfied *"that when the boy did this he knew what he was doing was wrong, not merely what was wrong but what was gravely wrong, seriously wrong."*

38. Many years later in *JM (a minor) v Runeckles* (1984) 79 Cr App R 255, Mann J. adopted Slater J's use of the phrase seriously wrong and said:

> *"I think it is unnecessary to show that the child appreciated that his or her action was morally wrong. It is sufficient that the child appreciated the action was seriously wrong. A court has to look for something beyond mere naughtiness or childish mischief."*

39. That case involved a child aged 13 years who stabbed another child with the remnant of a milk bottle and then ran away, hiding from the police. The child made a statement under caution. Those elements taken together were sufficient to rebut the presumption.

40. The nature of the crime itself may not be in and of itself sufficient to rebut the presumption, however, a jury may assess all elements present on the evidence to determine whether a child was aware that the conduct was seriously wrong.

This Appeal

41. Turning now to the present case and in particular to the evidence of distress in the aftermath of the events in the bathroom. We are not at all persuaded that the judge erred in finding that the jury could, if they accepted the evidence, draw the inference that these events caused great distress to the injured party. The evidence disclosed that she was crying and crying in the house and that her older brother told her to stop. There is no doubt that the evidence was there and, in the circumstances, the jury were entitled to draw certain inferences from that evidence.

42. In any event, this was not the *only* evidence which fell for consideration; it was a single element of the evidence on the issue of capacity. The judge identified three strands of evidence, a) the events in the bathroom and the distress arising therefrom, b) the surreptitious manner of the offence; where the appellant called his sister to his bedroom, being an area which was somewhat private, and, c) the evidence of his reaction when his older sister came into the room and he said 'it's not, it's not", the inference from his words, (if accepted by the jury as having been said) being – it's not what you think.

43. While the nature of the offending in and of itself does not automatically prove the necessary capacity, we believe it is a factor which may be taken into consideration in the determination of capacity. The evidence from the injured party that she was crying during the incident, pleading with him to please stop, and the evidence from the older sister that the injured party had tears coming down her face were relevant factors to consider.

44. Apart from the evidence of distress in the aftermath of the bathroom incident, the jury were entitled to take account of the appellant's conduct in calling his sister to his room, her distress during the incident, her pleas to stop, and his reaction to his older sister coming upon them.

45. In conclusion, even if there was any ambiguity on the issue of the appellant's awareness of his sister's distress in the aftermath of the events in the bathroom, and we do not believe there was, there was sufficient evidence to justify the trial judge leaving count 3 to the jury for their assessment as to whether the appellant knew at the time that his conduct was gravely, seriously wrong. This ground is therefore rejected.

46. Insofar as the second ground is concerned, as we said, in reality, if the judge was correct in leaving count 3 to the jury, consideration of that count would have to be informed by what occurred relating to counts 1 and 2 in the context of capacity to commit the crime. This ground is also rejected.

47. Accordingly, the appeal is dismissed.