



THE COURT OF APPEAL

Record No. 132/2021

**The President
McCarthy J
Kennedy J**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

P.S.

APPELLANT

JUDGMENT of the Court delivered by Ms Justice Isobel Kennedy on the 16th day of May 2023

- 1.** This is an appeal against conviction. On the 9th June 2021, PS, the appellant herein, was convicted of thirteen counts of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act, 1990 as amended by s. 37 of the Sex Offenders Act, 2001.
- 2.** This appeal is confined to a single issue, namely, that complaint evidence pertaining to two of the complainants should not have been admitted at the trial.
- 3.** The appellant was convicted of thirteen counts of sexual assault for offences against three sisters which occurred between 2009 and 2014. The appellant is the maternal grandfather of the three complainants.
- 4.** It was acknowledged that the appellant had had a close relationship with the three complainants prior to the alleged offences. They resided nearby and were regular visitors to their grandparents' home, he took them on drives and with him whilst farming. The complainants' ages ranged between 10 to 14 years, approximately, at the relevant times. The nature of the sexual assaults involved the touching of the vagina, breasts and bottom of the complainants which is outlined below.

The First Complainant – AB

- 5.** AB was born in 1996 and is the eldest of the three complainants. She was 12 years old when the first incident of sexual assault occurred in 2009. Three counts relate to this complainant. She was 14 years of age at the time of the third count preferred on the indictment, being the

summer of 2010. All the offences were alleged to have taken place in the appellant's home while there were other people present.

6. The first offence occurred at her grandparents' house during the Easter holidays of 2009. She awoke sometime between 5am and 6am to use the bathroom, and when passing by the kitchen, she noticed that her grandfather was having his breakfast. On her return from the bathroom, he beckoned her over and tapped his thigh for her to sit on his lap. She sat on his lap, and he touched her vagina and her breasts. There was no conversation while this was happening and afterwards, she went upstairs to try to figure out what had just occurred. She ultimately went back down to the sitting room and managed to fall asleep. She didn't tell anybody what had happened at that time.

7. Count 2 relates to events that occurred around Christmas of 2009, again in her grandparents' house. The complainant's aunt had put up Christmas lights on her grandparents' bedroom window and she went to see those lights. On returning inside, her grandfather stood in to let her pass by him on the way in the door and put his hand down the back of her school skirt and touched the top of her bottom. She stated that she then made her way past him, back into the kitchen as fast as she could, and she did not tell anybody. She was 13 years old when this offence took place.

8. Count 3 occurred in the summer of 2010, when she was 14 years of age. Here, AB gave evidence that she was sitting on a chair next to the door into the kitchen and there were a number of other people present and chatting in the kitchen. She said that her grandfather came into the room and leant over her, placing his hand inside the back of her top. She said that she wriggled forward and believed he was going to move his hand around the front of her body because of what had happened previously. She was scared and frightened. She also gave evidence that she was doing her best to stay out of his way from the time of the first offence.

The Complaint

9. AB was the first of the three sisters to make a complaint about the appellant's behaviour. Sometime in 2013, AB confided in a schoolfriend, who did not make a statement and was not a witness. She then complained to her PE teacher, Mr C, in January 2014. The teacher had noticed she was upset at school one day and told her "*If this is serious, I will have to report it.*" AB told him that "*a person had been at her.*" She named the person as her maternal grandfather. She went on to say that "*she had been touched inappropriately*" by him. The admissibility of this complaint is the subject matter of the first ground of appeal. Mr C notified the deputy school principal and the relevant authorities.

10. An Garda Síochána were informed about the matter. In August 2014, AB did not wish to make a statement to the Gardaí concerning these matters as he was her grandfather. She made her statement in 2016.

The Second Complainant-FB

11. The appeal is not advanced in respect of this complainant; FB. The first incident of sexual assault occurred when she was 10 years old and the last when she was 11 years old.

12. FB first disclosed this abuse to her mother in 2016 on the same night and following her sister KB making disclosure.

The Third Complainant - KB

13. KB was born in 2001. The first incident of sexual assault occurred when she was 11 years of age and the last incident occurred when she was 13 years old in 2014. Counts No. 9-13 on the indictment relate to this complainant between 2012 and 2014. These offences were alleged to have taken place when she was travelling in a van with the appellant as well as incidents arising whilst she was assisting with farm work in the appellant's company.

14. Count 9 relates to an incident in the appellant's vehicle where a cushion was placed over the handbrake of the vehicle, the complainant sat on this and the appellant allowed her to steer the vehicle, during the course of which, he took his hand off the gearstick and put it down inside her clothing and touched her vagina.

15. In respect of Count 10, the complainant gave evidence of being by a tree, on which she and her sisters and cousins had carved their names. The appellant came up from behind her, put his hand down her pants and touched her vagina.

16. Count 11 occurred in a hut in a field: the appellant placed his hand inside her pants and touched her on her vagina.

17. Count 12 was stated to have occurred at a farmyard belonging to a third party and it was at a haybarn at this yard, the appellant put his hand down inside the complainant's clothing and touched her vagina.

18. Count 13, the final offence in time, was stated as having occurred in a rented house attaching a farm being tended by the appellant when he touched her breast and vagina.

The Complaint

19. In 2016, KB disclosed to her friends via social media that she was upset about something and the following day at school she told a close friend, Ms R, that her grandfather had touched her inappropriately and pointed to her chest area and her private parts. This was over a year after the offending had ceased. She mentioned that it was when "*she was farming with her granddad that it happened.*" Subsequent to this and at trial, Ms R gave evidence that she and school friends encouraged KB to tell her sister, the first complainant, AB, about this.

20. Arising from this, KB confided in AB at home. Their parents were at home and AB called her parents upstairs and told them. The abuse of the complainant FB came to light and their father contacted the Gardaí and Tusla in relation to the allegations in respect of the abuse of his three daughters. Each of the three girls made full and formal complaints to Gardaí. KB did so on the 16th April 2016, AB did so on the 26th April 2016 and FB did so on the 15th May 2016.

Investigation and Trial

21. The appellant was arrested on the 3rd March 2017 and was interviewed on three occasions during the course of which he made no admissions. However, the appellant made assertions that his granddaughter AB had made up the first allegation, at the age of 12, because she had been taking boys from her friends and none of her friends were talking to her. He further asserted that all of these allegations had been made up by the three victims, that they were not telling the truth and that he still loved them in any event.

Grounds of Appeal

22. The appellant relies on the following grounds of appeal: -

- i. *The learned Circuit Court Judge erred in law in refusing a defence application in respect of the proposed evidence of TC and thus allowing the evidence of TC, pertaining to a complaint made to him in January 2014 in respect of alleged offences in 2009 and 2010, to be adduced before the jury.*
- ii. *The learned Circuit Court Judge erred in law in refusing a defence application in respect of the proposed evidence of AR and thus allowing the evidence of AR, pertaining to a complaint made to her in early 2016 in respect of alleged offences between 2012 and 2014, to be adduced before the jury.*

23. The issues arising in respect of the first two grounds are fundamentally the same. In respect of the first complainant, AB, the additional point is made that the complaint to Mr C was not in fact the first complaint in time, the first complaint having been made to a school friend approximately a year prior to the complaint to Mr C.

The Submissions

Ground 1: *The learned Circuit Court Judge erred in law in refusing a defence application in respect of the proposed evidence of TC Jr and thus allowing the evidence of TC Jr, pertaining to a complaint made to him in January 2014 in respect of alleged offences in 2009 and 2010, to be adduced before the jury.*

24. Firstly, counsel for the appellant argue that the complaint was not the first in time and there was no explanation provided as to why the person to whom the first complaint was made was not available to give evidence.

25. Counsel argues that this goes to the test of reasonableness. In the application to the court of trial, counsel for the appellant placed particular emphasis on the case of *People (DPP) v DR* [1998] 2 IR which involved a relatively short delay in making a complaint which was held to be reasonable by the court and the complaint evidence was allowed. Counsel further noted the decision of *People (DPP) v Brophy* [1992] IRLM 709 which sets out the principles of admissibility of recent complaint evidence given that such a complaint must “...*have been made as speedily as could reasonably be expected and in a voluntary fashion, not as a result of any inducements or exhortations.*” The appellant’s contention as to unreasonableness here goes to a distinction on the facts, on the lapse of a significant period of time and the absence of the first person to whom the complaint had been made to.

26. The prosecution in reply at trial, stated that *DR* does not establish any hard-and-fast rule concerning how quickly a complaint must be made in order to be admissible as recent complaint evidence. It was acknowledged that there was no explanation before the court below as to why the person to whom AB’s first complaint was made did not make a statement.

27. In oral hearing before this Court, counsel for the respondent offered the explanation that the child’s parents did not wish for her to make a statement. Counsel also said that although no facts or reasons were canvassed as to why the complainant had delayed in making her complaint, she said that her tender years speak for themselves.

28. Counsel for the appellant in submissions refers to *DPP v GC* [2017] IECA 43, in which Edwards J. noted that the Court of Criminal Appeal had previously quoted with approval from *R v Valentine* [1996] 2 Cr App R 213, to the effect that it is sufficient if the complaint is made at the first reasonable opportunity, as opposed to the first opportunity. However, counsel argue that if

any meaning is to be given to what is described as “*the first reasonable opportunity*”, some basis for asserting that the proposed complaint evidence amounts to a complaint made at the first reasonable opportunity must be put before the trial court, and the onus of doing so must rest with the prosecution.

29. In the instant case, counsel for the appellant submitted that no evidence or argument was put before the Court as to how or why the complaint to Mr C should be considered to have been made at the first reasonable opportunity.

Ground 2: *The learned Circuit Court Judge erred in law in refusing a defence application in respect of the proposed evidence of AR and thus allowing the evidence of AR, pertaining to a complaint made to her in early 2016 in respect of alleged offences between 2012 and 2014, to be adduced before the jury.*

30. The counts in respect of KB spanned a period between the 1st April 2012 and the 30th September 2014 and she made her complaint to Ms R, a friend from school. In her statement of proposed evidence, made on the 10th August 2016, AR described a conversation with KB sometime in 2016 in which the complainant stated that her grandfather had touched her and pointed to parts of her body where she alleged the said touching had occurred.

The Ruling

31. Following submissions at trial, the trial judge ruled as follows:-

“JUDGE: Good afternoon, counsel. I have been asked to rule in relation to the issue raised by Mr Sammon regarding the admissibility of the evidence of complaint having been made in fact to Mr C as opposed to [Ms H], who is not a witness in the book of evidence. Mr C’s evidence is in the book. He is witness No. 8.

In relation to that matter, it is the position that the first complainant has given evidence in respect of three allegations, the latest in time being the 31st of August 2010, and the proposal is that the prosecution would adduce evidence in respect of a recent complaint in early 2014, so some four years after the last-in-time allegation, as it were. Mr Sammon I think makes the point, and I hope I’m not paraphrasing him unfairly, that that does not constitute recent complaint within the meaning of the law and he, if I may say, gave a wonderful walk through of the decision in RD in which he clearly had appeared. This had started a change in the law in relation to adult complainants, what had started in terms of adult female complainants and a hue and cry situation in respect of, initially I think it was, rape complaints, but the law has evolved quite significantly over time in respect of it, not least in respect of children, child complainants, in sexual matters. This Court is mindful of the Supreme Court decisions, I think in the late 90s, in respect of delay, for instance. The Court is mindful of those Supreme Court decisions in relation to delay and the growing awareness of the position, particularly of children, and also persons with impairments or disabilities, or some lack of capacity, which made it more difficult for them to come forward. That’s the first thing to say in relation to it, and also the fact of the matter that the relationship between an alleged perpetrator and an alleged victim is a factor that the Court can take into account.

I am very grateful to both counsel in respect of the submissions that were made in relation to this matter. Clearly evidence of recent complaint is intended solely to demonstrate the consistency of the complainant's account. It never is admissible as evidence of the facts complained of. It only goes purely to consistency and it must be made at the first reasonable opportunity.

In that regard, I particularly want to mention the decision that was opened to me of Edwards J in GC of the 21st of February 2017. He says the following in relation to evidence of recent complaint: The following statement from the judgment of Roach LJ, this is at paragraph 75 of R v. Valentine: "It was quoted with approval in this jurisdiction by the Court of Criminal Appeal in DPP v. Murphy, which is an unreported decision of 13 November 2003. 'The authorities established 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 that it is the first reasonable opportunity'". And then he quotes Roach LJ in R v. Valentine, who went on to state: "We now have greater understanding that those who are 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." Edwards J in GC, at 77, says: "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, ie, the jury in a case such as the present." And they go on to say: "This general approach has previously been applied in DR and also in TOR, which was 2008." I say that in those circumstances, I am going to permit the prosecution to adduce evidence of the complaint to Mr C, I think is the schoolmaster, in 2014 by AB.

MR SAMMON: Judge, I have heard your ruling. However, there is an allied matter in relation to this and that is that in the materials that have been provided by way of disclosure, there's reference to this witness declining to give a statement to An Garda Síochána and that is based on an interview had with two specialist interviewers who are frequently engaged in such work, Garda Tammy Mitchell and Garda Carmel O'Sullivan. The actual date upon which this occurred is not entirely clear to me but it would seem that she was probably about 18 years of age at the time.

MS MCGILLICUDDY: It was in August 2014 that she was 18."

32. It was accepted that the same issues arose and the same outcome would inevitably follow in respect of the evidence of Ms R, regarding the complaint made to her by KB and therefore a formal objection was raised (the trial judge having already ruled in favour of the admissibility of the evidence of TC Jr), but, sensibly and responsibly the arguments were not rehearsed and the judge ruled in favour of the admissibility of the evidence of Ms R.

Discussion

33. Recent complaint evidence is an exception to the hearsay rule and if admissible, is adduced by the person to whom the complaint was made. The purpose of admission in trials for sexual offences is that of seeking to show consistency on the part of the complainant. Therefore, evidence of a complaint made after the alleged incident/s may be admissible to demonstrate that the complainant's conduct at the time in complaining is consistent with the complainant's testimony.

34. Murray J. (as he then was), set out the rationale for the doctrine in *People (DPP) v MA* [2001] 2 IR 601 at p 608.

*"Centuries ago, evidence that a woman who was the victim of rape or serious sexual assault had raised 'hue and cry' following the commission of the offence was admissible as evidence of conduct consistent with her testimony. Moreover it became effectively a precondition in those times to the initiation of a prosecution for such offences. Of course, the making of such a complaint has not been a precondition to a prosecution for a very long time but the fact of making a complaint to a third party soon after the offence was always admissible evidence in the prosecution of such offences. It is evidence which can be introduced to support the credibility of a complainant based on the view that it was the natural expression of the victim's feelings that **reasonably** soon after the offence she would complain to some person with whom she had a personal or confidential relationship."* (our emphasis)

35. Historically, it was necessary for a complainant alleging rape to raise a hue and cry and it is from this concept that the doctrine developed. In *R v Osborne* [1905] 1 KB 551, Ridley J. referred to this saying:-

"...in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised 'hue and cry' in the neighbouring towns, she shewed her injuries and clothing to men, and that the appellee might raise as a defence the denial that she had raised the hue and cry."

36. Thankfully, matters have moved on from that time and whilst the doctrine is sometimes known as recent complaint evidence or fresh complaint evidence, the terms recent or fresh are not as significant as once thought.

37. The conditions for the admissibility of this evidence were laid down in *People (DPP) v Brophy* as follows:

*"(a) Complaints may only be proved in criminal prosecutions for a sexual offence.
(b) The complaint must have been made as speedily as could reasonably be expected and in a voluntary fashion, not as a result of any inducements or exhortations. Once evidence of the making of a complaint is admissible then particulars of the complaint may also be proved."*

(c) *It should always be made clear to the jury that such evidence is not evidence of the facts on which the complaint is based but to show that the victim's conduct in so complaining was consistent with her testimony.*

(d) *While there is mention in one of the older cases, or in R. v. Osborne of a complaint being 'corroborative of a complainant's credibility' this does not mean that such a complaint amounts to corroboration of her testimony in the legal sense of that term but as pointing to the consistency of her testimony. Corroboration in the strict sense involves independent evidence, that is evidence other than the complainant's evidence."*

38. Subparagraph (b) lies at the heart of this appeal, and in particular that *"the complaint must have been made as speedily as could reasonably be expected..."*

39. Whilst the requirement that the complaint be made as speedily as could reasonably be expected was initially rigidly applied, it has been interpreted with more flexibility from time to time and certainly in more recent times as courts become more aware of the impact of sexual offending.

40. So, the question in the present case is whether the interval between the last incident of abuse and the time the complaint was made by AB satisfies the condition that the complaint be made at the first reasonable opportunity.

41. It seems that courts have not in recent times placed a strict interpretation on the temporal aspect of complaints. Indeed, as agreed by Mr Sammon, temporal factors are not conclusive in the determination of admissibility.

42. Whilst the facts in *R v Valentine* were very different to the present case, it is significant that the court stated that the first reasonable opportunity is circumstance dependent. As said in *Valentine*:-

"What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and 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. Further, a complaint will not be inadmissible merely because there has been an earlier complaint, provided that the complaint can fairly be said to have been made as speedily as could reasonably be expected. This is not to say that it is permissible to allow the Crown to lead evidence that the same complaint has been made by the complainant in substantially the same terms on several occasions soon after the alleged offence, where that would be prejudicial in that it might incline the jury to regard the contents of individual complaints as evidence of the truth of what they assert. The complaint has to be made within a reasonable time of the alleged offence and on the first occasion that reasonably offers itself for the complainant concerned to make the complaint that was made in the terms in which it was made."

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

44. The above dicta were endorsed in *GC* and are apposite in the present case, where one considers the relationship between the complainant and the appellant, the family dynamic, the close relationship between the complainant's mother and her father, the fact that a good relationship had existed between the complainant and the appellant, the age of the complainant, the fact that the abuse was prolonged, and her fear and efforts to keep her distance from the appellant.

45. These are all factors in the mix in determining the reasonableness of the conduct in complaining at the time the complaint was made. Moreover, whilst the complaint is made that no evidence or argument was put before the court as to how or why the complaint to TC should be considered to have been made at the first reasonable opportunity, the material outlined in the preceding paragraph was sufficient to enable the trial judge to determine that the complaint was made at the first reasonable opportunity in the prevailing circumstances.

46. As said by Edwards J. in *GC* regarding the proximity in time in making a complaint:-
"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."

47. The courts and society now have a greater understanding that the impact of sexual offending and inter-familial abuse can give rise to situations where a complainant may be understandably reluctant to complain to a parent or close relative who may have a close relationship with their abuser. Oftentimes, this type of abuse is prolonged and that in itself may inhibit disclosure or indeed there may be reluctance to upset the extended family. In these kinds of circumstances, where a complaint is made at a significant remove in time, a judge, on careful consideration of the particular circumstances may conclude that the complaint was made at the first *reasonable* opportunity.

48. It is obvious that each case falls to be determined on its own facts, however, we believe there is a distinction to be drawn between cases of prolonged sexual abuse of a child, particularly inter-familial abuse, and a single incident of the rape of an adult. There are perhaps obvious reasons for this, as the circumstances will be quite different, and it is the circumstances which are pivotal to the determination of whether the complaint is made at the first reasonable opportunity.

49. An illustration of the varying circumstances can be found in *GC*, the complaints related to a time when the complainant was aged between 6 and 14 years old, the complaints were made some years after the abuse and there was evidence that the complainant had complained to persons other than those giving evidence of complaint some four or five years prior. The Court was satisfied that the evidence of a GP and psychologist was relevant and probative providing a possible explanation for the delay in coming forward. Moreover, as the Court observed, these complaints were the first complaints made to professional persons outside of her family and friends. Bearing in mind, the perpetrator was the complainant's uncle.

Decision

50. In the present case, there were legitimate reasons arising from the circumstances which led the trial judge to exercise her discretion to admit the evidence of complaint. It is true that AB had previously complained to her friend, and only then, about a year later, complained to her PE teacher. However, in the circumstances of long term inter-familial abuse of a young girl, where the evidence disclosed that the appellant was her grandfather and godfather, that he lived in close proximity to AB's family, that she saw him every week and that her mother said that "*her heart was torn out*" on learning of the complaint these were all factors the judge was mandated to take into account in deciding on the admissibility of the evidence.

51. The words of Murray J. in *MA* have resonance and are worth repeating at this juncture: -
*"It is evidence which can be introduced to support the credibility of a complainant based on the view that it was the natural expression of the victim's feelings that **reasonably** soon after the offence she would complain to some person with whom she had a personal or confidential relationship."*

52. The purpose of the admission of evidence of this type is to demonstrate that the complainant's conduct in complaining is consistent with the complainant's testimony. The fact that the complaint was made some four years after the last offence did not render the evidence inadmissible in the present circumstances. The complaint was made to a person in authority, outside of the complainant's family. We are not persuaded that the judge erred in the manner she exercised her discretion.

53. Insofar as the complaint made by KB is concerned, it is arguably more difficult for the appellant to contend that this complaint was inadmissible, in that KB told a close friend who was with other friends, a year or more after the last offence, about the offending. She did so having been upset in school and was advised by her friends to tell someone else about it. On returning home, she told her older sister, AB. This was relevant, probative evidence, not only in terms of consistency but also as to how the Gardaí became involved and the investigation commenced.

54. Accordingly, we are not persuaded that either ground of appeal has been made out and we dismiss the appeal against conviction.