THE COURT OF APPEAL

Record Number: 315/18
Neutral Citation Number: [2021] IECA 89

Birmingham P.
Woulfe J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

C.B.

APPELLANT

JUDGMENT of the Court delivered on the 26th day of March 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 7th November 2018, the appellant was convicted of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 and possession of child pornography contrary to section 6(1) of the Child Trafficking and Pornography Act 1998.

Background

2. The prosecution of the appellant arose from a statement of complaint made by the injured party, who was eleven years old at the time of offending, that she had been sexually assaulted by the appellant. The sexual assault occurred in the appellant's apartment in that he placed his hand on her vagina. The injured party said that the appellant had threatened her not to tell anyone or there would be problems.

3. On the 11th August 2016, an off-duty member of An Garda Síochána saw the appellant in a café with young children, one of whom was the complainant. The garda was aware that the appellant had previously been convicted for possession of child pornography and raised a concern with the local garda station. As a result, members of An Garda Síochána spoke to the appellant and a referral was made to Tusla.

4. Social workers met with the complainant's mother to give advice of " good touching bad touching". Following this the complainant's mother asked her if the appellant had touched her and the complainant disclosed that he had. On the 13th September 2016, the complainant was interviewed in accordance with section 16(1)(b) of the Criminal Evidence Act 1992, as amended and she gave details of the appellant's conduct towards her including, *inter alia,* that the appellant invited her and her cousin to go swimming, that they changed together in the cubicle and the appellant exposed his penis in front of her, and that on one occasion the appellant took her shopping and bought her a bra.

5. On the 15th September 2016 a search warrant was executed in respect of the appellant's property and a disc containing child pornographic material was discovered. The data creation date of the DVD was the 7th December 2008.

6. On the 16th September 2016 the appellant was arrested and interviewed on three occasions. The appellant denied the allegations and stated that his interaction with the complainant was innocent, that he had taken pity on the family whom he felt to be socially deprived. In relation to the DVD of child pornographic material, the appellant claimed that he did not knowingly possess the disc and he believed it originated from the time when his house was first raided.

7. On the 7th November 2018 the appellant was found guilty by unanimous verdict and he was subsequently sentenced to a term of four years and six months' imprisonment with the final eighteen months suspended on terms.

Grounds of appeal

8. The appellant put forward four grounds of appeal but relies on three grounds as follows:-

(1) That the learned trial judge erred in law and in fact in failing to sever the indictment prior to the commencement of the trial.

(2) That the learned trial judge erred in law and in fact in failing to discharge the jury despite the complainant's mother alleging in evidence that the accused had abused other children.

(3) That the learned trial judge erred in law and in fact in failing to give a corroboration warning in the course of his charge to the jury.

Submissions of the parties

Ground 1-Failure to sever the indictment

9. Mr Cody SC for the appellant focused on this ground of appeal, in truth, it may be said, this is the primary ground. Issue is taken with the trial judge's refusal to sever the counts on the indictment on two bases; firstly, that the judge erred in finding the existence of a nexus concerning the two counts and secondly, that the judge erred in the application of the principles as stated in *The People (DPP) v. McNeill* [2011] 2 IR 669.

10. In refusing to accede to the application to sever the counts on the indictment, the trial judge concluded that the offences had a sufficiently common factual nexus as the allegations, if proven, took place in the same location, and involved young girls, whether in reality or in a visual mode, for the sexual gratification of the accused. The trial judge further stated that it would be a distortion of the truth to exclude the evidence regarding the DVD of child pornographic material in the appellant's possession from the jury as it is inextricably connected with the circumstances surrounding the alleged sexual assault.

11. The trial judge then went on to consider the second point raised by counsel whether a refusal to sever the indictment would unfairly prejudice the appellant. In terms of the count concerning possession of child pornography, the trial judge observed that the appellant intended to put forward a defence of innocent possession arising from his past and, if the indictment was severed, this defence would go unchallenged. He concluded that the evidence of the complainant was necessary to put into context the true circumstances surrounding the possession charge. Likewise, the trial judge concluded that if the sexual assault charge was viewed in a vacuum it would give an incomplete picture of the appellant's interest in young girls and would allow his defence that he was taking pity on an impoverished family to go unchecked.

12. The trial judge went on to state as follows:-

> "[The appellant] stated that he had no sexual attraction "to that child" and later suggests "nor to any child." In light of such an assertion, the alleged possession of child pornography involving young girls is an entirely relevant matter to make the evidence before the jury complete. I am satisfied that this evidence meets the test as laid down by the then Chief Justice in the McNeill case. Further, the probative value outweighs the prejudicial effect of this evidence. I am also satisfied that the evidence is not of such a scandalous nature that it would irredeemably destroy the jury's ability to deliberate on each count with an open mind or to use the words of O'Donnell J. in the McNeill decision; "Contaminate the reasoning and adjudication process of the jury." To sever these two counts would not only provide two separate juries with a distorted picture, but would allow the accused to persist in his denials as well as his explanations, as given in his memos of interview, while at the same time curbing the prosecution's ability to rebut these."

13. In written and oral submission, it is said on the part of the appellant that he was significantly prejudiced by the joinder of the two separate counts, and that there was an insufficient "common factual origin", as referred to in *R v. Barrell and Wilson* (1979) 69 Cr. App. R. 250, so as to justify the joinder of these counts. While there were certain incidental similarities, the core substance of the sexual assault charge was entirely unrelated to the materials grounding the child pornography charge

14. The appellant refers to *The People (DPP) v. McNeill* [2011] 2 IR 669 and says that the evidence on each count could not have been described as incomplete or incomprehensible without the addition of the other count. At best the joinder of the counts simply served to bolster the accusations against the accused based on the fact that both allegedly evidenced a sexual attraction to young girls. It is submitted that the probative weight of such was at the lower end of the scale while the prejudicial effect was very much at the higher end. It is thus submitted that test of relevance and admissibility cannot be said to have been met in all the circumstances.

15. In response, the respondent argues that the evidence in respect of each count was relevant and that the evidence on each count was cross - admissible to rebut the defence that the appellant had an innocent relationship with the complainant and had no sexual interest in the complainant or any child.

16. The respondent refers to Walsh on *Criminal Procedure* (2nd Ed., 2016) at para 15-107:-

> " If the evidence on one charge is admissible on the other charges, it is unlikely that the judge's refusal to sever the indictment would be overruled. It should be noted that admissible evidence in this context is not confined to system evidence that, exceptionally, could be admissible to show that because the accused committed one of the offences, he is likely to have committed the other. It extends to what might be

called background evidence, which tends to show that the accused had hostile intent towards the victim or a motive to commit the offence. It follows that the accused is unlikely to be embarrassed or prejudiced by the joinder of two counts where evidence pertaining to one offence would be admissible to show motive or hostile intent in the other."

Discussion

17. It is noteworthy that the seizure of the child pornographic material arose from a search of the appellant's residence, where the search warrant had issued on foot of the complaint made by the child complainant of a sexual allegation. The dicta of Barron J. in *The People (DPP) v. BK* [2000] 2 IR 199 has oft been stated, in particular where the learned judge distilled the principles concerning misconduct evidence. Of particular application is that "the rules of evidence should not be allowed to offend common sense".

18. Having made those general observations, we now proceed to examine the issue raised that the trial judge erred in determining that there was sufficient nexus between the counts to permit the trial of both to proceed and erred in the manner he applied *McNeill*.

19. Section 6(3) of the Criminal Justice (Administration) Act 1924 governs an application for the severance of counts on an indictment and provides:-

"Where before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in the indictment, the court may order a separate trial of any count or counts of such indictment."

20. Therefore, the trial judge must assess whether the joinder of counts on the indictment causes prejudice or embarrassment in the defence of an accused or whether there are any

other circumstances which would render it desirable that the counts on the indictment be severed.

21. In the present case the trial judge identified the issues raised on the part of the appellant and addressed the first of those issues as follows: –

> "It is the law that charges for any offences may be joined on the same indictment if those charges are founded on a series, on the same facts or form, or are part of a series of offences of the same or similar character. At first glance, it may seem that the two counts on this indictment could not meet this criteria, but it long settled that such joinder of charges is permissible even though the said effects bear only an incidental relationship to each other. This means that the respective charges need not be identical in substance. The test is whether the charges have a common factual origin. I am satisfied that there is a sufficient nexus or link between the alleged sexual assault of a young girl and the alleged possession of child pornography to meet the test. The allegations, if proven, took place in the same location, the accused's residence, and involve young girls, whether in reality or in a visual mode, for the sexual gratification of the accused."

22. It is difficult to find fault with the trial judge's reasoning in this respect. Moreover, it seems to this Court that the evidence on each count is cross-admissible in respect of the other count. Having said that, it is of course the position that there is no rule of law that separate trials must be directed where the evidence is not cross-admissible. However, in the present case, the evidence was so admissible and arose not only from the circumstances to which we have alluded at paragraph 17, but also from the defence which was relied upon by the appellant.

23. In interviews conducted with the appellant when he was arrested in respect of these offences, the appellant denied the allegation of sexual assault and stated that he had no sexual

attraction towards the injured party or indeed to any child. His defence was one of an individual who took pity on a family in straitened financial circumstances and was one of innocent association. Insofar as the second count was concerned, the appellant stated that he was unaware he was in possession of the material, that it was inadvertence on his part and that it was something from his past.

24. Therefore, it is readily apparent that the evidence on each count was cross-admissible in order to rebut innocent explanation, accident or denial. Again, we emphasise that the rules of evidence ought not offend common sense. We are not persuaded that the trial judge erred in finding a nexus inter counts, the appellant was not prejudiced in his defence to the extent that it was necessary to sever the indictment. Indeed to do so, in the present case would have presented a skewed picture for the jury, enabling the appellant to rely on a defence in respect of each count in a separate trial of innocent association and innocent possession respectively, whereas in reality, the evidence on the sexual assault of a young girl was cross-admissible in respect of the count of possession of child pornography and vice versa. Indeed the final comments of the trial judge neatly encapsulate his assessment of the application:-

> "…the probative value outweighs the prejudicial effect of this evidence…To sever these two counts would not only provide two separate juries with a distorted picture, but would allow the accused to persist in his denials as well as his explanations, as given in his memos of interview, while at the same time curbing the prosecution's ability to rebut these."

25. The aspect of a skewed picture brings us to consider *The People (DPP) v. McNeill* [2011] 2 IR 669 and its application to the instant case. Whilst reliance was placed on the decision in *McNeill*, the decision is not directly apposite to the issue of severance. This was not a case of the admission of misconduct evidence as that term is understood. The crux of the issue lies with the terms of s.6(3) of the 1924 Act, however, the dicta in *McNeill* has

application insofar as the judge properly considered whether the jury would be presented with a distorted picture in the event of severance. A judge has a broad discretion whether or not to sever the indictment and must of course consider the potential evidence in so doing. In this regard, and in the assessment of potential prejudice, a consideration of the potential defence and the impact of the defence is relevant. The judge carefully considered the relevant issues, applied the legal principles and, in our view, correctly exercised his discretion.

26. In the circumstances, we are not persuaded that the judge erred in refusing the application for severance.

27. This ground therefore fails.

Ground 2- Failure to discharge the jury

28. This ground arises from an exchange between counsel for the defence and the mother of the complainant during cross-examination in which the witness stated that the appellant had abused other children. Following this exchange an application was made to discharge the jury. In his ruling the trial judge set out the circumstances of the cross-examination leading to the impugned remarks:-

> "[The witness] stated that of course when she was alerted to the possibility of something untoward, that a mother, she wanted to know and that she had in fact asked her daughter if she had been touched by the accused. It was then suggested to her by Mr Cody that she was the one who was suggesting to the complainant that she had been touched. She denied this. I particularly noted the use of the continuous tense "suggesting" to imply that more than one suggestion was made rather than the past tense of "suggested". It was put to her that the mother was worried that her daughter would be taken into care, which was also denied. This involvement of social workers was clearly related to concerns about the accused, not about her parenting skills. Mr Cody then returned to the allegation that [the witness] was the person who put it

> into her daughter's head that she had been touched. Again, this was denied. This exchange, which must have very pointedly suggested to the witness that she was being accused of fabrication, which if true, would of itself be a serious offence, was flatly denied by the mother. It was at this point that she got emotional and came out with what Mr Cody condemns as gratuitous remarks to the effect that her child was hurt, that "he should deserve prison for what he did to my daughter" and for what she heard he had done to many other children."

29. In refusing the application the trial judge emphasised the robust nature of juries and considered that the impugned remark fell short of being of the most prejudicial type that necessitates, in the interests of fairness to the accused, that the nuclear option of discharge be triggered.

30. The appellant submits that the impugned remark was gratuitous and was incredibly prejudicial to the appellant's right to a fair trial, particularly when taken in tandem with the prejudicial effect of the joinder of the respective counts against the appellant.

31. The respondent refers to *The People (DPP) v. Cleary* [2009] IECCA 142 where the Court reiterated that the decision to discharge a jury is a matter within the discretion of the trial judge and will only be interfered with when there is a real and substantial risk of an unfair trial.

32. The respondent submits that the trial judge correctly refused the application and dealt appropriately with the issue as it arose on the evidence.

Discussion

33. It is necessary to give some limited background relating to the genesis of the allegation. The injured party's family were in difficult financial circumstances, they were befriended by the appellant and the witness considered that he was very good with the children; bringing them on outings, baking with the injured party and buying her a bra. Following garda

intervention, the witness was contacted by the social services and advised not to permit her children to have contact with the appellant. Following this, the witness spoke with her daughter who then disclosed to her that she had been sexually assaulted by the appellant.

34. The impugned comment arose in the course of cross-examination, where it was repeatedly suggested to her that she suggested to her daughter that she had been inappropriately touched by the appellant. At an earlier stage in the cross-examination, she was repeatedly asked whether she asked her daughter if the appellant had touched her, and she agreed with that suggestion. She was also questioned as to whether she had concerns that her children would be taken into care by the social services.

35. Counsel made an application to discharge the jury on the basis of the words spoken by the witness which were in the following terms:-

> "And he should deserve prison for this, because the way what he did to my daughter and the way we hear that he has done to many children."

36. It must be observed that the defence was aware that the appellant had a previous conviction for possession of child pornography, after all, this was the reason the gardaí were concerned about him being unsupervised in the company of children, leading to the social services contacting the injured party's mother. It is also the position that in her statement, the witness referred to seeing a newspaper article regarding the appellant's previous conviction. Therefore, the hazard of repeated questioning on the same topic was apparent.

37. That said, we have examined the answer given by the witness, and the level of prejudice which may have arisen as a consequence.

38. Whether or not to discharge a jury is within the broad discretion of the trial judge. The manner in which a judge exercises his or her discretion is one which will not be interfered with by this Court unless it is clear that there is a real risk of an unfair trial. We are most cognisant that the trial judge is present for the entire trial, will have observed witnesses, their

demeanour and the examination of those witnesses. It is in that context that a judge exercises his/her discretion. The discharge of a jury is an extreme measure and one which we do not think was appropriate in the present case. The comment made by the witness was one easily capable of being considered by a jury as one based on rumour and speculation and the words of a tired and upset witness at the end of a long day in court.

39. We have also considered whether any potential prejudice could have been rectified by directions by the trial judge. However, in this respect, we observe that no such request was made to the judge, counsel preference perhaps being not to draw attention to the comment. It would certainly have been open to the judge to point out to the jury that the appellant had no previous convictions for the sexual abuse of children. However, counsel present at trial are tasked with assessing not only the evidence adduced, but the manner and run of the trial and are therefore in the premier position to take decisions of this nature.

40. This ground fails.

Ground 3- Failure to give corroboration warning

41. The trial judge refused to give a corroboration warning as follows:-

> "An application has been made by Mr Roberts that in view of the fact that he says there is no corroboration in relation to the sexual assault, a warning in relation to corroboration ought to be given particularly in view of the age of the complainant, the delay in making the complaint albeit accepting that it was not a historic complaint, and that the complaint emerged following [the complainant's mother] raising of the issue of touching with her daughter contrary to the best practice of the HSE…
>
> I have not been persuaded that there is any compelling reason to give a corroboration warning nor do I see any evidential basis for doing so. Having carefully considered the content and quality of the evidence and being familiar with the

jurisprudence, I do not find that it is necessary to give such a warning and I am refusing that application, exercising my discretion in that regard."

42. The appellant submits that the trial judge failed to give sufficient consideration to all of the circumstances of the case that may warrant the issuing of a corroboration warning. These circumstances include the youth of the complainant and the delay between the alleged incident and eventual complaint and also the fact that her mother asked her directly about the incident, in contravention of HSE best practice and procedure. In oral hearing, counsel emphasises the circumstances surrounding the child's disclosure, an inconsistency in the injured party's testimony and her lack of recall in evidence.

43. It is said that the accumulation of these factors could render the complainant's evidence unreliable to the extent that a corroboration warning was required.

44. The respondent submits that the trial judge acted in his discretion and in accordance with the evidence in refusing to give a corroboration warning. The respondent refers to *The People (DPP) v. DN* [2018] IECA 279 where Birmingham P. stated as follows:-

> "As set out in the authorities cited above, it is a matter for the discretion of the trial judge whether a corroboration warning should be given. There must be an evidential basis upon which the reliability of the witness's evidence is questionable."

Discussion

45. The law concerning a corroboration warning and whether such a warning is necessary in any given case is well established. Such a warning is discretionary in accordance with statute and on the jurisprudence the party applying for a warning will need to demonstrate that the facts of the case mandate that a corroboration warning be given. It is said that the combination of factors that were present meant that there was only one way that the judge's discretion could be exercised and that a warning was justified in the circumstances. However, the question is not whether a warning is justified, it is whether a warning on the

facts of any given case is mandated. It is now well-established by the authorities that this Court should be slow to intervene in the exercise of judicial discretion and should do so only when the decision was made on an incorrect legal basis or was clearly wrong in fact.

46. The request for a corroboration warning was advanced on a number of grounds as stated above. The issues raised at first instance have again been relied upon and canvassed in this Court. It was said that there was no corroboration of either offence. Insofar as the individual points are concerned, we are not persuaded that the child's age, the passage of time between the offence alleged and the complaint to the gardaí, being a matter of months, mandated the giving of a warning.

47. In support of the application for a warning, it is said that there was an aspect of the child's testimony which gave rise to concern. Reference was made to the fact that when interviewed by the specialist interviewer, the witness referred to the appellant washing her after swimming whereas in cross-examination, she said she had washed herself. Reliance is also placed on the witness responding to some questions, that she could not recall. We highlight this aspect of the application for a corroboration warning as it clearly falls within the rubric of credibility and reliability and is quintessentially a jury matter.

48. Moving on to the final aspect of this application, that is that the injured party's mother raised the issue of touching with her daughter contrary to best practice, we are not at all persuaded that this bears any merit. This falls within recent complaint evidence, there was no objection to this evidence and it was a matter which was addressed by the trial judge who directed the jury in the appropriate manner as to how to treat such evidence, it being evidence relevant to consistency only.

49. In the view of the Court, the circumstances in this case did not mandate a warning be given. The facts were very different from those in *The People (DPP) v. Hanley* [2018] IECA 173 where this Court was of the view that a warning was positively required on its own

particular facts. There are no concerns of that type in this case and we consequently reject this ground.

50. The appeal against conviction is dismissed.

The appeal against sentence.

51. The appellant was sentenced to a period of four years and six months on the sexual assault count with the final eighteen months suspended on terms. A sentence of one year was imposed on count 2 with the final three months suspended.

52. We understand that the custodial element of the appellant's sentence is due to expire shortly, however, at oral hearing it was clarified that this aspect of the appeal is concerned only with the conditions imposed.

53. The mandatory condition was imposed for a period of three years from the appellant's release from custody with a further condition that the appellant remain under the supervision of the probation services for the same period and comply with the directions and recommendations of the service and to undertake an appropriate therapeutic course for sex offenders as directed by the probation service.

54. It is said that the appellant is subject to post-release supervision on his release from the custodial element of the sentence. However, this is not so, a part-suspended sentence was imposed which gives the appellant the opportunity of making efforts to rehabilitate himself. He has been given the benefit of a partly suspended sentence and should he comply with the conditions of that suspension, his sentence will not be reactivated. It is therefore entirely within his own hands.

55. However, if the Court had seen fit to impose a period of post-release supervision pursuant to the Sex Offenders Act 2001, and it was entirely within the Court's discretion to

do so, if the appellant failed to comply with the terms of the post-release supervision order, he would then be liable to a further period of imprisonment.

56. In the circumstances, we see no merit in the appeal against the sentence, the conditions imposed are fair and reasonable and entirely justified given the appellant's convictions and previous conviction.

57. The appellant remains on the sex offenders register for life.

Addendum

58. The issue of whether the appellant may be named in this judgment was not canvassed on appeal, consequently, the matter will be listed in the first case management list next term to address this issue.