THE COURT OF APPEAL

Court of Appeal Record No. 38/2020

President
McCarthy J
Kennedy J

BETWEEN/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

GHEORGHE GOIDAN

APPELLANT

JUDGMENT of the Court delivered on the 14th day of July 2022 by Mr Justice McCarthy

1. This is an appeal against conviction and sentence. Gheorghe Goidan, the appellant herein, came before Ms Justice Burns in the Central Criminal Court. At the commencement of trial on the 30th of April 2019, the appellant pleaded guilty to two counts on the indictment (Counts 2 and 7) which were robbery charges contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. On the 10th of May 2019 he was convicted on the remaining five charges against him which were three counts of rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act 1990 (Counts 1, 4 and 6); and two counts of rape contrary to Section 48 of the Offences Against the Person Act, 1861 and section 2 of the Criminal Law (Rape) Act, 1981 as amended by section 21 of the Criminal Law (Rape) (Amendment) Act 1990 (Counts 3 and 5). There were two victims – a separate group of offences were charged in respect of each.

2. The appellant was sentenced on the 31st of July 2019. Sentences of ten years imprisonment were imposed on Counts 1 and 3 pertaining to the first complainant and further sentences of ten years on Counts 4, 5 and 6 pertaining to the second complainant were imposed. The

sentences for each group of rape offences were to be served concurrently *inter se* and consecutively to each other. The appellant was also sentenced to seven years imprisonment on the two counts for robbery but these were to be served concurrently. The overall twenty year period was backdated to the 14th of September 2017 when the appellant first entered custody.

3. Because of the issues which have been raised on appeal we think it appropriate to set out the somewhat unusual yet similar sequence of events which occurred on the 7th of September 2017. The appellant had arranged to obtain sexual services from both of the complainants who were both working separately as prostitutes and had advertised their services on the Escort Ireland website. The complainants operated by using the same booking agent and were both of foreign origin having arrived in the country in the days prior to engage in sex work. The charges arose from separate incidents that occurred on that date, namely, at a hotel in Portlaoise (involving the first victim) and a later incident at a hotel in Galway (involving the second victim).

4. The first victim was one K.S. and the offences here are dealt with on Counts 1, 2 and 3 on the indictment. She came to Ireland on the 4th of September 2017. She had a friend abroad, C.D., who acted as her booking agent. She started working on the day after and then on the 7th of September her friend C.D. texted her at 10.15am to let her know that a client, found to be the appellant, would be arriving within 10 or 15 minutes and had requested her to wear "*secretary clothing*". At 10.30am he arrived at her room and upon entry, there was a discussion about money. She told the appellant that the charge was €100 for half an hour and she texted C.D. to let her know that the client arrived and was in the room with her. Almost immediately afterwards, the appellant threw her on the floor and produced a knife which he held to her face. He told her to shut up or he would cut her and asked her where her money was. She gave him €400 from her handbag which was all she had.

5. The appellant pushed her towards the bed in the room and into a kneeling position on the floor and then opened his trousers and forced her to perform oral sex on him. The appellant forced the complainant to perform various sex acts on the bed, table, carpet, and chair in the room without a condom. The appellant was holding the knife throughout the attack. He ejaculated into her mouth and she spat the semen onto the carpet. At the moment she did that, she received a text message from C.D. stating that a new client was waiting. The complainant stated that she thought the appellant wanted to steal her iPhone as he tried to get the SIM card out with the knife. She asked him to instead take her tablet and her Samsung phone, which he did. Before leaving, the appellant asked for her ID (her national identity card) and took a picture of it. He told her to go home to the country from where she came, not to return to Ireland and that he would be able to find out if she did or not. After the appellant left she washed herself and called her friend C.D. on her iPhone arising from which the Gardaí were ultimately notified via the agency of J.M., who was in the victim's home country, and who communicated with one D.R. in Ireland, who in turn communicated with a Detective Garda Karen Ryan. CCTV footage captured the appellant at the hotel and DNA extracted from the area where she spat the semen out was matched to

DNA extracted from a sample provided by the appellant during the course of the investigation.

6. The second victim was one M.S. She was the victim of the second group of offences which occurred on the same day. She was also working at that time in the jurisdiction for a number of days prior and the offences here are dealt with on Counts 4, 5, 6 and 7 on the indictment. She gave her evidence via video-link from her home country pursuant to section 13 of the Criminal Evidence Act 1992. C.D. was also her booking agent and she received a message from her stating that a man should be coming around 9pm for half an hour to her hotel room.

7. The man, who emerged to be the appellant, arrived at 9.10pm. On being told that he had to pay before any touching occurred, the complainant gave evidence that he grabbed her by the hair and put a knife to her throat. She described the knife as being about 15 centimetres long with a black handle curved at the end. Evidence was heard that he told her to keep silent and pushed her towards the bed. He then asked her to give him money. She gave him "*€400 or €200*" but he requested more and told her that he knew she was in Limerick and in Cork. He then asked her to perform oral sex on him and put the knife on the table at her request. Various unprotected sexual activities took place which the complainant said were without her consent and to which she submitted out of fear. The appellant ejaculated into her mouth and she vomited onto a towel which he used afterwards to clean himself. Thereafter he took an iPhone and Ray-Ban sunglasses belonged to the complainant. He tried to get the SIM card out of her phone but was not successful. The complainant managed to write a "*help*" message to C.D. Before the appellant left, he told her to go back to her own country the next day and not to mention what had happened to anyone as he had a friend downstairs. Thereafter, she contacted the reception and afterwards spoke to Gardaí. She was driven to the hospital and to the police station where she identified the appellant from CCTV footage shown to her. She was also informed by the Gardaí that another woman had had the same experience but they didn't tell her the name.

8. She also told C.D. who then also got in touch with J.M. who thereafter communicated with D.R., who works with an agency called the Sex Workers Alliance (one of a number of agencies that deals with people involved in prostitution and sex workers in this jurisdiction), and thereafter Detective Garda Ryan was informed.

9. A search warrant was obtained for the appellant's apartment where a number of items taken from the complainants were found. Pursuant to section 22 of the Criminal Justice Act 1984 a number of significant admissions were made by the defence in respect of the arrest, the search conducted under warrant of his residence and vehicle, his subsequent detention and treatment whilst in custody, his identification, the harvesting or the safe transmission of all real evidence in the case, including CCTV and DNA profiling.

10. The appellant was interviewed on the 14th and 15th of September 2017. He told Gardaí that he had travelled to Galway on the 7th of September 2017 intending to hand out his CV to prospective employers. In Portlaoise, he contacted Escort Ireland. He said that he made an appointment to see the complainant for a half hour session and did not ask for

her to be dressed up. He claimed that they had unprotected oral sex as advertised and he put on a condom afterwards for sexual intercourse. The appellant accepted that he ejaculated into her mouth but that he left thereafter and nothing else occurred nor did he take anything from her. He denied having a knife and threatening her with it. He identified himself on the CCTV from the hotel. After he left the hotel, he said that he drove to Galway, passing through the toll on the M7. In respect of the second incident, he stated that he dispersed a few CV's in Galway before meeting the second escort in the evening. He arranged for another 30 minute session and paid €100. He said that he wore a condom for the sexual intercourse and ejaculated during oral sex afterwards. He stated that he left after he received the services he paid for. The similarities between the incidents are clearly manifest

Victim Impact Reports

11. The first complainant, K.S., outlined her financial loss amounted to €700 and described the effects as follows: -

> *"… I suffered psychological harm above all. I was afraid for my life. I felt helpless and afraid which will accompany me for the rest of my days. I have been afraid since then. Overall I am afraid of men. I do not trust them. When there is a man near me with his hands in his pocket I automatically think he is holding a knife. My heart starts racing like on that very day. I was most worried about my health, about whether I was HIV infected. I visited a specialist immediately after landing in [my home country]. He took a sample of my blood and I waited for a long two month period overwhelmed by fear. The results of this sexually transmitted infection test turned out negative. I feel more anxious than ever before and sometimes get depressed."*

She further stated that: -

> *"I cannot share my problem with my family or loved ones because they didn't know about my work and I am not sure whether I would have the strength to tell them so they don't feel sorry for me but I would certainly feel relieved. The day will accompany me to the end of my days as a scar that will never disappear."*

She concluded by saying: -

> *"I do not feel safe and I never will. As the person knows my name, date of birth, birth number and the address where I live all from a photo of my ID he had taken, the fear will forever remain with me."*

12. The second complainant, M.S., referred to the effects on her in these terms: -

> *"1. I am afraid all unknown mens. I am nervous every time because of this.*
>
> *2. The relationship with my family is not same like before because I can't talk them what really happened so I am closed inside of me.*

3. *I feel shock/afraid when somebody knock on my door or when I hear some noise from corridor.*

4. *I less friends because can't talk about this and they see I am different and don't understand why so I less contact with them.*

5. *I can't believe anybody, unknown people or new friends. I don't believe in their smile. Can be fake and I don't know who want to attack me.*

6. *I miss my phone and especially my phone number which he has stolen. I have to delete my profile on social network and complete block this number. Family and friends didn't understand why I had a new number and profile and I also lost many contacts which I had in my stolen phone. I think this is the most important things which I want to write to you."*

13. The mitigating factors may be seen from the judge's sentencing remarks. In reducing the headline sentence of 17 years identified by her in respect of each group of rape offences and ten years in respect of the robberies, the judge then looked to the mitigating factors available in this case. The judge referred to the saving in court time flowing from those guilty pleas entered by the appellant to the robbery charges; however she did weigh this against the "*reality he was caught red handed for the robbery committed in respect of each of the victims*". The judge also took account of the appellant's personal circumstances and these included that "*…he has a heart condition. He is a foreign national, though clearly, he's in this jurisdiction for a significant period of time and speaks good English. He gave evidence before me on an issue in the trial so I could assess that for myself*". The judge considered that a reduction of 18 months from the headline sentences was appropriate in respect of the rape offences, and reduction of three years was appropriate in respect of the robbery offences.

14. The judge then considered that it was proper that consecutive sentences be imposed to mark the offences committed against each victim in light of the facts as a whole and as she viewed the fact that "*the offences committed against each of the victims are not part of one transaction. They were committed at opposite ends of the day, 10 am in respect of K.S. and 9 pm in respect of M.S. and in different parts of the country requiring the accused to drive from Portlaoise to Galway*". The judge was mindful of the principle of proportionality in sentencing and made explicit reference to it in arriving at the final period of imprisonment.

Application to adduce evidence on appeal

15. By motion dated the 2nd of December 2021, heard with the substantive appeal, an application was made pursuant to section 3(c) of the Criminal Procedure Act 1993 permitting the appellant to adduce evidence viva voce at the hearing of the appeal, being the evidence of J.M., D.R. and Detective Garda Karen Ryan. This application is grounded on the affidavit of Ashimedua Okonkwo, the appellant's current solicitor. It was sought to suggest at the time of the trial that there was what is called in the affidavit "*a mutual nexus*" between the complainants and that such nexus cast doubt on the independence of the

evidence of each complainant. It is suggested that what is called "*fresh evidence*" has come to the appellant's attention since the trial which "*could have potentially affected the credibility and independence of the complainants and the outcome of his case if same was available to him during the trial*".

16. The appellant was apparently prosecuted for offences similar to the present offences in the Circuit Court. The appellant's solicitors were instructed in both courts in substitution for another firm and came on record in the present case on the 3rd of April 2019. His solicitor deposes that she received the former solicitor's file of papers in respect of the Circuit Court case on the 13th of May 2019 (three days after the appellant's conviction in the Central Criminal Court) and she asserts that it is on the basis of information gleaned from it that the so called fresh evidence became known to her.

17. She says that the prosecution in the Circuit Court involved an allegation of robbery and of sexual assault on a prostitute on the 23rd of August 2017. She says that "*at least four witnesses were involved in both cases, one of which was a civilian witness Ms D.R., a community worker in the organisation 'Sex Workers Alliance Ireland' and Detective Garda Ryan*". She deposes, as referred to above, that it was by the agency of D.R. that the allegations grounding the Circuit Court proceedings were communicated to Detective Garda Ryan. D.R. was informed of those events by one J.M. (to whom reference is made in the statements of evidence of D.R. and Detective Garda Ryan as served in the present case and annexed to the affidavit). A *nolle prosequi* was subsequently entered in the Circuit Court.

18. We are not told explicitly who the four so-called common witnesses were; D.R. and Detective Garda Ryan were two of them. J.M. was not a witness in either case, but her limited involvement must have been known to the appellant since he had access to all of the papers in both cases at all times. The height of the connection between both cases before us is that J.M., at the request of C.D., was in communication with D.R. to make complaints in respect of the present offences. The fact that she had an involvement in events pertaining to the Circuit Court proceedings does not constitute a connection of any significance.

19. We are given no information as to the instructions which the appellant gave to his solicitors in either case or his state of knowledge at material times. It was open to the appellant, either by himself or his representatives, to pursue or cause to be pursued any relevant enquiry pertaining to J.M. or her involvement. The appellant has not said one way or another whether he knew of J.M. or her engagement in the matter. As we have said, he must have known all and the means of knowledge of his present solicitor is irrelevant.

20. The principles applicable to applications on appeal for the receipt of fresh evidence are well established. These principles are summarised in *DPP v Willoughby* [2005] IECCA 4. They are as follows: -

> "*(a) given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow*

further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.

(b) The evidence must not have known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

(c) It must be evidence of which is credible and which might have a material and important influence on the result of the case.

(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at trial and not in isolation."

21. Any actual or potential evidence of J.M., D.R., and Detective Garda Ryan, pertaining to the proceedings in the Circuit Court must have been known at the time of the trial and is not such that it could not reasonably have been known or acquired at the trial (to put the matter no higher). Any such evidence could not have had a material or any influence whether important or otherwise on the result of the case. Indeed, it is hard to see how any evidence of J.M. would have been admissible in the present case because she reported the crimes in all three cases to D.R. Of course J.M. is not a compellable witness which is fatal in itself to the application. There is no basis to contend that the evidence potentially available from these witnesses should be heard here, accordingly.

Grounds of Appeal as to Conviction

22. The grounds of appeal in are as follows: -

I. The Learned Trial Judge erred in law and/or fact in her ruling on the question of admissibility of the evidence of the complainant by video-link.

II. The Learned Trial Judge erred in law and/or fact, in that she refused an application to sever the indictment, which resulted, inter alia, in the Appellant facing trial in respect of two separate complainants in respect of two separate incidents.

III. The Learned Trial Judge erred in law and/or fact, in refusing an application for an adjournment of the trial to allow [the appellant] to receive outstanding disclosure and to examine recent disclosure received from the Prosecution.

IV. The Learned Trial Judge erred in law and/or fact, in that she refused leave to the Appellant to cross-examine the complainant on her prior sexual history.

V. The Learned Trial Judge erred in law and/or fact in failing to stay the trial of the Appellant at the conclusion of the Prosecution case.

VI. The Learned Trial Judge erred in law and/or fact, in her ruling that the Solicitor should continue with the trial and cross-examination of the complainant and not allowing an adjournment of the Trial.

VII. The Learned Trial Judge erred in law and in fact in failing to discharge the Jury after unedited, prejudicial material was given to them in error.

VIII. The Learned Trial Judge erred in law and in fact in her charge to the Jury in relation to corroboration.

IX. The Learned Trial Judge erred in law and in fact in her charge to the Jury in relation to system evidence.

X. The trial was unsatisfactory by virtue of the fact that it was not made known to the Jury that the complainants knew [OF] each other.

23. Ground 4 was not pursued in the written submissions of the appellant nor was Ground 5 on the basis that no application was made. Furthermore, at the hearing of the appeal, Grounds 7-10 were withdrawn. Therefore we will deal with the remaining grounds of appeal and each in turn.

I. The Learned Trial Judge erred in law and/or fact in her ruling on the question of admissibility of the evidence of the complainant by video-link.

24. In relation to the first ground of appeal, counsel for the appellant argue that the judge erred in law and in fact by permitting the second complainant, M.S., to give her evidence by video link pursuant section 13 of the Criminal Evidence Act 1992 on the stated basis that there was no prejudice expressed by counsel for the appellant at trial and there were no specific issues raised in relation to video-link evidence by the complainant.

25. Section 13 of the Criminal Evidence Act 1992, as amended, and so far as relevant, is as follows: -

"**13.**—(1) In any proceedings (including proceedings under section 4E or 4F of the **Criminal Procedure Act, 1967**) for a relevant offence a person other than the accused may give evidence, whether from within or outside the State, through a live television link—

(a) if the person is under 18 years of age, unless the court sees good reason to the contrary,

(b) in any other case, with the leave of the court.

(1A) In any proceedings (including proceedings under section 4E or 4F of the **Criminal Procedure Act 1967**) relating to an offence, other than a relevant offence, a court may, subject to *section 14AA*, grant leave for a victim of the offence to give evidence, whether from within or outside the State, through a live television link.

(2) Evidence given under *subsection (1) or (1A)* shall be video-recorded."

26. Garda Orla Keenan, the liaison guard tasked with providing support to M.S. gave evidence on the first day of trial, the 30th of April 2019, of a then recent conversation with her and of an explanation she gave for being unable to travel for the trial forming the basis of the prosecution's application to have the evidence heard remotely. The Court heard that over three and half weeks prior to the trial of these matters, M.S. travelled to Ireland to give an additional statement and to identify certain exhibits. Evidence was heard that she was due to fly into Dublin on a flight boarding at 4.10pm Irish time from her home country on 28th of April 2019. An SMS was received from M.S. at 4.25pm where she indicated that she had missed her flight due to a family emergency at home. The defence was notified of this on the morning the trial was due to start.

27. In cross-examination it was established that the flight for M.S. had been booked on the 23rd of April 2019 by the Garda travel bureau and no travel difficulties were raised at that stage. The trial was due to start on the 29th of April 2019 and was adjourned by Mr Justice White to inquire further into the matter. After conducting some enquiries, it was established that M.S. was unavailable to travel that week or the next. Defence counsel's objections to the section 13 application were based on the need for *viva voce* evidence to ensure a fair trial, the absence of notice, the lack of sufficient reason for her absence, and the apparent failure of the Gardaí to enquire as to her availability beyond the week ahead. Having heard submissions, the judge ruled in favour of the prosecution and allowed the evidence of M.S. to be given by video link pursuant to section 13. The Court indicated (as was the fact) that no prejudice to the accused was alleged to be likely to occur although there was some concern about the reason and detail given to Garda Keenan. It is submitted by the appellant in written submissions that "*the witness deliberately missed her flight…*". There is no evidential basis for this assertion.

28. The Supreme Court in *Donnelly v Ireland* [1998] 1 IR 321 considered whether or not the right to cross examine a witness in order to be effective and to give the accused person the opportunity to defend himself adequately required that the witness should give evidence in his or her presence and that the witness when giving evidence should physically confront him. This was rejected and hence no procedural unfairness need be feared when evidence is given in this way.

29. There is no basis for saying there is any infringement of the right to constitutional justice by virtue of the fact that a witness is heard remotely or by video link in accordance with *Donnelly*. Accordingly it is a matter within the discretion of the judge and on a matter of this kind she is in the best position to make a judgment as to whether it is permissible to hear a witness in this way. The norm will of course remain that evidence will be given *viva voce* in person in court. Where there is a coherent and rational basis, as here, on the evidence as to why the witness could not attend the judge properly exercised her discretion in permitting the evidence to be given in this way.

30. We accordingly reject this ground of appeal.

II. The Learned Trial Judge erred in law and/or fact, in that she refused an application to sever the indictment, which resulted, inter alia, in the Appellant facing trial in respect of two separate complainants in respect of two separate incidents.

31. An application was made at the commencement of the trial for severance of the indictment. This was opposed by counsel for the respondent who contended that having regard to the striking similarity between both complaints, the evidence of each complainant was admissible to corroborate the evidence of the other. Joint trials are not of course limited to cases of this kind. Whilst a number of authorities were referred to in respect of the principles applicable to cross-admissibility and its bearing on whether or not a joint trial should take place, the leading authority is *The People (DPP) v Clement Limen* 1 ILRM 61. They were summarised as follows by O'Malley J: -

"*a) A judge may in any case sever the indictment if of the opinion that it would be unfair to the accused to proceed with the indictment as drafted.*

b) Where the accused is charged with multiple offences of the same nature against several individuals, some probative value may be found in the inherent unlikelihood that several people have made the same or similar false accusations. The accusations need not be identical or "strikingly similar" but must be of the same nature. However, similarity may add to the probative value, and the greater the similarity is, the greater the probative value.

c) The inherent unlikelihood of multiple false accusations, and therefore the probative value, rises in situations where the complainants are independent of each other and there is no reason to fear collusion or mutual contamination.

d) Where an application is made to sever the indictment (or, indeed, if the trial develops in such a way as to give rise to the issue), the judge will have to consider whether or not the complainants are independent of each other, and whether there are any grounds for concern that there may have been either collusion or innocent mutual contamination. This does not mean that, for example, accusations by a number of family members against a relative cannot be tried together. They may not be independent of each other, and may very probably have discussed the matter together and with other family members, but there may nonetheless be probative value in the content of their various accounts.

e) Depending on the judge's assessment of the situation either at the outset (based on the statements of proposed evidence), or during the trial (if the evidence raises concern) it may be necessary to either sever the indictment or give the jury an appropriately tailored warning about the possibility of collusion or contamination.

f) In a case involving multiple complainants, if it is determined that the evidence of each complainant is admissible in respect of counts relating to other complainants, there is no requirement to explain that ruling to the jury other than in general terms.

The jury may be told that they need to be sure that the witnesses are truthful and have not been influenced in their evidence by each other. If they so find, they can regard any similarities that they find between the witnesses' accounts of what the accused did as supportive evidence in relation to each count.

g) Where any material part of the evidence can be regarded as admissible only in respect of an individual complainant, the jury should be instructed to take it into consideration in respect of that complainant only.

h) The weight to be attached to supportive evidence of this nature is a matter for the jury, but they should be warned that they can convict on any individual count only if satisfied beyond reasonable doubt that the accused committed the offence charged, and that they must not reach that conclusion solely on the basis that there are multiple accusers.

i) It is unnecessary, and may be unhelpful, to direct the jury in relation to the rules about corroboration unless the trial judge decides to give a corroboration warning. In that situation, the ordinary definition of corroboration applies. Evidence given by other complainants may or may not come within that definition. If it is not within the definition, but is capable of being found by the jury to support the prosecution case in respect of any particular count, there is no reason why counsel should not say so."

In the same case Charleton J said that: -

"…for people in a family or a school, or who otherwise know of each other, to discuss a hideous experience or to form support groups or offer friendship to each other. That is not contamination. Nor is it an undermining of independence. If the defence wish to explore how any such understandable support might lead to an inference of mutual concoction, that is of course permissible where circumstances or specific instruction reasonably suggests this. It should only, however, undermine admissibility where any contamination is so blatant as to render the evidence unworthy of belief; R v H [1995] 2 AC 596."

32. The fact that the appellant booked the complainants' services via C.D. does not mean that the possibility of collusion or contamination had any rational basis, still less could this be so established because communication was made with D.R. and the Gardaí via the agency of J.M. or indeed that the services of the victim in the Circuit Court proceedings were booked through her and the report in that case made similarly to D.R. Furthermore, the evidence of the complainants was thoroughly tested by counsel and the issue of collusion and contamination was canvassed. There is no evidential basis on which collusion or contamination might be alleged to have occurred. Ultimately therefore, there is no doubt but that the evidence was cross-admissible. Indeed, this a textbook case for cross-admissibility and it would have been wrong for the judge to sever the indictment.

33. We accordingly reject this ground of appeal.

III. The Learned Trial Judge erred in law and/or fact, in refusing an application for an adjournment of the trial to allow [the appellant] to receive outstanding disclosure and to examine recent disclosure received from the Prosecution.

34. We think that it may be of assistance when dealing with this head to quote briefly from the submissions of the appellant for the purpose of seeking to set out clearly his case in respect of the disclosure. We do so as follows: -

> "*33. It is submitted that the Trial Judge erred in refusing the application for an adjournment in not taking fully in consideration sworn evidence given by [the appellant] during the trial to the effect that his complaint related not only to relevant additional disclosure that was disclosed during the trial and which he sought an adjournment to consider, but also in relation to the unavailability of disclosure that was sought by his solicitor and was not provided by the DPP.*
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> *34. On it was indicated to the Court by Senior counsel for the defence that [the appellant] was 'somewhat distressed' about the progress of events in the case so far and wished 'to have the matters adjourned for a number of days to allow him to consider the papers further and reconsider the position with respect to the instructions that he wants to give his solicitor and counsel. He is in a position to tell you about that if that's any assistance…'*
>
> *35. It was further indicated to the Court that the application was being made in respect of:*
>
> > *'the opportunity he perceives that he has to consider all the disclosure in the case…. Material not only in the book of evidence but disclosed by the DPP to the defence.'. 'I think the primary complaint, and I use that word advisedly, is for example, a notice of additional evidence was served on the 30th of April, which was yesterday, and another on the 29th. Now, my consideration of those papers, and indeed I understand that [the appellant] has considered them himself, is that none of that material, I have to say, is material that is either in controversy or going to led but is more in the nature of continuity type of material and matters of that nature but [the appellant] evinces a concern that material is coming at him late in the day and is asking that the Court facilitate him in this regard.'.*"

35. The judge rejected this application and gave a very comprehensive ruling (from which the matters in issue can also be seen) which we cannot set out *in extenso* but do so in part. She said, at the commencement of her ruling: -

> "*Yes. Well, the reality of the situation is that it's clear to me that substantial disclosure has been made in this case, looking at the very large bundle of correspondence that commences with a letter from Connolly Fleming Solicitors on the 17th of August 2018 and then various replies to the DPP and then the change of solicitor letter that came*

on the 2nd of April 2019 from Cyril & Company solicitors and then the very large disclosure letters that I can see which clearly enclose voluminous material that substantial disclosure has been made in the matter. Obviously I'm not in a position to say whether everything that should have been disclosed was disclosed, all I can deal with are applications that are made to me in relation to whether there hasn't in fact been proper disclosure. I am sure Mr Greene and his solicitor have explained to [the appellant] that [he] isn't entitled to every single document that has been generated in relation to a garda investigation, that his entitlements are to receive every single relevant piece of information that has come to the prosecution's attention. I note in the letter written by his solicitor that there was a request for the DPP to confirm that all relevant documentation had in fact been disclosed to him and that has been confirmed. Mr Costelloe has confirmed that in the course of the hearing before me. I can't quite find the letter in front of me but I know that the letter was replied to at the time. So, unless there's a specific issue that raises its head, and obviously I must keep an eye on that and ensure that nothing is at issue in terms of some relevant material not having been disclosed to [the appellant], but in terms of what I am presently aware of, there's nothing that raises a concern for me as to whether all relevant material has been disclosed or not."

and she went on to say: -

"*…If there is any issue that will obviously be raised in due course by Mr Greene and we will have a further investigation in relation to at that stage. But in terms of any unfairness arising, certainly no unfairness has arisen at all whatsoever presently in relation to this case. [The appellant] in reality is seeking that there would be an adjournment for a short period of days for him to consider the disclosure. Now, I have no wish to discommode anyone in relation to their conduct of their defence in relation to the matter but the reality of the situation is that disclosure was made a very long time ago to [the appellant's] first firm of solicitors. Apparently he had disagreements with his first firm of solicitors and he has referenced disclosure in relation to that. He changed solicitors. So, he took matters into his own hands, changed solicitors and has accepted in the course of his evidence, without in fact having been questioned in relation to this, but accepted that disclosure then began to be made to him in the last month, obviously on foot of all the material the DPP had already disclosed to his solicitors."*

and concluded her observations by rightly saying that: -

"*The only issue that I really need to concern myself with now is whether I give any time for [the appellant] to consider further the disclosure in the matter and my attitude to that is that I would not. [The appellant] has had this disclosure for a long period of time. He has had the benefit of solicitor. He has had the benefit of counsel. He has had the benefit of consultation with solicitor and counsel… If there are issues that specifically raise their head in terms of disclosure and any further disclosure that*

[the appellant] seeks, they can be attended to in letter form overnight and the prosecution can respond to them tomorrow..."

36. The judge fully engaged with the issue of disclosure and whether or not the trial should be adjourned. This was a matter within her discretion. She engaged with the issue thoroughly and we agree with her reasoning.

37. We therefore reject this ground.

VI. The Learned Trial Judge erred in law and/or fact, in her ruling that the Solicitor should continue with the trial and cross-examination of the complainant and not allowing an adjournment of the Trial.

38. It was not clear at the hearing whether or not this ground was being pursued but for the avoidance of doubt, we deal with it. The factual position is, however, that whilst senior counsel was discharged by the appellant during the trial prior to the evidence in chief of M.S., senior counsel was re-engaged before cross-examination and a copy of the transcript of the examination-in-chief was furnished to him. Furthermore, the appellant's retainer of solicitor and junior counsel was not discharged and they were present through this examination-in-chief. There is no question that any procedural unfairness arose because the judge proceeded with the witness' evidence after the appellant had chosen to discharge senior counsel. In any view, the judge was entitled to take this course as it was entirely a matter for the appellant as to whether or not he wished to be represented by senior counsel. The law can do no more than provide him with legal representation at public expense. In any event as a matter of fact, there was no prejudice.

39. We reject this ground also.

40. Accordingly we dismiss the appeal against conviction.

Grounds of Appeal as to Sentence

41. The grounds of appeal in are as follows: -

I. The Learned Trial Judge erred in law and in fact in failing to give proper weight to the manner in which the Appellant met the case, in particular concessions under section 22 which resulted in only 12 witnesses attending in lieu of 98.

II. The Learned Trial Judge erred in law and in fact in failing to give proper weight to the guilty plea entered to some of the charges.

III. The Learned Trial Judge erred in law and in fact in attributing excessive weight to the victim impact statements.

IV. The Learned Trial Judge erred in law and in fact in setting the headline sentences as it did.

V. The Learned Trial Judge erred in law and in fact in failing adequately or at all to take into account any or all of the mitigating factors.

VI. The Learned Trial Judge erred in law and in fact in failing adequately or at all to have regard for the Appellant's status in this jurisdictions and hardships arising.

VII. The Learned Trial Judge erred in law and in fact in failing adequately or at all to have regard to the fact that the Appellant had no previous convictions recorded in this jurisdiction and only one previous conviction of some vintage recorded against him in another jurisdiction in a lower Court.

VIII. The Learned Trial Judge erred in law and in fact in imposing consecutive sentences.

IX. The sentence imposed by the Learned Trial Judge was excessive and oppressive in all the circumstances.

42. A number of these grounds are generic and in any event overlap. There is much repetition. Therefore, we will deal with them together.

43. In the course of the hearing Mr Gageby in substance primarily focused on the core proposition, namely, that because the sentences on what we might shortly describe as the rape offences were consecutive the ultimate penalty was disproportionate and the period to be spent in custody excessive on the basis of totality. He did however continue to rely on a supposed failure to give proper weight to the concessions made at trial by the appellant whereby it was necessary for the prosecution to call 12 witnesses only in circumstances where apparently 98 witnesses were contemplated by the Book of Evidence or by virtue of service of additional evidence. On the latter point, prosecuting counsel said that the drastic reduction in the number of witnesses arose by virtue of the pleas of guilty to robbery which meant the appellant was placed at the scenes of the offences and the matters at issue in the trial were sharply focused on the immediate events themselves. It was further said that the judge failed to give sufficient weight to the fact that the appellant had no previous relevant convictions.

44. Counsel referred to *DPP v FE* [2019] IESC 85 and submitted that on the basis of the gravity of the offences the nominated headline sentences of 17 years were too high. He said, by reference to *FE*, that the most serious offences of the present kind attract headlines of between 10-15 years. He said that sentences which go beyond that range are unusual and involve significant propensity to violence over a long period of time or involve long-term child abuse. Counsel referred the Court to *People (Director of Public Prosecutions) v Tiernan* [1988] IR 250 which, by way of example, involving a so-called "*gang rape*", as he put it and the fact that it attracted a sentence of 17 years.

45. Counsel for the appellant submits that even if he were wrong in that submission, the finding that the sentences should be entirely consecutive though adjusted downwards for

proportionality still resulted in an error in principle. To remedy the disproportionate and cumulative sentences, the second group of sentences (which we infer to be the offences which occurred second in time) should have been lower or not fully consecutive.

46. Counsel for the respondent rejected these arguments and stressed the severity, violence and gravity of the attack culminating in photographing the ID card of the first complainant and the engendering of fear in the complainants both during and after the attacks. As to the judge's identification of the aggravating and mitigating factors, counsel for the respondent stated that the judge correctly weighed these factors and particularly the assessment of the appellant in deliberately going online to find these vulnerable women to commit these attacks upon them and going to various parts of the country to do so. They also argue that the sentence was well within her range of discretion and another judge, might, with ease, have considered sentences of 17 years appropriate without reduction for these offences.

47. We cannot set out in *extenso* the judge's ruling on sentence but we think it is manifest that she had regard to all aggravating and mitigating factors. She rightly pointed out that these complainants were in positions of exceptional vulnerability because of their occupation, they were foreigners temporality visiting this country and the offences were premeditated. They were each rendered into a state of terror in the course of prolonged violent sexual abuse, and in the case of the first complainant a photograph was taken of her ID and the lives of both were threatened if they did not leave the country after the attack. The judge, again rightly, pointed out that the appellant must have thought that because of who they were, he would not be apprehended. Their modest possessions were also stolen. Grave long-term ill effects were suffered by both victims. The judge correctly highlighted what she described as "*the sad reality of the lives of these ladies. The secrecy in which they conduct their business which means that their families do not know the lives they conduct which means in this scenario not knowing their activities, they receive no comfort from their respective families.*" Again, the judge correctly said that the "*…details of these rapes are vicious and shocking… he obviously saw these women as objects, mere dirt for him to rob and steal from. They are not*".

48. We do not think that the manner in which the trial was conducted is a mitigating factor *per se*. Insofar as the trial was shortened we accept the prosecutor's submission that the overwhelming majority of witnesses (many of whom might have contributed only brief evidence) were dispensed with by virtue of the pleas to robbery and credit was given for those pleas by the judge in sentencing.

49. Each case must depend on its own facts. *FE* does not exclude sentences in excess of 15 years, even though the highest range on the scale falls between 10-15 years in the ordinary course. This is to say nothing of the fact that sentencing is not an exact science and where ranges or periods of years are referred to the figures are not set in stone. *FE* contemplates circumstances in which sentences in excess of 15 years may be imposed in cases of exceptional or egregious severity. We are of the view that this is such a case.

50. We think accordingly that when the judge identified headline sentences in respect of the rape offences of 17 years she did not fall into error. Putting the matter at its height from the perspective of the appellant, in any event, the case lay at or near the top of the highest scale which would have attracted a penalty of in or about 14 or 15 years. Only the most modest reduction from the headline figures would, on any view, be warranted here. The judge was required to sentence for both offences which were wholly separate. This can be done by either the imposition of consecutive sentences or what one might call a sentence fixed at a level which punishes all criminality before the court in a global sense. The judge chose legitimately to use the mechanism of consecutive sentences. On any view we think that mitigation would have involved a reduction of in or about two years whether the sentence was at or near the top of the highest range or perhaps in excess of it. Accordingly if one were to make the sentences consecutive, without more, it would amount to a total period of incarceration well in excess of that the appellant is now required to serve. The judge applied the totality principle to the potential period of imprisonment which would have arisen by the mere crude addition of the sentences.

51. The ultimate question accordingly, regardless of how the sentences were arrived at, is whether or not in our judgment the effective period of 20 years imprisonment is excessive or disproportionate. We think not. We think that the total lies at or near the top of the range of sentences on the present facts available to the trial judge, in whom is vested a margin of appreciation. It might be that a somewhat lower sentence might have been imposed by another judge or indeed we might have done so if hearing the matter on first instance but the fact remains that it was in the judge's discretion to have decided as she did. We do not see any basis for saying there was any freestanding obligation to make the sentences in part concurrent. To do that would merely be a procedural mechanism to achieve a proportionate result by the proper application of the totality principle. There was no error in principle.

52. We therefore dismiss the appeal against sentence also.