THE COURT OF APPEAL

Record No: 24/2023

The President.
Kennedy J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

P.M.

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of January 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 27th May 2022, the appellant was convicted of 14 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, and 8 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, as amended. The jury disagreed on count 3.

2. The trial concerned allegations of offending in respect of two of the appellant's nieces and his nephew. The appellant was between the ages of 12 and 18.

Factual Background

3. The offences alleged occurred at four separate locations when each of the complainants were young children.

LH

4. This complainant described an incident when she was 5 years of age when she was in her grandmother's house. The appellant used the game of hide and seek to touch her inappropriately. He was not wearing trousers or underwear. The incident came to an end when her grandmother knocked on the door of the bedroom whereupon the appellant fixed both of their clothing before opening the door.

CH

5. CH is the sister of the first complainant. The appellant was convicted of 5 separate counts at three locations when this complainant was aged between 4 and 6 years of age.

6. She described an incident when she was around 4 years of age at her home. The appellant came into her room at night, removed her underwear and touched her inappropriately. She said that the appellant told her that if she let him continue, he would play a game with her in the sitting

room. She described another incident in the same location and further incidents in her grandparents' house when the appellant told her they were going to play Humpty Dumpty. This game involved him sitting on his bed with her on his lap, that he would bounce her up and down, rubbing his penis between her buttocks while in his underpants. She described a second incident as being exactly the same as the foregoing.

7. Count 7 involved both CH and her cousin, DH, at her family home where the complainant, DH, and the appellant were outside playing. She described how the appellant tried to make them kiss, making it like a game, removed their underclothing and told DH to "hump" her. She described feeling her cousin's skin against her and his penis hitting against her buttocks. She recalls the appellant laughing.

8. Another incident involved the appellant compelling the complainant to masturbate him.

9. This complainant said that in the earlier periods of abuse, the appellant told her that the conduct was normal because another girl, NM, was engaging in this type of conduct with him too. This girl was the daughter of the complainant's aunt's partner at the time, which relationship ended when the complainant was a child.

10. The appellant was aged between 12 and 14 years for these counts and so was entitled to the presumption of doli incapax; that it was presumed he was incapable of committing the offences, which presumption could be rebutted.

DH

11. These offences were alleged when the appellant's nephew DH was between 7 and 9 years of age and the appellant was aged between 14 and 16 years old; 8 counts of sexual assault and 8 counts of rape, all occurring at the appellant's parents' house.

12. The complainant's father, the appellant's brother, would leave him at his grandparent's house and the appellant would bring him to his bedroom. The complainant was interested in wrestling and had wrestler toys. The appellant and he would play a game of wrestling which progressed to the appellant removing the complainant's clothing.

13. The abuse involved inappropriate intimate touching, oral and anal rape. If the complainant did not do what the appellant asked, he would threaten to break his wrestler toys and the complainant described how he chewed the figure of his favourite wrestler toy and cut the hair of another.

14. DH gave evidence of the incident with CH and that during this, the appellant was masturbating.

The Appeal

15. The appeal concerns the refusal to sever the indictment and the decision to permit the prosecution to adduce evidence from NM.

16. Application was made to sever the indictment so that the counts concerning DH would be tried separately from those concerning LH and CH, which application was refused. While noting the existence of some dissimilarities in the offending behaviour, the trial judge observed that the offences were alleged to have taken place on family properties, that in each case, the child's desire to play various games was exploited and that there was a direct evidential link between DH and CH, both complainants having been involved in the same incident.

17. The second issue concerns the admissibility of the evidence of NM who described that when she was 9 or 10 years old, the appellant asked her highly sexualised questions and kissed her and, on another occasion, that he tried to touch her inappropriately. The prosecution contended that her evidence was highly probative as CH said the appellant told her this kind of conduct was normal and that NM engaged in it.

18. The appellant denied the offending and said in evidence that he would not have been around to commit the offences.

19. While four grounds were filed the appellant now proceeds on the following:-

> *"1) The Learned Trial Judge erred in law and in fact in refusing to accede to applications to sever the indictment and for separate trials in respect of each of the complainants as set out on the Bill of Indictment.*
>
> *3) The Learned Trial Judge erred in law and in fact in allowing the evidence of [NM] go before the jury in circumstances where its probative value was outweighed by its prejudicial effect.*

The Severance Application

Submissions of the Appellant

20. The appellant submits, in essence, that while the allegations need not be strikingly similar, nonetheless they must be of the same nature. There must be an evidential basis to permit counts to remain on a single indictment. It is argued that the physical acts alleged in respect of DH constituted a move to the other end of the spectrum in terms of gravity. It is further said that the joinder of the counts was prejudicial to the appellant, outweighing the probative value.

21. The second basis for the application related to the presumption of doli incapax in that it is submitted that there was little or nothing in the evidence of CH to suggest that the appellant knew the conduct was gravely wrong so as to rebut the presumption. However, DH in his evidence said that if he didn't do what he was asked to do or facilitate what was requested of him, the appellant threatened to damage his wrestling toys, which it is suggested took place on occasion and so this evidence could be used to rebut the presumption. In effect, the respondent sought to use the more serious offending relating to DH to inform the jury of the appellant's state of mind in respect of the offences where doli incapax was engaged.

22. It is submitted that the judge's charge is demonstrative of the fact that each complaint, apart from the complaint of CH as contained in count 7 on the indictment, was not cross-admissible in respect of the others, and that it was an error to try the counts relating to all three complainants together.

Submissions of the Respondent

23. It is submitted that there was a strong element of independence in the evidence of DH and a notable component of this independence was the lack of collusion as there was no contact between the two sisters and DH due to the family dynamic. He was only in their lives for a very short period of time.

24. Attention is drawn to the similarities between the offences. It is said that these similarities added to the probative value. *People (DPP) v McCurdy* [2012] IECCA 76 is relied upon in relation to the probative force of multiple allegations.

25. It is noted that the appellant accepts in written submissions that DH was an admissible witness in respect of count 7 and that the appellant acknowledges that "*quite clearly, the greater the similarity, then the greater its probative value*."

26. Reliance is placed on the following excerpt from *B v DPP* [1997] 3 IR 140 as cited in *People (DPP) v Limen* [2021] 2 IR 546:-

> *"It seems that the underlying principle is that the probative value of multiple accusations may depend in part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of multiple accusations is a coincidence in itself, which has to be taken into account in deciding admissibility."*

27. It is submitted that the provision of guidance to the jury on the issue of corroboration inured to the benefit of the appellant. Reliance is placed on the transcript of the 25th May 2020 on which date it is said that the trial judge set out his reasoning for dealing with matters as he did.

28. It is noted that while the judge indicated on the 25th May 2020 that he would tell the jury that they could derive cross-support from each complainant's evidence for the other complainants by virtue of an inherent probability that several people would make false allegations, this was not ultimately done, which, it is submitted, also inured to the benefit of the appellant and no requisition was raised as to do so would not have assisted the defence case.

29. It is argued that there was a very strong reason for having the trials together because of the inherent improbability of a false accusation being made by three people independently from one another and further that *Limen* states that that in itself is sufficient reason for there to be joint trials, regardless of similarities. But, in this case, it is said that there were similarities, and the similarities were sufficient to permit a joint trial.

Discussion

30. The starting point for consideration is that the trial judge has a discretion to sever the indictment upon application. S.6 (3) of the Criminal Justice (Administration) Act, 1924 makes such provision:-

> "*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 for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment."*

31. It was held by the Supreme Court in *Limen* that a judge may sever the indictment if the judge is of the opinion that it would be unfair to the accused to proceed on the basis of the indictment as preferred.

32. As this Court is generally reluctant to interfere with the manner in which a trial judge exercises his/her discretion, it is necessary to look to the ruling of the judge but before doing so, certain matters should be noted.

33. The respondent argued for joinder on the basis of the probative value to be derived from the inherent unlikelihood that several people have made similar false accusations.

34. In giving guidance to trial judges, the Supreme Court in *Limen* distilled certain principles, including the following at p. 620:-

> *"(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 had 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 might 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 were independent of each other and there was no reason to fear collusion or mutual contamination."*

35. And at p. 618, para. 189, O'Malley J. (*obiter dicta*) said:-

> *"It may be the case, as Barron J. believed, that in practice joinder generally occurred only where the evidence in respect of the various counts will be cross-admissible, but that is not an explicit requirement under the rules and it is at least theoretically possible for counts to form "part of a series of offences of the same or a similar character" in a case where at least some of the proposed evidence in respect of one or more of the charges would not be admissible in respect of another. That is permissible provided that the accused is not unfairly prejudiced as a result and provided it will be possible, in practical terms, for the trial judge to make it clear to the jury what evidence should be considered in relation to which charge."*

The Judge's Ruling

36. *"There are differences between the complaints made by each. There are differences in relation to the nature of the abuse said to have occurred in respect of each allegation made by the complainants. They occur in different locations. The games referred to are different. The nature and extent of the abuse alleged is different and much more serious allegations are made against the accused by DH than the two girls. Is that determinative of the issue? The gender of the complainants is also different. The alleged offences occurred when the boy was about two years older than when it happened to the girls.*

> *The essence of the ruling that has to be made here depends on the principles which have been set out in the judgment of – essentially Ms Justice O'Malley and Mr Justice Charleton in the Supreme Court and the fundamental question in all of these cases is whether it is likely to lead to an unfair trial from both side's perspective but most particularly from the accused's perspective if it's to proceed in the way envisaged. That is to say, will there be such a disproportionate prejudice engendered by the admissibility of the various allegations made by the two girls in the trial in respect of which the more serious allegations are made, namely DH's allegations? It is not the case, and the case law of the Court of Appeal has indicated this, that where there are different degrees of sexual abuse involved against separate complainants that that must necessarily lead to separate trials of separate counts. So, essentially, I'm not satisfied that the trial of these cases together is something that will result in an unfair trial.*

There will be, as is envisaged in the two rulings in the Supreme Court – two judgments of the Supreme Court specific and detailed instructions to a jury as to how charges must be approached, and that includes the issue of doli incapax. ***I'm satisfied that given the opportunity to commit the offences alleged to have taken place on family properties in circumstances where the children's desire to play various games was allegedly exploited in each case, and that these matters are related and bear similarities which warrant the joint trial of the offences, that they should proceed together. I appreciate that the more serious offences are alleged against the accused by DH and there are a substantial number of counts laid against him in that regard. I also appreciate that there is only one in respect of LH and the allegations against – brought by her and by CH are allegations of lesser offences but those features and the fact that the victims are of different gender don't satisfy me that the interests of justice are not served by a joint trial of the charges.*** *Family movements, relationships and engagements are I'm told an important feature of the case, including interaction between the accused and the girls' mother and the attendance of DH with the family and the extent of his engagement with the family. An understanding of that dynamic and the issues said to arise around it led me to believe that the counts should be tried together. It's inevitable in such cases that there is engagement with the accusers about the opportunity for such wrongful activity or the potential for discovery if it's carried out, especially in a family environment. It's also clear that in respect of count 7 the accused is alleged to have engaged D directly in abusing C at the tree outside the house, which involves a direct evidential link between these two complainants on that count and how the accused engaged – is alleged to have engaged directly with them on that occasion. That is evidence which in my view speaks to the allegations made by each complainant, the dynamic of how he dealt with his niece and nephew on that occasion and for those reasons and having regard to the appropriate principles that apply and having regard to the necessary directions which must be given in a case of this kind, I am satisfied that the counts should proceed together."*

37. It might be observed here that courts have moved on in the knowledge of sexual abuse. We now know that an abuser of children is not necessarily influenced by the gender of a child. The overriding interest is that of the interest in children. It is perhaps armed with this knowledge that courts are much less likely to sever an indictment on the basis of the different gender of complainants. Equally, locations are of much less importance than might have been considered at the time of *People (DPP) v BK.* In any event, the primary basis of the application to sever rests, not with either of the above, but with the different nature of the abuse alleged by DH, it being of a graver nature.

38. This is a case with many similarities, involving three young children who were of similar ages at the time of their respective allegations of abuse at the hands of the appellant. They were inter-related, two sisters and a cousin. The relationship of the appellant to each child was that of uncle. Significantly, the precursor to some of the incidents involved the use of various games thought up by the appellant in order to lure the children into situations of abuse.

39. The argument is advanced that in permitting the evidence of DH, such enabled the jury to use his evidence of threats and damage to his toys in order to rebut the presumption of incapacity where the evidence of CH may not have been sufficient in and of itself to do so. However, we are not persuaded that the judge erred in his consideration of that argument. There was evidence from LH of the appellant locking the door and the jury would have been able to consider the use of games as evidence relevant to the appellant's state of mind.

40. The appellant draws upon the dicta of O'Malley J. in seeking to contend that the accusations need not be identical or strikingly similar but must be of the same nature. However, in the instance of all three complainants, the appellant touched them inappropriately on intimate areas of their bodies. In the case of DH, certainly, the sexual activity was of a more serious nature involving oral and anal intercourse, which could have been perpetrated on CH and LH. However, it cannot be said with any degree of force that the sexual activity was not of a similar nature. Where the abuse falls on the spectrum of gravity will not necessarily be determinative. The fact that some conduct is more egregious than other conduct will not in and of itself require severance of an indictment, particularly where the offending and the surrounding circumstances are broadly similar. In the present case, the aspect of "games" as a precursor to the abuse was common to all three complainants.

41. The fact that DH had not had contact with his cousins was a relevant factor to be considered by the trial judge, particularly where the appellant contended for potential collusion on the part of these complainants and not in the instance of DH. His evidence was free from such a contention and therefore strengthened the respondent's opposition to the application for severance in that it was evidence potentially capable of rebutting the defence contention of collusion.

42. The respondent submitted that the probative value was to be found in the inherent unlikelihood that the three complainants would make similar false accusations. As stated in *Limen*, the probative value increases where complainants are independent of each other and where there is no risk of collusion or contamination. DH was, in essence, independent of the other two complainants, his evidence added weight to the prosecution, with the capacity to rebut the allegation of collusion on the part of the two sisters.

43. In the present case, not only were the allegations broadly similar with the very significant feature relating to the game playing, but DH was independent of his two cousins. Moreover, count 7 involved DH and CH and so that evidence was cross admissible. There was significant probative value to be derived from the inherent unlikelihood of three people making similar false accusations. While such evidence was undoubtedly prejudicial to the appellant, as is the case with all prosecution evidence, the probative value was not outweighed by the prejudicial effect. We are not persuaded that the trial was rendered unfair by proceeding with the three complainants on a joint indictment.

44. Accordingly, this ground fails.

The Witness NM

45. This witness gave evidence of alleged sexual offending against her by the appellant herein. The appellant was not charged with any of this alleged conduct. The evidence was called to support the credibility of CH.

46. NM described an incident when she was approximately 9 or 10 in New York on a family holiday where the appellant played a game with her and asked her highly sexualised questions and kissed her. She recalled another occasion where she was watching a movie with the appellant and he lifted up her nightdress, exposing her underwear and asked her further sexualised questions.

47. The trial judge considered this evidence to be essential and necessary evidence and relevant to CH's allegation of sexual assault as CH claimed as part of her allegation that the appellant mentioned NM by name when committing the sexual assault.

48. The judge deemed the evidence admissible as without it the jury would be left without evidence which was important to an essential issue which they were asked to determine in the case, namely, whether the appellant had sexually assaulted CH and as to what was said by the appellant during the commission of the alleged offence.

Submissions of the Appellant

49. It is the appellant's position that this evidence had very limited probative value and whatever probative value it did have was far outweighed by its prejudicial effect. It is submitted that the introduction of misconduct evidence for offences not charged on an indictment cannot fall under background evidence, but must instead be assessed in accordance with its relevance and its probative value as weighed against its inherent prejudicial effect.

50. It is submitted that this prejudice was then compounded by the manner in which the judge charged the jury. It is said that despite being told of the limited purpose of NM's evidence in the course of what was effectively a *MacNeill* direction, the jury were directed that the evidence was corroborative in a sense it simply was not.

51. The appellant's arguments on this issue were, in essence, twofold; firstly, that the evidence was overwhelmingly prejudicial, introducing in effect, a fourth complainant; and secondly, that the evidence also had potential value in terms of doli incapax.

52. While it is conceded that the trial judge did not find favour with the latter, nonetheless, it is said that it effectively added to the prejudicial impact of the evidence which ought to have been ruled inadmissible.

Submissions of the Respondent

53. It is the respondent's position that the trial judge exercised his discretion in relation to NM's evidence properly and in a judicial manner giving careful consideration to the evidence and the submissions of counsel and that no error of law arises in relation to the admission into evidence of this account.

Discussion

54. There is no doubt but that the impugned evidence was prejudicial, but the key question for the judge was whether in the particular circumstances, the probative value was outweighed by prejudicial effect. That was a matter for determination by the judge on a consideration of the overall circumstances and, significantly, the purpose of the admission of the evidence.

55. Addressing the issue of doli incapax first, the trial judge made it very clear to the jury the limited purpose for the admission of the evidence and the jury can have been in no doubt in that regard. We must and do assume that juries do not ignore the directions of a trial judge. Moreover, no requisitions, (quite properly we might add), were raised on behalf of the appellant. We do not find merit in this argument.

56. If one were asked to speak of the most probative evidence, one would be hard pressed to find evidence of greater probative value than the evidence of NM. The evidence of NM was closely connected to the allegation by CH in terms of what CH said the appellant said to her regarding NM during the assault. CH could not have known of the incidents regarding NM and so this evidence was of significance to the credibility of CH.

57. The trial judge was entirely correct to refuse to exclude this evidence, in fact to do so, would have left the jury wondering about the situation regarding NM which could have negatively impacted on the evidence of CH.

As succinctly stated by the trial judge:-

> *"It would, in my view, be entirely illogical and contrary to good sense to deprive the jury of evidence which is central to a core issue which they have to determine."*

Conclusion

58. We are entirely satisfied that the evidence was relevant, probative evidence, properly admitted by the trial judge and accordingly this ground fails.

Decision

59. As the grounds argued have not been upheld, the appeal against conviction is dismissed.