THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2020] IECA 219

Record Number: 168/17

The President.

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

NC

APPELLANT

JUDGMENT of the Court delivered (by remote hearing) on the 31st day of July 2020 by Birmingham P.

1. On 7th April 2017, following a trial which had commenced on 3rd April 2017, the appellant was convicted by unanimous jury verdicts on two counts of indecent assault. Subsequently, he was sentenced to a term of six and a half years' imprisonment. He has now appealed against his conviction.

2. The grounds of appeal advanced are as follows:

(i) The trial judge erred in law and/or in fact in allowing the complainant to give evidence of other incidents of indecent assaults, which extended the scope of the indictment and in respect of which the applicant had been previously acquitted or had never been charged;

[Ground 1: Scope of indictment]

(ii) The trial judge erred in law and in fact in discrediting the evidence of Dr. John Conway before the jury; [Ground 2: Medical Evidence]

(iii) The trial judge erred in law and/or in fact in failing to discharge the jury when, during deliberations, following a request to rehear certain particular evidence surrounding the death of the complainant's grandmother, the learned trial judge repeated and reemphasised the evidence of the complainant dealing with the particulars of the offences for which the appellant was charged, wholly and unfairly prejudicing the appellant in the eyes of the jury; [Ground 3: The Question from the Jury]

(iv) The trial judge erred in law and/or in fact in curtailing cross-examination by not permitting the applicant to explore issues touching upon the credibility of the complainant; [Ground 4: Curtailment of Cross-examination]

(v) The trial overall was rendered unsatisfactory on each of the aforesaid grounds individually and collectively. [Ground 5]

3. Before setting out the alleged factual background and addressing the issues raised in the Notice of Appeal and the submissions, there are some matters by way of general background to which reference should be made at this stage.

4. The applicant was originally charged with 58 counts of rape and indecent assault in respect of three complainants. In October 2014, there was a successful application to sever the indictment as between all three complainants. The complainant in the present trial, Mr. FC, was the third complainant on the original indictment. Following the successful application for severance, the trial proceeded in relation to the counts involving the first complainant only, which resulted in a disagreement. That matter was retried and, once more, resulted in a disagreement. In May 2016, there was a trial relating to the counts involving the

second complainant, which saw the now appellant acquitted on all counts. In July 2016, there was a trial involving the counts relating to the third complainant; 16 counts in all were before the jury. In the course of that trial, there was a directed verdict of not guilty in respect of Counts 11 to 16, these relating to offences alleged to have occurred on dates between 1st April 1986 and 30th September 1987. The jury disagreed on the remaining counts.

5. At the retrial, which commenced on 3rd April 2017, and gives rise to the present appeal, the applicant was acquitted of the offences dealt with at Counts 1 to 8, and convicted on Counts 9 and 10 on the indictment. These referred to an indecent assault on a date unknown between 1st October 1985 and 31st December 1985, and on a date unknown between 1st January 1986 and 31st March 1986. It might be noted at this stage that a number of witnesses tended to date or provide context for particular events by reference to deaths in the family *e.g.* references to events before or after the death of the complainant's grandmother (2nd March 1986), and events before or after the death of his grandfather (22nd April 1990).

The History of the Case

6. For the sake of context, it is necessary to refer briefly to the factual background. The appellant was born in 1958 and the complainant was born in 1976. The complainant is a nephew of the appellant. From birth, the complainant lived at the same address in the county in question ("the first address"). He lived with his grandparents, with the appellant, an aunt, PC, and with his mother, EF, until she married a gentleman known as MF, who accordingly became the complainant's stepfather, and thereafter moved from the location. The complainant's mother, EF, is the older sister of the appellant. However, the complainant believed that his grandparents, FC Sr and CC, were in fact his parents, and his understanding was that the appellant and EF were his older siblings. The appellant lived at the first address until a couple of weeks after the death of his grandmother on 2nd March 1986, when he

moved from that initial address to another address within the same county to live with his mother and stepfather ("the second address").

7. The complainant contended that in the three-month period between the start of October 1985 and the end of December 1985, the appellant began to engage in inappropriate touching of his private parts. This was a period of time during which he was residing at the first address. More often than not, this was over clothing, and there was also unwanted kissing. During the following quarter, between 1st January 1986 and 31st March 1986, the nature of the activity escalated and to involving unwanted kissing, mutual masturbation, and unwanted oral and anal sex. In relation to the escalated behaviour, the complainant alleged that it happened on one occasion when both he and the appellant were at the first address alone, and on other occasions, it involved him being removed from his bedroom into the appellant's room where the offending occurred, following which the complainant was returned to his own room. While the complainant was unsure about when he moved between the two locations, his mother, EF, indicated that this happened shortly after the death of her mother. According to the complainant, following this, he was an occasional visitor at weekends to the original location and that offending continued there until the death of his maternal grandfather, FC Sr, on 22nd April 1990.

8. The complainant describes the circumstances in which the abuse that he alleges came to an end in these terms. At a time when the complainant was living at the second address in the county in question with both his mother, EF, and his stepfather, MF, the household had a visitor from England, Mr. T. All involved linked this visit to attendance at a family funeral, but there was disagreement as to which particular funeral. The complainant was firmly of the view that it was his grandfather's funeral in April 1990, while the complainant's mother was of the view that it was linked to the funeral of her mother, the complainant's grandmother, in March 1986. The position of the complainant's stepfather evolved. At the initial trial, he was

putting the visit in the context of the grandmother's funeral, but by the time of the trial which resulted in the verdict which is now the subject of appeal, his positon was that it occurred at the time of the funeral of the grandfather. During the course of the visit, the complainant reported that he had been the subject of a separate inappropriate sexual advance by the visitor, Mr.T. As a result of this, he was brought by his stepfather to visit Dr. Conway, to be examined by him. The complainant says that arising from what emerged in relation to Mr. T, that he made reference to the activity in which his uncle, the appellant, had been involved. He did not thereafter return to the original location.

Grounds of Appeal

Ground 1: Scope of indictment.

9. In the course of the complainant's direct evidence on the first day of the trial, he gave evidence of the first significant incident. He did so, referencing it by the hospitalisation of his grandmother for cancer. He did so, using language such as "would have" which suggested that he had moved on from describing the single initial incident and was dealing, at least to some extent, with a pattern of conduct. In those circumstances, prosecution counsel asked the question "did that happen on other occasions?". The following exchange developed:

> "Q. Did that happen on other occasions?
>
> A. It happened, it did, it happened on several occasions after that.
>
> Q. Say that?
>
> A. It happened on several occasions after that.
>
> Q. Several occasions? And can you help the jury as to how many you mean by several or how often you mean by several?

A. Well, it happened over a period of time until my grandfather died and that's when I wasn't back down in the house then, really. I was there for a couple of weeks after that until I basically came out with this, well, told what had happened.

Q. Well, let's look at that. What age were you when your grandfather died? Can you recall?

A. I can't recall what age I was. I believed and as, when I put in my statement, I believed I was about 12, but on reading the statement, I am actually 14, so –

Q: Okay."

At that stage, defence counsel intervened. In the absence of the jury, the defence counsel made the case that while the last date on the indictment was 31st March 1986, given that the death of grandfather C was in April 1990, this meant that they were now faced with a further four years of abusing behaviour. Defence counsel made the point that the prosecution would not have been unaware of the difficulties, given that there had been a direction granted at the earlier trial in relation to anything occurring after the death of CC, grandmother of the complainant, on 2nd March 1986.

10. Prosecution counsel indicated that the application canvassed was wholly premature. The judge's response was to confirm with counsel for the appellant that he was making an application to discharge the jury, and then said:

"Well, I am not going to grant this application. I agree with Mr. Greene (Senior Counsel for the prosecution) that it is entirely premature, and in fact, I do not think there is any basis for the application, in any event. It is a position that the events are entirely at large as regards the cross-examination, whether there are inconsistencies or otherwise, of course within reason, and following the rules of evidence. It is also the position that the prosecution may seek to amend the indictment, in due course. They may not. We have to see how that unfolds, and it is also the position, in accordance

with the decision of *R v. Dossi* and *DPP v Walsh*, that dates are considered to be somewhat unimportant in the aspect of the offences of historical alleged sexual abuse, unless, of course, there are offences which require dates to be proved with particularity. So, I am not going to accede to the application."

11. From the brief factual background set out above, it will be apparent that the complainant's narrative involved prolonged sexual abuse, with the abuse starting around the time of his grandmother's final illness and the first really significant act of abuse linked to her hospitalisation for the last time, as she entered hospital, never to leave it. On his account, the abuse continued over a number of years until it emerged in conjunction with a disclosure that he made about the actions of a family friend who had travelled from England to attend a funeral. It may be that the run of the evidence on the original trial and the confusion and controversy about which family funeral provided the backdrop for the visitor from England meant that the trial judge had little option but to grant a direction in respect of offences alleged to have occurred post-April 1986, but it meant that the complainant was always going to be placed in a very difficult position to give evidence that was the truth, the whole truth and nothing but the truth without referring to the fact that untoward activity continued until it was brought to an end by the fact that the complainant disclosed what was happening, making disclosure in a particular context. It is undoubtedly the situation that the narrative offered by the complainant went beyond and outside the parameters of the indictment.

12. It does not seem to us that what occurred gave rise to any unfairness. This was not a case of a jury getting to hear of the fact that an accused person had previous convictions or had been established to have engaged in conduct of a nature which would greatly lower him in the estimation of a jury of right-thinking people. At all times, the prosecution case was that the appellant had engaged in sustained child abuse, and while the evidence of the

complainant went beyond the dates in the indictment, the evidence was no more and no less than that.

Ground 2: Medical evidence

13. The background to this issue is that, following the incident involving the visitor from England, which led to the complainant making reports, the complainant was brought by his stepfather, Martin, to be examined by Dr. John Conway. Dr. Conway gave evidence on the third day of the trial. He indicated that he had no records or notes relating to the occasion. Dr. Conway's earliest medical records relating to the complainant dated from March 1992. However, the doctor did have a memory, though his memory was very vague, of being contacted in relation to an allegation of sexual assault. His memory is linked to the fact that he was contacted while off duty and made arrangements to attend his surgery specifically in response to the call. In cross-examination, Dr. Conway was asked about the physical examination and the fact that no evidence of trauma had been found. He stated that he was not an expert in the area, but that "as a General Practitioner, I would have expected some evidence of trauma, in broad terms". When it was put to him that at the time of the examination, the complainant was ten years of age, the doctor said that his memory was vague, but his impression was that he was ten years old, possibly less. When asked if he recalled seeing signs of adolescence, such as pubic hair, the doctor stated, again, that his memory was vague, but "in broad terms, he did not".

14. When the cross-examination concluded, the trial judge put some questions to the doctor herself. She did so as follows:

> "Judge: Doctor, can I ask you, I think you might already have indicated this, I think you are a General Practitioner, is that correct?
>
> A: Yes.

Judge: And obviously practising for many years in your particular area in [the county] ?

A: Yes

Judge: I think, when you were asked about certain questions, you said in reply that you are not a specialist in the field of genital trauma, would that be right?

A: Yes

Judge: I see"

At that point, counsel on behalf of the appellant intervened, requested that the jury would withdraw, and in the absence of the jury, contended that Dr. Conway, as a frontline practitioner, was qualified to give an opinion in the manner that he had.

15. The appellant says that the issue was compounded by the fact that the judge, in the course of her summary of the evidence, referred to Dr. Conway's lack of expertise. At that stage, what the judge had to say was as follows:

> "[t]he witness said that he was not at all an expert in the area and I want to say something to you now about expert witnesses. So, an expert witness is entitled to give evidence of his or her opinion which is within his area of expertise. That does not mean an expert, having given evidence, that a jury automatically accepts the evidence. It is for the jury to weigh and to assess that evidence in the same way a jury would assess any witness's evidence. The weight to be attached to an expert witness's testimony is dependent upon a number of factors, including the degree of expertise, the qualifications of the expert, the extent of the expert's first-hand knowledge of the facts upon which he based his expert opinion but that of course is where a person is an expert in a particular field. Now, Dr. Conway said to you that he was a General Practitioner and he very properly told you that he was not an expert in this area, that he was not a specialist in the field of genital trauma, and, in

fact, I think he was very anxious to convey that to you, in the course of his giving his evidence, having been asked the question by counsel for the accused.

. . .

So, it is for you assess therefore the weight which you consider appropriate to give that evidence and the fact that Dr. Conway is not an expert in this field means that must affect the weight you give to that answer regarding the opinion that he expressed, particularly when he himself recognised and was anxious to point out to you that he was not an expert in this particular area.

. . .

[y]ou should bear in mind that legal direction that I have just given you in relation to the expert evidence. You should look at that very carefully and you must remember that the good doctor, in a very proper way, said he is simply not an expert in this area. It is not his area of speciality."

16. The defence say that the undermining of the evidence of Dr. Conway impinged adversely on them in relation to a particular area of controversy. The defence were contending that the incident involving Mr. T and the subsequent visit by the complainant to Dr. Conway, all took place in the aftermath of the death of Mrs. CC, in March 1986, as suggested by the complainant's mother, Mrs. EF, and not as contended for by the complainant and his stepfather, around the time of the death of FC Sr in April 1990. The defence say that the evidence of Dr. Conway tended to support their position, in that his recollection was that the boy he had seen, when a complaint of sexual assault was made, was around ten years of age, possibly younger, and that his memory was that the boy was pre-pubescent.

17. To put this controversy in context, it is worth noting that Dr. Conway was called by the prosecution for a specific purpose, to say that on an occasion, a complaint was made to him

that FC had been sexually assaulted. That he was not expected to be a witness of great import in the trial is evidenced by the fact that when he was called to give evidence, the defence indicated that the prosecution could lead him through his evidence. Prosecution counsel concluded his direct evidence by thanking the witness for coming to give evidence at short notice. Thereafter, defence counsel took advantage of the presence of Dr. Conway, as he was entitled to do, to put a line of questioning to him.

18. In the context of an application for a corroboration warning, prosecution counsel, addressing the judge, commented:

> "[y]our role, as you well know, is to ensure that everyone gets a fair crack of the whip, and if he's –
>
> Judge: Well, that's why I intervened yesterday.

Prosecution counsel submitted that the jury needed to be clear that Dr. Conway was effectively called to produce records and to give his recollection, and that for the defence to set him up as an expert giving opinion evidence was unsatisfactory. Prosecution counsel indicated that he proposed to address that in his closing speech. The judge indicated that it was her intention to tell the jury that experts are often called before the courts, but that she would direct the jury's attention to the fact that when Dr. Conway was asked a particular question as to an expectation of finding trauma, the doctor indicated that he was not an expert in that area.

19. In the Court's view, the judge's intervention was not inappropriate and did not go beyond what was permitted in terms of intervention and clarification. This was not a question of the judge entering the arena as the champion of one side. The intervention has to be seen in the context that in cases of this nature when experts are called, that frequently, their evidence is to the effect that it is often the case that no visible signs of trauma are found. The doctor's memory was understandably vague. He was dealing with a single consultation which had

taken place somewhere between 27 and 31 years earlier, and in respect of which he had no notes. That he had a memory at all was linked to the fact that he was called in when off duty, and perhaps, though this was not stated, to the nature of the examination and report, which must have been fairly unusual. That he had a memory, even if vague, that he was dealing with a prepubescent boy of approximately ten years was of assistance. That assistance remained available to the defence with the qualification that the doctor's memory was vague. In the circumstances, we are not prepared to uphold this ground of complaint.

Ground 3: The Question from the Jury

20. The background to this issue is that on Day 5 of the trial, at a time when the jury had been deliberating for some three hours and forty minutes, the jury returned to Court. The usual question as to whether they had reached a verdict on any count was put to them and the Foreman responded "yes, but not in the final count". The Jury Foreman then asked if the jury was "able to get a record of the dates and timeframe of the stay in hospital of the grandmother" (Mrs. CC). Consideration of this issue is not helped by the fact that for some reason, there is no DAR recording of what occurred, and in the course of the oral appeal, which was dealt with remotely, we were told that the backup system was also not operating, or certainly, no backup copy had been made available to the solicitor for the appellant.

21. According to the appellant's submissions, the judge confirmed that Mrs. EF, mother of the complainant, and the complainant, had given evidence in relation to the stay in hospital of Mrs. CC. The judge responded to the request by, firstly, reading to them the transcript of those aspects of the evidence of Mrs. F that dealt with her mother's stay in hospital. The judge then read from the complainant's evidence. However, the appellant says that when she was doing this, she went further than she had been asked and revisited the evidence given by the complainant in relation to allegations made by him as to what had occurred at that time. They attribute the phrase "so, basically, all around the grandmother's last hospitalisation".

22. On behalf of the respondent, it is said that the question asked was answered entirely correctly and appropriately by the trial judge. The respondent said that the jury had asked for assistance regarding evidence in relation to hospital records and the judge assisted them by finding the evidence which related to that. They say that the judge did no more than reference the relevant evidence and that there was nothing untoward in the way in which the issue was handled. We are not assisted in our task by the absence of the DAR, but we have considered the transcript of the evidence of the complainant. He does not deal with the question of his grandmother's hospitalisation as a separate and discrete issue. Rather, insofar as there is reference to hospitalisation, it is as the backdrop to events that occurred and a means by which those events can be provided with a timeline.

23. Slightly surprisingly, given the difficulties with the DAR, no effort has been made to put before this Court any evidence as to what transpired when the jury asked the question and the judge answered it, as distinct from the issue being dealt with by way of submissions. However, insofar as the jury was asking to be reminded about what had been said about hospitalisation, there had been no formal evidence by reference to admission records or the like, and it was always going to be a question of recapping on what witnesses had said. We are very far from persuaded that anything at all improper or untoward occurred, and we do not at all believe that the fairness of the trial has been called into question.

Ground 4: Curtailment of Cross-examination

24. This ground is formulated in broad, and it might be said, trenchant terms. It is necessary to examine the reality of what happened. In the course of cross-examination, counsel referred to the fact that in November 2009, the complainant had come under the care of the psychiatric services in St. Dympna's. The complainant agreed, adding that he had signed himself in. He agreed that that this had occurred against the backdrop of an incident of self-harm, stating "I hung myself". He was asked and answered about the number of children

he had, their ages and who their mother was. He was asked whether the relationship with the mother of his children was ongoing and he said it was not, that it had ended some 14 years previously. He agreed that he had a partner at present. It was put to him that on the night before his admission to hospital, that he had gone to the public house where he had drunk pints of lager and ten shots of vodka and Red Bull. He was asked if he had an argument with his then girlfriend that led to the breakup of the relationship the following morning. He agreed. He gave the name of his then girlfriend and counsel then said:

> "Counsel: and it's recorded [in the hospital notes] 'that as she packed her bags to leave the house, he grabbed her hair and pushed her out', is that right?
>
> Witness: I grabbed her hair and threw her out, yes.
>
> Counsel: And you subsequently regretted doing so, it is recorded.
>
> Witness: Yes, most definitely."

At that stage, there was an intervention from prosecution counsel who stated that he was questioning the relevance of these questions with respect to the ultimate issue in the case. The jury withdrew and counsel for the defence was asked by the judge how he said this was relevant.

> "Judge: What's the relevance of it?
>
> Counsel: The relevance of it is the ultimate issue in relation to this case is the complainant's credibility in relation to because it is effectively a bald assertion against blanket denial-type case, so credibility is central and the notes that I'm putting to the witness, that he appears to be accepting, insofar as we've got through them, that he is attending a psychiatric service for issues of self-harm. Against that backdrop is the allegation of child sexual abuse, but that's not the only issue and it also sets out the issue of previous self-harming, five years prior to that, which apparently stems from the breakup of the relationship in 2003/2004."

In further exchanges, counsel indicated that one issue he wished to explore, he referred to it as an "island that he wished to examine", was a question of drug use.

25. In further exchanges, the judge made reference to the statutory provisions enacted in s.33 of the Criminal Procedure Act of 2010 which inserted a new s.1A into the Courts of Justice Act 1924 *vís-a-vís* the imputation of the character of a prosecution witness and the requirement to give the prosecution seven days' notice of such an intention. The judge ruled on the matter as follows:

> "Well, great latitude is given in cross-examination, but it is the position that cross-examination must be relevant to the issues in dispute between the parties and the aspect of matters which have been cross-examined upon being a previous alleged assault by the complainant on a previous partner does not appear to me to be in any way relevant. It is an entirely collateral issue, but the horse has now bolted. The second point to make in relation to that is that, arguably, it can be said to put the complainant's character in issue, and, as a consequence, as Mr. Greene rightly says, before that can be done, a notice must be served pursuant to the Criminal Procedure Act 2010. That has not been done in this instance. But, as I said, that horse has now bolted. The question has been asked, but in my view, it is not relevant. It is a collateral issue.
>
> In relation to the balance of the material, I am told that in March 2009, a complaint was made on an informal basis, as regularly happens, to a member of An Garda Síochána. The complainant was admitted under the care of the psychiatric services in November 2009, so that the admission to the psychiatric services post-dated the initial complaint to a member of An Garda Síochána. I cannot see that the issue in relation to financial difficulties, binge drinking or going to Australia, or the fact,

that a contention, I should say, that he was given Diazepam, is in any way relevant to the credibility of the complainant or goes in any way towards the ultimate issue. The fact that on a previous occasion it was put to him that there was a use of drugs, and he denied that, and that there is a reference of abuse of drugs, brings that into the case by way of a credibility issue, and I will allow that aspect of matters, but no other type of questioning in relation to other aspects. I do not see that they are relevant. They are entirely collateral, therefore, they are not admissible."

26. Notwithstanding, as the trial judge pointed out, that great latitude is allowed in cross-examination, the Court feels that the intervention by prosecution counsel was a perfectly proper one and the judge's ruling fully justified. While latitude is afforded in cross-examination, questions asked must be relevant to a fact in issue. We cannot see how it could ever have been thought that whether or not the complainant pulled his partner's hair in 2009, as an adult, could have any relevance to whether the complainant was abused as a child. Quite simply, it was a line of questioning that should never have been pursued.

27. We are aware that, as it happens, this issue of the scope of cross-examination of complainants in sexual cases was considered by the courts of Scotland in recent days, where the Opinion of the Appeal Court was delivered by Lord Carloway, Lord Justice General, in the case of *McDonald v. Her Majesty's Advocate*. While the statutory regimes in Scotland and in this jurisdiction differ in some respects, the Opinion delivered by Lord Carloway is an important one, and it is one that judges presiding over trials of this nature may find of considerable assistance. In the course of his introductory remarks, Lord Carloway explained that "leave to appeal [had] been granted only in respect of one ground of appeal; whether the Sheriff's references to the complainant as a 'victim' at certain parts of his charge were such as to constitute a miscarriage of justice". However, as Lord Carloway went on to explain:

> "[that] the case raised a number of issues in relation to the conduct of sexual offences trials in general. In particular, first, it highlights deficiencies in the procedure for the determination of applications under section 275 of the Criminal Procedure (Scotland) Act 1995 [a restriction on questions designed to show that the complainer was not of good character in relation to sexual matters, was a prostitute, or an associated of prostitutes, or had at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge)]. Secondly, it focuses sharply on questions of what may be put to a complainer in cross-examination. Thirdly, once again, it concerns what may be said in a defence jury speech in relation to an accused's 'positon' when no evidence has been led to demonstrate what that position might be. Fourthly, the appeal concerns the duty of the presiding judge or Sheriff in controlling the proceedings, especially in relation to unwarranted attacks upon the character of a complainer, and in formulating the charge to the jury relative to the live issues at trial. It must be said *in limine* that the manner in which trial proceeded gives rise to real causes of concern."

In the course of the judgment, Lord Carloway quotes at some length from the speech to the jury by the defence lawyer. Lord Carloway referred to the fact that the courts in Scotland had continually been criticised for failing to provide complainers in sexual offence prosecutions with adequate protection from irrelevant and often distressing questioning, adding "this case is a further illustration of a trial court's failure in this regard".

28. It seems to the members of this Court that the observations of Lord Carloway have some considerable relevance to the conduct of trials in this jurisdiction. However, in the context of the issue raised in the present appeal, we will content ourselves by saying that the line of questioning sought to be pursued was one that should never have been followed, that the objection taken by the prosecution was well-founded and that the judge was perfectly

correct in identifying the areas that were properly a matter for cross-examination and those that were not. Accordingly, the Court will reject this ground of appeal.

29. In summary, the Court has not been persuaded that the trial was unfair or the verdict unsafe. Accordingly, we will dismiss the appeal.