



THE COURT OF APPEAL

Record Number: 168/15

**The President
McCarthy J.
Kennedy J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

P.R.

APPELLANT

JUDGMENT of the Court delivered on the 12th day of March 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. The appellant was convicted of 74 counts, namely; 37 counts of rape contrary to section 2 of the Criminal Law (Rape) Act, as amended, 2 counts of rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act 1990 and 35 counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990 in relation to three complainants: CR, ST and MR, who are daughters of the appellant.

Background

2. In relation to the first victim, CR, the appellant was convicted of 11 counts of sexual assault, one count of section 4 rape and 37 counts of rape. The assaults began in 1994 when the complainant was 9 years of age and they continued up until after her 17th birthday. The complainant was regularly sexually assaulted by the appellant from the age of 9 to 11 at which point the appellant progressed to regularly raping the complainant. The abuse occurred mainly in the family home, but several counts also relate to rapes occurring at various building sites and industrial estates where the appellant worked and during car trips to Tipperary. On one occasion, when the complainant was 16, she was anally raped by the appellant in the family home. The abuse stopped in May 2002 when the complainant ran away from home.
3. The second victim is ST, a younger sister of the first victim. The appellant was found guilty of 15 counts of sexual assault and one count of section 4 rape concerning ST. These offences were perpetrated against the victim when she was 10 years of age and continued until just before her 14th birthday. These offences occurred in the family home and became a regular occurrence. They began with the appellant forcing ST to masturbate him and the level of involvement increased with the appellant touching her body and performing oral sex on her. On one occasion the appellant forced ST to perform oral sex on him and on another occasion, he digitally penetrated her vagina.
4. The third victim, MR, is a younger sister of the previous two victims. The appellant was found guilty of 9 counts of sexual assault in relation to MR. The abuse began at a time when the complainant was aged between 11 and 13 years of age. Much like ST, the

abuse began with the appellant forcing MR to masturbate him and progressed to him feeling her body, her being required to rub against him whilst naked and being digitally penetrated by the appellant. This abuse mainly took place in the family home apart from one incident which took place while the family were on holiday in Co. Waterford.

Grounds of appeal

5. The appellant puts forward two grounds of appeal in his submissions:-

- (1) The trial judge erred in failing to grant a direction for an acquittal on a significant number of the counts on the indictment, in circumstances where there was insufficient evidence to sustain such counts.
- (2) The trial judge erred in refusing the defence's application to refer to the conduct of one of the complainants during the appellant's previous trial, wherein the trial judge had threatened to hold the complainant in contempt arising from her attempts to influence the jury through her demeanour.

Ground one

6. At the close of the prosecution's case, counsel for the appellant sought a directed verdict of not guilty in relation to several of the counts on the indictment on the grounds that no evidence had been adduced to show that the offences took place within the time periods set out on the indictment. The respondent conceded that there was no evidence relating to counts 50, 74, 75 and 76 on the indictment.
7. In relation to ST, counts 51-66 on the indictment pertained to her, with counts 51-60 being incidents of sexual assault preferred on a quarterly basis and count 61 being an incident of oral rape contrary to section 4 of the 1990 Act. Count 51 was an allegation of a sexual assault occurring on an occasion between 1st May 1997 and 30th September 1997. The appellant argued that since ST described the first instance of assault occurring during the springtime, this did not fit with the timeframe on the indictment. Furthermore, the appellant submitted that ST described the assaults as "sporadic" which did not necessarily fit in with the timeframe of the counts on the indictment.
8. In relation to MR, there were 9 counts of sexual assault preferred in three-month tranches on the indictment and again counsel for the appellant argued that there was no evidence to support that the sexual assaults necessarily occurred during the time frames laid out in the indictment.
9. In relation to CR, counsel for the appellant submitted that counts 1 and 2 on the indictment related to the period 1st October 1994 to 24th December 1994 and yet the only evidence the complainant gave of a time frame for these offences was that they occurred during the wintertime, thus, in a similar vein as the arguments presented for the counts concerning ST, there was no evidence that they occurred between the times alleged. The appellant further argued that there were a number of counts for which CR gave no time frame and thus should not have gone before the jury.

10. The trial judge refused to accede to the appellant's application and in considering the submissions in respect of each complainants' evidence, she accepted that there was some evidence to go to the jury on each count and it was a matter for the jury to interpret and decide upon the evidence given. The trial judge concluded her ruling by remarking as follows:-

"I have to say that in cases like these, having considered the case law, that there has to be an approach of realism, but also that, as the trial judge, I must be careful not to usurp the function of the jury and I think that there's a nice phrase in I think it's the Kearns case. It says that the guiding principle is that it's for the jury to decide and resolve matters of inconsistency in the evidence and matters essentially which are within the province of the jury and I'm satisfied that that so be the case. I also don't accept that there's any injustice to PR in relation to these matters because there's no suggestion and no case made out that he was out of the country or that he was in prison while these events occurred, and that's on the evidence as given."

Submissions of the appellant

11. The appellant submits that the first limb of the test in *R v. Galbraith* [1981] 1 WLR 1039 is not satisfied, as a constituent element of the counts in issue is not made out i.e. the time frame in which they occurred. The classic statement regarding the approach to such an application as stated by Lord Lane is as follows:-

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case."

12. The appellant refers to *R v. Shippey* [1988] Crim LR 767 where Turner J. rejected the proposition that the effect of *Galbraith* was that if there are parts of the evidence which go to support the charge, then no matter what the state of the rest of the evidence, that is enough to leave the matter to the jury. Turner J. stated that taking the prosecution case at its highest 'did not mean picking out the plums and leaving the duff behind'. It is necessary to assess the evidence as a whole. In the case of the appellant, it is submitted the evidence was so imprecise and unspecific that it would force a jury to reach their conclusions based on conjecture

Submissions of the respondent

13. The respondent submits that there was ample evidence to allow the matter to go to the jury and each of the complainants gave clear and cogent evidence, as recognised in the trial judge's rulings.
14. The respondent submits that the courts are cognisant of the difficulties in framing of dates in indictments in cases of this nature, but it is only where it can be shown that the period of time specified will work an injustice, that a legitimate complaint can be made out.

15. The respondent refers to *PF v. DPP* [2016] IECA 304 where the Court quotes from Humphries J, who had echoed observations made by Fennelly J. in *The People (Director of Public Prosecutions) v. Farrell* [2010] IECCA 94 who had said:-

‘It is well established in law that the precise date on which an offence took place is not of the essence of the offence unless it be a component of the offence itself which it can be.’

Discussion

16. The core arguments advanced on behalf of the appellant are that there is simply no evidence of a constituent element of certain of the offences alleged on the indictment due to the absence of evidence that the offences alleged occurred within the time frame specified on the indictment and that the respondent failed to seek to amend the indictment at trial. Against such a consideration it is important to examine the evidential and legal basis underpinning an application to withdraw counts from consideration by a jury.
17. In the present case, reliance is placed on the submission that the respondent has failed to satisfy the first limb of the test in *R v. Galbraith*; that is, that the respondent has failed to adduce *prima facie* evidence that the various offences were committed on the dates alleged on the indictment.
18. Section 4 of the Criminal Justice (Administration) Act 1924 provides:

“(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act.”

The Counts relating to ST

19. Mr McGinn SC for the appellant focused his argument insofar as ST was concerned regarding the dates reflected in count 51 on the indictment, the first offence of sexual assault between the 1st May 1997 and the 30th September 1997. She was born in February 1987 and gave evidence that when she was 10 years old, an incident of sexual assault occurred in the home. In evidence she said:-

“When I turned ten like I don’t know exactly what time it was, there was a particular day where I was at home, it could have been a Thursday...”

At a later stage in her evidence, concerning the same incident, the following was said:-

“Q. ...So, after that, can you recollect what time of year that was?

A. It could have been around maybe spring.

Q. Springtime, I see, after you had turned ten, is that right?

A. Yes"

20. The contention is that the evidence of the event occurring in springtime suggests a period earlier than May, perhaps from February 1997 to April 1997 and that therefore there was no evidence that the first offence occurred between the dates alleged on the indictment.
21. In the first instance, it is well established that precision on dates is not an essential element of offences where long term sexual abuse is alleged as in the instant case. Dates may be relevant where the specific date is relevant to the offence alleged, such as in the instance of an offence of defilement where the age of the alleged victim is an essential element of the offence.
22. However, in circumstances where age is not an essential element, and in particular where the defence is one of denial, no question of injustice or unfairness can arise where there is a lack of precision on dates.
23. In *Blackstone's Criminal Practice* (2010), para.D11.26 the following is noted regarding the materiality of dates:-

"If the evidence at trial as to date differs from that particularised in the count, that is not, as a rule, fatal to a conviction (Dossi (1918) 13 CR App R 158."

The text goes on to say: –

"This position will be different where the allegation as to date is not merely procedural but may determine the outcome of the case. For example, in some instances the date on which the act occurred will affect the age of the alleged victim, which may be material. This was the case in Radcliff [1990] Crim LR 524, where, in the case of indecency with a child, the judge in summing – up said: 'The dates which are set out in the indictment... are immaterial. The prosecution do not have to prove that any particular act happens between those dates. What you have to prove is that it happened.' The Court of Appeal criticised this direction because the jury may have been left with the belief that her age was immaterial and that they could convict even if she was over 14 at the time."

24. Clearly, the age of each of the three complainants in the present case was not material. The allegations were those of sexual assault and rape and s.4 rape. The defence was not one of consent, as the appellant's case was that the events complained of never took place.
25. Moreover, it is the position in law that even if there is an error within the indictment concerning the dates or indeed other matters, this will not necessarily be fatal to a conviction, unless the accused person has been prejudiced by the error. In this respect it was open to the respondent to apply to amend the indictment, however, it was argued on behalf of the respondent that while the end date on count 51 was that of the 30th

September 1997, the start date was at a time when spring had arrived and therefore the offence alleged was within the timeframe.

26. An indictment may be amended at any stage of the trial so long as such amendments will not cause an injustice to the accused person. It is preferable that any application to amend an indictment be made as soon as possible, this of course does not preclude an amendment to an indictment right up to the stage of the receipt of a verdict but the success of such an application will be dependent upon the nature of the amendment. As was said in *R v. Johal* [1972] 2 All ER 449:

“The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.”

27. The nature of the defence is therefore apposite in the consideration as to whether any injustice has occurred, and this is relevant in the overall consideration as to whether or not to amend an indictment.

Conclusion regarding count 51

28. The evidence disclosed an offence of sexual assault on a location after the witness had turned 10 years, around springtime. The respondent emphasises the evidence given by ST where she stated that the event could have occurred ‘around maybe spring’, thus contending that where the witness gave evidence that the incident occurred when she was 10 years old and was imprecise as to whether it was or was not around springtime, the evidence fell within the time period on the indictment.
29. We cannot agree with the submission on behalf of the respondent in this respect. We are of the view that an application could, and indeed should, have been made to amend the indictment and it is very difficult to see how that application would not have met with success. Any such amendment was not a significant one in the context of the case.
30. However, that said, we are not persuaded that the lack of precision in the date on the indictment rendered the indictment a nullity or caused any injustice or prejudice to the appellant. This defect in the indictment was not therefore a fundamental defect of the kind which would cause this Court to intervene and quash the conviction.
31. It is quite clear that the particulars of the offence on count 51 on the indictment disclosed a criminal offence and the imprecision concerning the date rendered the particulars of the indictment imperfect. In those circumstances and in light of the defence advanced by the appellant, we are satisfied to apply section 3(1) of the Criminal Procedure Act 1993 or as it is more generally known; the proviso.

The general complaint of absence of evidence of regularity of offending.

32. The appellant’s submissions make reference to the witness’ description of the regularity of the incidents as ‘sporadic’. Whilst the appellant relies on submissions on the first limb of the test in *R v. Galbraith*, in submissions to the trial judge, it was said as follows:-

"The only definitive time we have, as I say, is the first assault, which was when S says she was 10 and happened during the spring. We don't have a count reflecting that and therefore there is no evidence before the jury to say that any one of the other counts or that any of the other alleged offences occurred in any one of the other periods because the evidence is too vague"

33. Earlier in her evidence, when asked as to whether anything further occurred after the first incident, she described how a few weeks went by, perhaps two weeks and then another similar event took place. Thereafter she gave evidence that it became a bit more regular and described the regularity as follows: -

"Q... And how regular did these occurrences happen?

A. Like, it wouldn't be every single week, but it would kind of be--- you know, it would be regular enough, like, do you know what I mean, it could be maybe every two weeks, every-- sometimes then three weeks, it was a kind of a gap, but it would be fairly regular enough."

34. We are not persuaded that there is any merit in this contention as it is clear from the evidence that the events complained of occurred with some regularity and consequently there was justification in the respondent preferring the counts on a quarterly basis.
35. We have carefully considered whether the error we have found in the particulars on count 51 impacts on the balance of the counts on the indictment in respect of this witness. We have concluded that it did not, and we say that on the basis of the consideration of the evidence as a whole and moreover, that, if the indictment had been amended, the amendment would have concerned only the start date, bringing that date to 14th February 1997 as the witness's evidence was that the first event occurred 'around maybe spring'. As there was some room for uncertainty regarding the timing of the first incident, which is not surprising given the age of the witness at the time of the offending conduct and the prolonged nature of the conduct, it is readily apparent that there would be no necessity to amend the end date. The evidence would have permitted the jury to conclude that the first event occurred at some stage between 14th February 1997 and 30th September 1997.

The counts concerning MR

36. The remaining counts for the jury's consideration concerning MR were preferred on a quarterly basis commencing on 13th January 2001 onto 30th September 2002 and a count from 1st October 2003 to 31st December 2003. These counts related to offending in the family home. A single count was preferred of offending in rented accommodation between 1st May 2002 and 31st August 2002.
37. The first count concerned a period of time from when the witness turned 11 years old. The complaint advanced MR regarding the counts concerning this witness on behalf of the appellant was that whilst the witness gave evidence that the first event occurred when she was 11 years of age, she was unable to say how far into her 11th year that was and

so it was contended at trial that there was no evidence to say that the first incident occurred between 13th January 2001 and 31st March 2001.

38. The argument advanced is that the incident could have occurred at any stage between 13th January 2001 and 13th January 2002 and therefore in effect that the particulars of the indictment lacked the necessary precision.
39. We are not at all persuaded by this argument. The evidence disclosed that the first event occurred when the witness was 11 years of age. Taking into consideration her date of birth, it is quite clear that the evidence disclosed that an offence occurred on a date unknown between those dates.
40. A further submission was made on behalf of the appellant that MR did not give sufficient evidence as to the frequency of the offences. In that regard in her direct testimony the witness said the following in response to a question by counsel for the respondent: –

“Q. ... How often would incidents occur?”

A. Well, you see, at the time, right, incidents wouldn't happen that often to me, it was because the way I look at it now is obviously C was there, like, do you know he was constantly with her. Like, when she wasn't there, when she would be gone off with her friends or she went to band practice, or do you know when she wasn't there, he'd come to me, like do you know. Like, first thing in the morning, it would be like, you know-- I remember going to school, my mother, as I said, would be going to --- Hospital, like he would call--- like, I'd always wake up super early with my mam, he called me, I'd always wanted to be alert, to be awake just so I'm ready, on the ball. But he'd call me, like, do you know and I'd be like, "what?" And he'd be like, "Just come..." -and just make me lie on his bed and just hold my boobs..."

She then went on to say:-

“Often and often----yes, often enough like, do you know.”

At a later stage regarding further sexual assaults she was asked: –

“Q. Was that a regular occurrence?”

A. Yes. Like, do you know, yes, like, yes, do you know yes he would..."

Conclusion on evidence of regularity

41. Three complainants made allegations of sexual abuse as against their father. As is clear, one of these complainants was CR. It is readily apparent from the evidence of MR, that the regularity of the appellant's abuse of her was dependent upon the presence of CR. She stated quite clearly that when CR was not there, the appellant would come to her. She then went on to say that the incidents occurred often enough. She was then asked whether certain incidents of inappropriate touching took place on a regular basis and she replied in the affirmative.

42. We are not persuaded that there is any merit to this submission.

The evidence relating to count 77

43. In her evidence, MR accepted that following a complaint which she made to the gardaí in November 2002 that no further incidents occurred until the final incident where the particulars of the offence allege that:-

----- on a date unknown between 1 October 2003 and 31 December 2003, both dates inclusive at-----, did sexually assault MR.

44. It is contended on the part of the appellant that the witness's evidence concerning the period during which the abuse ceased was in effect not the period reflected in the indictment and accordingly the issue fell within the first limb of *R v. Galbraith*.

45. In this respect it is instructive to examine the series of questions and answers on this issue:

"Q. I see. Now, in terms of 2002 then, and the time that you go and make the complaint, I think you've indicated in your evidence was a period of time when there were no sexual incidents?

A. Yes, none.

Q. And can you recollect how long that went on for?

A. I'd say, I'd say about a year, because the way I'd say is because I was 12, and then I was 13 and the last time he sexually abused me was when I was 14.

Q. I see?

A. You know what I'm saying, do you know like literally just turning 14 or something like that. So a good couple of months he didn't go near me, he obviously kept his low low profile, everything, and then just boom, out of nowhere that morning and then I was just gone, out of that home.

Q. Was it a couple of months or a year, just you've mentioned two different things there, so?

A. Yes. Well, see, like you a month and a year is not really a big difference, 12 months in a year, you know, a couple of months, like, do you know.

Q. I see?

A. Like he didn't like, after we reported it, my dad the first time, he didn't sexually abuse me for like give or take six, seven months, but I thought it would never happen again, I believed like, oh there is not going to happen again, like do you know that way. And then when mam went to work, boom, happened again, and then I was just gone, like.

Q. And do I take it from your evidence, it was just the one occasion then and you left then?

A. Oh it was just one occasion, it was, it was just the one occasion, and I was gone, I was gone out of the house, like, after that."

46. The argument advanced is that as the witness turned 14 in January 2004, the offence could not have occurred within the dates preferred on the indictment.

Conclusion

47. As can be seen from the foregoing extract from the evidence, it is quite clear that the witness gave evidence that the abuse ceased for about one year. Approaching the evidence even from that limited perspective, the evidence would suggest that the abuse recommenced in November 2003 when the witness was 13 years of age. However further clarification is proffered by the witness when she said that she was "literally just turning 14 or something like that"
48. We are not persuaded that the trial judge erred in refusing to direct verdicts of not guilty on these counts.

The counts concerning CR

49. The counts concerning this witness concerned counts of sexual assault and rape. The first offence of sexual assault is alleged to have taken place in a car on a date unknown between 1st October 1994 and 24th December 1994. The balance of the counts of sexual assault are preferred on a quarterly basis from 1st October 1994 to 1st October 1996 in the family home. The counts of rape contrary to section 2 of the Criminal Law (Rape) Act, 1981 as amended are preferred from 27th July 1996 to 30th May 2003 with a specific count preferred concerning 25th December 2000. Further counts concerned rape contrary to section 2 of the 1981 Act in a vehicle in various locations and in a partially built building site, warehouse, and an industrial site on diverse dates between 1st September 1996 and April 1999 and a count of section 2 rape contrary to the 1981 Act in November 2002 at rented stables and finally a count of section 4 anal rape between 1st April 2001 and 1st July 2001 in the family home.

50. The particulars of the first count on the indictment state: -

... on a date unknown between 1 October 1994 and 24 December 1994, both dates inclusive, as an unknown location on the road between the county of-----, in a car being driven by you en route from----- did sexually assault CR...

51. Issue is taken with the date preferred in respect of this count on the basis that in her evidence the witness indicated that she was 9 years of age at the time of the first incident. She further stated:-

"Q. Just now in relation to that, first of all, can you recollect what time of the year that was?

A. I think I remember it was sometime in the winter, I don't know when but it was snowing at the time anyway."

52. It is contended the first incident must have related to the winter of 1994/1995. It is therefore contended that the incident could have occurred from November 1994 through to January/February 1995. The argument is advanced that as the indictment relates to a more concise period of time that the evidence was insufficiently specific to enable the jury to be satisfied beyond reasonable doubt that the incidents complained of occurred between the dates preferred on the indictment.
53. It is contended that the second count on the indictment suffers from the same infirmity; the incident the subject of this count was stated to have occurred a few days after the incident, the subject of count one on the indictment, and was stated to have occurred in the family home.

In respect of count 2 the evidence was as follows:-

"Q. And do you recollect anything occurring a few days after this event?

A. Yes. My dad had called me into his bedroom and he told me to close the door. I didn't I didn't I wasn't sure what he was up to, but I was definitely suspicious at this stage, and I didn't want to close the door. But anyway

Q. And why were you suspicious?

A. I was suspicious because he had touched me in the car, and I was worried this is probably going to happen again. So I went into his room after he told me to. He called me up to the side of the bed and he pulled the blanket back and he was naked and he had an erection.

Q. I see. So he was obviously in bed then?

A. Yes.

Q. And what happened then?

A. He told me to touch his penis.

Q. And what did you do?

A. I told him I didn't want to, and he grabbed my hand and he put my hand on to his penis and he started to move my hand up and down. I was crying, and I begging him to stop and to leave me alone. All the while I'm terrified of my dad because he would beat us regularly and very viciously beat us as well. So he was doing that anyway, and basically I said to my dad, like, "If you keep doing this to me I'm going to tell my mam", and he said, "If you tell your mam, I'm going to kill her, I'll kill your mam in front of you." So from there, I just I thought there was nothing I could do.

Q. Did he say anything else to you apart from saying that about your mother?

A. I just know that he said that he would just kill my mam in front of me, that he'd chop her up, he'd tie me to a chair and chop up my mam in front of me, and I better not speak of this to anybody. Basically that was it, I think.

Q. I see. And did he say anything in terms of the type of behaviour?

A. I'm sorry?

Q. Did he say anything about the type of behaviour?

A. I don't understand the question?

Q. Did he did he say anything in relation to the rights or wrongs of this type of behaviour?

A. Oh yes. I'd asked him, because I loved my dad as much as he beat us, I still loved my dad, you know, he's your dad, and I just understood that he was a violent man. I just asked him, you know, "Why are you doing this to me?" And he just said, "It's normal, loads of people do this".

Q. I see. So how were you at this stage?

A. Absolutely distraught, I couldn't believe what was happening to my life.

Q. And what did you do?

A. After he had abused me, I went to my room and I just cried."

The witness gave evidence that this type of abuse continued over the following weeks and months.

Conclusion on counts 1 and 2

54. We are not persuaded by the argument advanced on behalf of the appellant. Unlike the position which pertains to count 51 on the indictment, evidence was given by the witness that the incident reflected at count one, occurred during the wintertime, and that it was snowing at the time. In that regard on any analysis, there was more than sufficient evidence for the jury to conclude that the incident occurred when the witness was nine years of age during the wintertime which includes an occasion between the dates preferred on the indictment, specifically between the months of October and December, November and December being the winter months.
55. Insofar as the argument is made that count 2 suffers from the same infirmity, the evidence disclosed that this incident occurred a few days after the assault in the car. That being so, this incident occurred further into the timeframe reflected on the indictment and it follows that there was evidence before the jury to enable them to

conclude that an incident of sexual abuse occurred during the time specified on the indictment.

Count 11

56. The next complaint concerns count 11 on the indictment which is a count of sexual assault:

'.... On a date unknown between 27 July 1996 and 1 October 1996....sexually assaulted CR in circumstances which involved you ejaculating on her.'

57. During this period the witness was aged 11 years. It is contended that as the witness offered no evidence in relation to the time other than that of being age 11 when the event occurred, the respondent has failed in an essential proof.

58. The evidence regarding count 11 concerned an incident in the family home when the appellant came into her room, told her he was going to penetrate her, attempted to do so and ejaculated on her body. She gave the time of this type of conduct as being when she was 11 years old. She stated:-

"Q. I see. Now, as you got older, did anything further occur in relation to your father's behaviour towards you?

A. From then he regularly put his fingers inside and he regularly got me to touch him, and that kind of thing. Then when I was about 13 years old, or 11 years old, sorry, my dad, he came into the room one day and he said to me he came into

Q. What room was that?

A. He came into my room, and he said to me, "I'm going to put it in you now." And I absolutely terrified, and

Q. I'll just stop you, where were you?

A. I was in my bunk bed.

Q. And is that still in the upper level of the bunk bed that you were occupying?

A. He he that was my bed, he had asked me to get out of that bed and to get into the lower bed or to the single bed that MR slept in. He asked me to get into that and he got on top of me, and that's when he said, "I'm going to put it in you now." And at that thought, I knew what he was talking about, because he always referred his penis as "It." And so obviously I

Q. Just to stop you there for a second, Ms R. Can you recollect what time of the day this was?

A. I'm not sure exactly what time of the day it was, but it was definitely the daytime, it was daylight.

Q. Was there anybody else in the bedroom?

A. Nobody else was in the room.

Q. I see. So you'd been in the room by yourself; is that correct?

A. Yes.

Q. On the top bunk; is that correct?

A. Yes.

Q. And then you were asked to get down on to the single bed instead?

A. I was yes, I was told to get down and to get on to the bed that was a single bed.

Q. I see. So what happened then?

A. So he climbed on top of me and said, "I'm going to put it in you now."

59. The same argument is made concerning count 12 on the indictment which alleges an offence of rape between 27th July 1996 and 1st October 1996. This related to the first occasion when the appellant raped the witness. In respect of that allegation the witness indicated that the offence of rape took place shortly after the incident complained of and the subject of count 11 on the indictment. The witness was asked how the appellant interacted with her following the aforementioned incident of sexual assault. In that respect the witness gave the following evidence:

"A... He'd come in everyday and check if I was okay and he could see I was quite disturbed after what had happened to me. But he'd check if I was okay and then after about a week, straight back to abuse.

Q. And what form did the abuse take then?

A. At this stage, it just became rape, every time".

As regards the regularity of this conduct she said:-

"A. It was basically he'd call me into his room and abuse me there, he would come into my room at night and abuse me there and it basically always became rape at that stage, it was putting his fingers inside my vagina, getting me to touch his penis, then penetrating me with his penis every time.

Q. I see. And how regularly did that occur?

A. I just I can't say, it wasn't every day because my dad would go to Tipperary sometimes, things like that. But mostly it was every day, it felt like it was every day for the most part of it.

Q. I see. And where in the house would this occur?

A. My bed my bedroom and my parents' bed."

60. Counts 12 – 14 concern the same time period. It is important to note that in cross-examination, the witness stated that she was abused from the age of 9 years until she was 17 years. She gave evidence that the abuse was on a daily basis; that it 'happened all the time.'

Conclusion

61. We are not satisfied that there is merit to this argument and that the trial judge erred in refusing to direct verdicts of not guilty in respect of these counts. Evidence was adduced to enable a jury to conclude that the event on counts 11 and 12 respectively occurred on an occasion between the commencement date and the end date on those counts. Moreover, counts 13 to count 14 inclusive are particularised as having occurred between the same dates as counts 11 and count 12 on the indictment. The evidence disclosed that the witness was sexually assaulted from the age of 9 years and from the age of 11 years until she reached the age of 17 years; the abuse had escalated to sexual intercourse. She stated that the events were always the same from the time of the first incident of rape, that is; that on every occasion thereafter the abuse included the act of intercourse. The events occurred with regularity; with the witness indicating that the abuse occurred on a daily basis. There was no evidence to the effect that there was a break in the abuse between the incidents of sexual assault and the incidents of rape. Indeed the evidence was that the first incident of rape occurred on the same date as the incident of sexual assault where the appellant ejaculated on the injured party. One incident segued with the next. Therefore, it was open to the jury on the evidence to conclude that on three occasions between July 1996 and October 1996, the witness was raped by the appellant.
62. It is correct to say that the witness did not give evidence of the month or time of year when the events complained of took place, as she was unable to recall the dates, but the events took place with regularity and over a prolonged period from the age of 11 years until 17 years. Moreover, the counts thereafter on the indictment; from counts 15 – 41 inclusive are preferred quarterly from 1st October 1996 until 30th May 2003, in the family home, thus covering the prolonged abuse from when the injured party was aged 11 years until the age of 17 years.
63. The same argument is advanced on behalf of the appellant regarding counts 44 and 45 on the indictment, which argument we reject for the reasons stated above.

Counts 40 and 41

64. These counts concern a timeframe between 1st January 2003 and 30th May 2003. The appellant says that the evidence was unclear regarding the injured party's movements during that period. Evidence was adduced that early in 2003 the injured party moved into accommodation in Capel Street early in 2003. After a brief period in that accommodation, the witness was brought home and the abuse continued. Thereafter, she left the jurisdiction sometime in June 2003. It is said that there was no evidence that the offences occurred between January and March 2003 or between April and May 2003.

65. In the course of her evidence, the injured party agreed that she was out of the family home for a short period of time, when she was 17 years old. The witness had fled to Holyhead sometime in the new year 2003. She thought that might have been in March, but she was unsure of the date. Thereafter, she left home to live in accommodation in Capel Street and on her evidence, she was there for about 3 weeks. It appears that she was in the Capel Street accommodation for 3 – 4 days, when she was brought home, held at home and sexually abused. Thereafter, she returned to Capel Street, but was again removed and brought home, until leaving for England in June 2003.

Conclusion

66. It is apparent from the evidence, that the witness travelled to Holyhead in early 2003, possibly in and around March of that year, on her return she stayed briefly in accommodation in Dublin city, but was returned to the family home after a few days. Therefore, the dates as preferred on count 40 of the indictment cover that time frame.

67. She then states she was in the family home for a few days, at which point she was permitted to return to the accommodation in the city. She was there for a period of 3 weeks when she was returned to the family home. Therefore, it is clear that the dates preferred in count 41 cover the time period until she left the country in June 2003.

68. Overall, as the witness was away from the family home for a very short period of time, amounting to a maximum of 3 weeks, and where the abuse was almost constant; there was evidence to substantiate the counts.

Counts 47, 48 and 49.

69. These counts concerned incidents of rape when the injured party was aged between 11 and 13 years and occurred in locations where the appellant worked, including a building site, a warehouse and an industrial site. It is contended that there was no evidence as to when these incidents occurred.

70. The injured party gave evidence that she was violated in this manner by the appellant from the age of 11 years. She said that he worked in various industrial sites, including in Tallaght and Swords. It is important to note that the offences in question concerned historic, prolonged sexual abuse which abuse, on the evidence occurred very regularly indeed. While it is preferable that counts are preferred on a quarterly basis, rather than over a 19-month time period, nonetheless, this is not fatal to the count.

71. Moreover, in her evidence while she did not specifically state with precision as to when the incidents the subject of these counts occurred, the following exchange took place:-

“Q. I see. And in terms of your trips to Tipperary, this is at a stage when you're 11 years of age, did you continue to go to Tipperary?

A. Yes. I was still being brought to Tipperary.

Q. And did anything happen on your trips to Tipperary?

A. Yes. He would do the same thing. Less and less bringing anyone else, just me and on the way back, he would pull in, it would always be late at night when we'd be arriving home. He'd pull into like a truck stop where it's really dark and take me into the back of the car and rape me there.

Q. And in terms of building sites or industrial sites, did you continue to attend those with your father?

A. Yes. He basically took me everywhere with him. I was like my dad's favourite, you know, he was completely obsessive and possessive of me. He was completely I was his only focus it seemed in his life. So everywhere he went I would have to go with him. So he'd take me to the building sites, then on the building sites what he'd do is he'd abuse me on them, he'd take me into like, partially built buildings, he'd get me to put my hands against the wall and he would rape me from behind in the building sites, take my pants down and then like ejaculate on to the floor beside me."

72. Therefore, it is clear that the witness prefaced her evidence regarding the incidents in the various industrial sites as taking place from a time when she was 11 years old. In those circumstances and in particular where age was not an essential element of these offences, the offending fell within the timespan on the indictment.

Conclusion

73. Inevitably in cases of historic sexual abuse over a protracted period, difficulties arise in that complainants are unable to specify with precision the date, month or indeed on occasion the year when sexual events are alleged to have occurred. This presents difficulties for the prosecution and the defence. It is imperative that counts are preferred with as much precision and detail as is reasonably possible. For example, while on occasion, it may not be possible to pinpoint a date, it may be possible to identify the location in a house and the nature of the sexual activity concerned.

74. The primary complaint in the present case is that the jury could not be satisfied that the offences alleged occurred within the time frame on the indictment. A balance must be struck by the prosecution in preferring counts in cases of prolonged sexual abuse to prefer counts which properly reflect the offending conduct without preferring a proliferation of counts; the balance has been sought to be struck in the present case by preferring counts on a quarterly basis, specifying the location and on one occasion the precise nature of the sexual abuse. However, certain counts were preferred on a much broader basis, but the same argument was advanced, that being the lack of certainty that the offending fell within that frame.

75. The overarching principle is that no count on an indictment should be framed so as to give rise to a possible injustice. An accused must know with as much certainty as is possible, the offence alleged against him. In the present case, the particulars on the indictment identified the dates within which the offences were alleged, the location and the nature of the offending conduct, in some instances specifying the precise conduct

alleged, such as in count 11. However, as we have said, some counts were undoubtedly less specific, but in our view, not so lacking in specificity so as to result in an injustice to the appellant.

76. It is the position, that on occasion, the witnesses, in particular CR, were unable to give a time of year when events occurred, but, this is readily understandable when one is dealing with prolonged and prolific sexual abuse.
77. We have considered the submissions made and the evidence in some detail and we reject the contention that the offences alleged could not have been committed within the periods on the various counts on the indictment. We are satisfied that where each complainant gave evidence of their respective date of birth, coupled with the location of the offences, and the degree of regularity with which the offences were committed, that the trial judge was correct to refuse the appellant's application to withdraw counts from the jury. We are satisfied that the evidence was for the jury to evaluate, there was more than ample evidence for the jury, having done so, to come to the conclusion on each count as they did.
78. We have identified the count with which there are concerns, specifically count 51 and are satisfied for the reasons already given, to apply the proviso.

Ground two

79. During the course of cross-examination of CR, counsel for the appellant questioned the complainant on alterations in her behaviour during the previous trial in which the jury had disagreed and the current trial. In particular, counsel for the appellant sought to question CR on an incident during closing speeches in which she left the courtroom and banged the door on the way out:-

"Q. Well, the way you gave evidence not only were you all over the place with the facts, but you also were much more emotional, you cried a lot during the course of it, didn't you?

A. I just said there just this second ago that yes, I was in a very traumatic state last year.

Q. You got angry?

A. Of course I'm angry, I was tortured as a child, and now I'm being made go through it all again, of course I'm angry.

Q. And then at the end of the case, you stormed out and banged the door and made a holy show of yourself in front of jury?"

80. At this point, counsel for the respondent interjected and the jury were sent out. The trial judge ruled that counsel for the appellant could not put it to the complainant that she had stormed out of the courtroom:-

“You have -- you have plenty of ways to explore things with her and I don't think it's necessary to go into what happened on the last occasion before the previous jury. You can deal with her behaviour, you can make -- you can ask her all the questions you want to ask her. But I don't think it's appropriate to go into her behaviour when-- with this jury, when this jury weren't the jury that were there on the last occasion.”

81. The trial judge further held that it could be put to the complainant that she was a consummate actress and that she was seeking to influence the jury.

It seems that in the first trial, when the complainant left the courtroom, the trial judge was exercised by her conduct and felt that she was seeking to influence the jury in some manner. When the trial concluded the witness apologised to the judge and it appears that she had been informed that she could be held in contempt of court.

Submissions of the appellant

82. It is submitted that the conduct of the complainant during the previous trial was not irrelevant to her credibility and was not inadmissible, simply by virtue of the fact that the subsequent jury had not witnessed that conduct. The appellant submits that he ought to have been able to explore this issue and to establish why the complainant had behaved the way she did since it was a fact that during the last trial, she had stormed out of court and had created a disturbance. Without knowing this context, the questions that counsel was later permitted to ask lacked all context and force.

Submissions of the respondent

83. The respondent submits that the trial judge still allowed counsel for the appellant considerable leeway in his cross-examination of the complainant and was permitted to comment on her previous behaviour, the fact that the previous jury had not convicted her father and as a result she had changed her approach in order to be more convincing.
84. Counsel for the appellant was also permitted to put to the complainant that she was a “consummate actress”. As a result, it is submitted that the cross-examination of the complainant was far-reaching, and it was made clear to the jury what had happened at the previous trial
85. It is submitted that there was no error on the part of the learned trial judge in this regard. It was completely inappropriate that reference would be made to what happened in a previous court case in circumstances where it did not relate to the testimony of the complainant and the present jury had not witnessed the conduct.

Discussion

86. Cross-examination of a witness is a fundamental right of every accused person and counsel on behalf of the appellant cross-examined each complainant in a fulsome manner. While cross-examination is one of the most important tools available to an accused person, it is not without limits. The aim of cross-examination is to challenge a witness's evidence by putting matters to the witness in an effort to undermine the direct testimony or to demonstrate unreliability and to seek to elicit evidence favourable to the accused.

When cross-examining a witness with a view to attacking the credibility of the witness, matters may be suggested to the witness which are not directly relevant to the facts in issue, but a trial judge may disallow questions which are improper or irrelevant to any matter in issue.

87. In *The People (DPP) v. Piotrowski* [2014] IECCA 17 at para.8.3, the Court held:-

“Where the issues raised simply go to general credibility not directly connected with the offence but connected with matters which may have some indirect bearing on the credibility of witnesses in relation to the offence, then it seems to this Court that the trial judge is entitled to exercise a greater degree of control over the extent to which such issues can be pursued.”

88. In the present case, counsel for the appellant was permitted considerable leeway in cross-examination; for example, the fact that a disagreement was recorded in the previous trial cannot have had any relevance to the jury’s deliberations and determination in this trial, but nonetheless, this material was made known to the jury. Furthermore, the line of questioning included the suggestion that the witness had altered her demeanour intertrial, in an effort to convince the jury of her credibility.

89. It is submitted in written submissions that the defence ought to have been permitted to explore the reasons why the witness left court during Mr McGinn’s closing speech in the manner she did. She had been admonished by the trial judge and it is submitted that the jury ought to have been made aware of this background.

90. In the application to the trial judge the following was said relating to the witness leaving court and her apology to the trial judge a number of days later after the jury disagreed:

“Mr McGinn: And she said, “I’m very sorry for causing a disruption.” She then explained the reason for it, and said she deeply apologised. But my concern is that Mr Justice White, who is a very experienced criminal practitioner and a criminal judge...

[]

...[t]ook the view and what he said was, “Any reasonable observer of your conduct could reasonably have concluded that you were seeking to influence the jury in the case.” That feeds into the defence position that this is a witness who will do anything in order to get the jury around her way of thinking. That is something that was said to Ms.R, so she’s aware of that conduct.”

91. It is certainly so that any inconsistencies vis-à-vis the evidence in a previous trial may be of relevance, but cross-examination of a witness with a view to eliciting the views and expressions of a trial judge in an earlier trial had no relevance and is inadmissible. The rules of evidence in relation to the admissibility of evidence apply to all parties and inadmissible evidence will not be rendered admissible by seeking to adduce it in cross examination.

92. Towards the closing stages of the present trial, and in the course of evidence given by the appellant's wife, she stated that she and the appellant babysat CR's young child. Application was made by the respondent to recall CR to rebut this suggestion. It was made known to the judge at this stage that the reason CR had left court during counsel for the appellant's closing speech in the first trial was due to the suggestion that she had left her child with her parents.
93. On viewing the transcript of the date when CR apologised to the trial judge after the first trial, she stated, in apologising to the judge, that what Mr McGinn had said about her leaving her child with her parents was untrue. Following her apology, the judge then made the remark that any reasonable observer of her conduct would have been reasonably satisfied that she was seeking to influence the jury. The respondent was permitted to recall CR in this respect.
94. It is said on behalf of the appellant that the appellant was prevented from cross-examining CR concerning the reason for her leaving court. However, the application was to permit the view of the trial judge to be adduced in evidence, which would have necessitated cross-examination on the fact of the witness leaving court during counsel's closing address.

Conclusion

95. It seems to this Court that there was nothing to prevent the witness being cross-examined as to whether she ever left her child with her parents. This could of course have been put to the witness without raising the issue of her leaving court during counsel's closing speech. What was not permissible was to adduce the trial judge's remarks in the earlier trial. Moreover, there can be no suggestion of unfairness to the appellant in that when CR was recalled, she was cross-examined regarding the babysitting issue and a photograph of the child being held by the appellant was introduced in cross-examination and exhibited:-

"Q. Yes. I suggest, Ms R, that you're wrong about that, that photographs were taken on the same occasion and that that was one of the many occasions that you left A with your parents?"

A. I never left my child with my Mam and Dad, never."

96. While the demeanour of the witness during counsel for the appellant's closing speech in the previous trial may have had some modest relevance, in order to underpin the appellant's contention that the witness was 'a consummate actress', this Court would, if dealing with the matter at trial, be most reluctant to permit such a line of cross-examination. The evidence as to her demeanour in the previous trial may have had some tangential relevance to her credibility, but it was entirely within the discretion of the trial judge to disallow the line of questioning.
97. In any event, we are entirely satisfied that the cross-examination on behalf of the appellant was not hampered or restricted in such a manner so as to give rise to any

unfairness in the trial process or was such so as to render the verdict unsafe or unsatisfactory.

98. We therefore cannot find any error in the judge's ruling in this regard and we reject this ground of appeal.
99. Accordingly, the appeal against conviction is dismissed.