



THE COURT OF APPEAL

[250/19]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

T.P.

APPELLANT

JUDGMENT of the Court delivered (via electronic delivery) on the 22nd day of October 2021 by Birmingham P.

1. On 30th July 2019, the appellant was found guilty by a jury of 24 counts of indecent assault on a male cousin, X. The offending in question occurred between April 1984 and March 1990. The indictment on which he had stood trial contained 49 counts of indecent assault and named two complainants: X, and the sister of X,Y.
2. Subsequently, on 6th November 2019, he was sentenced to an aggregate term of ten years' imprisonment. He has now appealed against conviction and sentence.
3. So far as the conviction aspect is concerned, three grounds of appeal are advanced. These are:
 - (i) That the trial judge erred in failing to sever the indictment so as to provide for separate trials of the allegations made by each complainant;
 - (ii) That the trial judge erred in failing to discharge the jury arising from an issue that arose during the cross-examination of a defence witness, V (paternal aunt of the appellant); and
 - (iii) That the trial judge erred in failing to give an appropriately strong warning to the jury on the dangers of convicting in the absence of corroboration.

4. This third ground was the subject of a motion which sought to substitute it for a ground originally advanced. The motion was not opposed by the prosecution and the ground of appeal was the subject of both written and oral submissions.
5. To provide some context for the appeal, it may be helpful to say something about the background to the allegations that were at the centre of the trial.

Background Events

6. The appellant is now 53 years of age, is married, and is the father of two adult children. He was raised in County Donegal by his paternal grandmother. His paternal cousin, X, lived in Dublin and is nine years younger than the appellant. X visited his grandmother's home in Donegal from time to time. The convictions which are now the subject of an appeal date back to the time when the appellant was aged between fifteen and 21 years, and his cousin was aged between six and twelve years.
7. In adulthood, the appellant moved to Dublin where he became involved in the construction sector. He was assisted by his paternal uncles in gaining a foothold in the industry, and until the last financial crisis, was running a successful construction company in Dublin. When X reached adulthood, the appellant assisted him in gaining a foothold in the industry, as the appellant's uncles had done for him, and so the appellant and complainant found themselves working together for a number of years. In or around 2008, the appellant's company fell victim to the recession. In the aftermath of this development, the appellant spent much of the following decade working abroad.
8. In June 2013, at a time when the appellant was working in the Middle East, X attended at a Garda station in Dublin, alleging that he had been abused as a child by the appellant and by two other named individuals. The allegations in relation to the appellant were centred on their grandmother's home in Donegal. Some five months later, in November 2013, Y, the sister of X, attended at a Garda station on Dublin's north side, and she also made a statement of complaint against the appellant, claiming that he had sexually abused her as a child in their grandmother's home in Donegal.
9. At some time around the turn of the year in 2013/2014, the appellant's brother told the appellant that it had been alleged that he and two others had plied X with alcohol in Donegal and had "interfered" with him. The appellant, through his solicitor, made contact with An Garda Síochána, and in July 2014, presented himself at a Garda station with his solicitor on a voluntary basis and submitted to an interview under caution. Shortly after the Garda interview concluded, the appellant learned for the first time that allegations were being made by Y. He made himself available for a further voluntary interview under caution at which he asserted that the allegations against him were untrue. When interviewed in relation to the X allegations, while conceding that there were occasions

when he had shared a bed with X when they were young, he denied that there was ever any incident of a sexual nature between them.

The Application to Sever

10. At the commencement of the trial, senior counsel on behalf of the then accused indicated that he was seeking to sever the indictment. He explained that his application was grounded on the Court's jurisdiction to sever pursuant to the Criminal Justice (Administration) Act 1924, and that it was his position that there was a danger of embarrassment or prejudice in having to deal with both sets of allegations before the one jury. Counsel said that while it was his application to sever, it was really the role of counsel for the prosecution to outline why the counts should be tried together, to say whether the sets of allegations were cross-admissible and to indicate why that was so. Counsel said that while, customarily, there had been an approach of identifying points of similarity with respect to the allegations, a broader test had emerged as to whether or not the probative value of admitting the evidence outweighed the prejudicial effect. Counsel explained that the potential for prejudice was a serious one where more than one set of allegations was being tried by the one jury.
11. Counsel then pointed out that there were differences of a significant nature between the two sets of allegations. He instanced these as being that Y, the second-named complainant on the indictment, was some years older when the alleged offending began. He highlighted the fact that while the allegations made by X were set against the background where he had shared a room from time to time with the appellant, and that offending had occurred in circumstances where they had shared a bed on occasions, the position was different with respect to Y. Y had been sharing a room with other female relatives, and for abuse to have occurred, it would have necessitated visits from the accused. Counsel said that in his submission, the difference in gender, the difference with respect to opportunity (about which he meant the fact of sharing a bedroom with one and not the other), the difference with respect to the ages of the parties, and the inherent unfairness of allowing one set of allegations to infect the other, were reasons why the Court ought to exercise its discretion to refuse to allow the prosecution to try the sets of allegations together. Counsel observed that from his point of view, the law on the application was not wholly in his favour.
12. At that point, the trial judge intervened and began to say, "[w]ell, there seems to be a shift away from applying a --". Her sentence was finished for her by counsel for the defence who supplied the words, "[a] similarity test". Counsel then made reference to a paper that had been made available at the prosecutors' conference and to the decision of the Court of Criminal Appeal in DPP v. BK [2000] 2 IR 199, the decision of Budd J. in B v. DPP [1997] 3 IR 140, and the decision of the House of Lords in DPP v. P [1991] 2 A.C. 447, which he summarised as saying that it was "acceptable to try these matters together where it is to rebut the improbability for example of a lot of people making the same

allegation and that sort of thing.” However, counsel said that he was saying that there were points of difference here that went to the fundamentals of the case, and that the justice of the case would be met by separate trials on this occasion.

13. In response to the application to sever, counsel for the prosecution highlighted the fact that X and Y were brother and sister, and that both were minors at the time when the alleged abuse commenced. In the case of X, the alleged abuse occurred at a time when he was aged between five and 13 years of age (between the years 1983 to 1990). He acknowledged that Y was a number of years older, as had been pointed out by counsel for the defence, and that, in her case, the alleged abuse commenced in approximately 1983, and continued until 1987. The complainants came from Dublin, and both travelled up to a family residence in Donegal where their grandmother lived. Counsel, like his colleague, also referred to the cases of DPP v. BK and DPP v. B. He then made reference to the cases of DPP v. JC [2017] 1 IR 417, DPP v. FMcL and BW [2016] IECA 307, to the judgment of Hardiman J. in DPP v. Martin McCurdy [2012] IECCA 76, and finally to DPP v. DMcG [2017] IECA 98.
14. In reply, counsel on behalf of the then accused suggested that the prosecution position had not really gone further than to say that the alleged abuse had occurred at the same address with the same family members. There had been no attempt to suggest that the nature of the alleged offending was of a broadly similar nature. Counsel submitted that the judge should be satisfied by the prosecution as to why the allegations were described as cross-admissible, adding that, of course, there would be a knock-on effect later in the trial if the application was refused and that there would have to be further debates. It seems that this was a somewhat oblique reference to the possibility that there might be a debate at a later stage about whether the allegations made by one complainant provided corroboration for the allegations made by the other.
15. The trial judge took some time to consider the authorities to which he had been referred, and returned and ruled as follows:

“Now, I have had an opportunity to consider the authorities which have been opened to me by [counsel on behalf of the prosecution] and as applied to the facts which have been outlined by [counsel for the defence] and in applications to sever the indictment the Court enjoys a wide discretion. The underlying principle to be applied is in part based on similarity but also on the unlikelihood that the same person would find himself accused by different persons on multiple occasions. I acknowledge that there are differences in the sexual acts alleged and that there is a difference in the gender of the two alleged complainants and different sleeping arrangements applied. However there are or there is a very high degree of similarity in terms of the circumstances surrounding the alleged offending in terms of the relationship between each of the two complainants and the accused. The location at which the offences are alleged to have been committed, the circumstances under which each of the two complainants came to be in Donegal, a significant overlap in terms of the boundaries of time and the fact that they were

both children. In my view to sever the indictment in this case would be to allow the rules of evidence to offend common sense and the jury would not receive a complete picture. I'm of the view that the prejudicial value is outweighed by the potential probative value and that the allegations show a practice which would rebut denial or innocent explanation. So, having applied the principles which I have distilled from the authorities submitted to me, I'm refusing the application."

16. Undoubtedly, there were significant divergences. At the most basic, one of the alleged victims was a boy and the other a girl. Other differences are that the male complainant says that the abuse began when he was five years of age, while the female complainant says that it began when she was ten years of age. There are further divergences in how it is suggested that the abuse came to be carried out; in the case of the male complainant, the suggestion was that the then accused was in a position to take advantage of the sleeping arrangement which saw that complainant and the appellant sharing a bed. On the other hand, a greater degree of furtiveness was required in the case of the female complainant as she had slept in a different room with a number of other family members. These divergences are significant. However, there are features that embrace both sets of allegations. First of all, there is the fact that the two complainants are brother and sister and that their allegations are against a family relative. Second, the abuse is alleged to have occurred at the same location – the home of the complainants' grandmother in County Donegal – and the allegations arise in the context of family visits to Donegal.
17. In the view of this Court, the fact that the complainants are siblings, that they were alleging abuse by the same person who is in the same degree of relationship to each of them, that they were both alleging that the abuse took place in the same location, and in a particular context (family visits to their grandmother's home), added a unity and a coherence to the allegations which justified the trial judge in refusing the application for separate trials. In the course of her ruling, the trial judge commented that in her view, to sever the indictment in the case would be to allow the rules of evidence to offend common sense. In making that observation, she was recalling the words of Barron J. in the BK decision. It seems to us to be very clear indeed that the multiple counts of indecent assault which appeared on the indictment formed or were part of a series of offences of the same or similar character.
18. On appeal, the appellant has contended that the case for severance was strengthened by the fact that this was a case where the indictment provided very little detail. It is said that the counts on the indictment were essentially generic sample counts. It is the case that it sometimes happens, even in historic sex cases where the allegations go back very many years, that a particular allegation may be linked to a particular event, or to an ascertainable date, e.g. an allegation that abuse occurred on the day a child made his or her Confirmation, or on the date of a family gathering when the family assembled to celebrate a wedding anniversary or a 21st birthday (or something of that nature). That degree of detail is absent here, but the indictment does not stand alone and each complainant had provided a detailed witness statement which appeared in the book of evidence.

19. A further aspect of the severance issue on this appeal relates to what it is suggested was a volte face on the part of the prosecution. Having successfully resisted the application for severance, counsel then opened the case to the jury in the usual way, and in the course of his opening address, referred to the fact that the evidence would show that a "pattern or system" of indecent assault had occurred against both X and Y. There was a reference to the "inherent improbability" that the two complainants were making up similar types of accounts, and it was said that there were similarities in how the abuse occurred in respect of each complainant, and that this was a fact which the jury could take on board. Counsel concluded his opening statement as follows:

"So, the allegations are that they [X and Y] went up on a regular basis to Donegal and when they went up to Donegal they stayed in that particular address in [townland named]. That's where the grandmother lived but also at times that's where [...] the accused man also resided there. Now, it'll be alleged, and it's a matter for you ladies and gentlemen when you hear the evidence -- we'll deal firstly with [the appellant, but the reference should have been to X]. And it's going to be alleged that when he resided there he shared his bed with [the appellant] and in the course of those periods of between 1983 up until 1990 various acts of indecent assault or abuse occurred to him. Now, I won't go into those details because you're going to hear that from [X] himself. But, at times [Y] also went up and stayed in that particular house although not in the same bedroom but notwithstanding that we say that indecent assault or abuse was also inflicted on her as well during the time periods that I've already pointed out and you're going to hear that as well. Now, because there are two different people involved being [X] and [Y] they're both being brought together and you have to consider all aspects of it. But, they're being brought together because the prosecution say it's relevant first of all for you to consider whether or not there has been a pattern or a system being operated of indecent assault or abuse being perpetrated upon them. When you think about that both of them were children at the time, both of them I think came from the [suburb named] area of Dublin, both of them went up to Donegal to their grandmother's home, both of them stayed there and both of them were subjected to be indecently assaulted or to be abused and both of them say that the person involved in that was [the appellant]. So, when they both made statements to the [G]ardaí they both gave an account of what occurred, you're going to hear that from them themselves. But, I'm suggesting that there's an inherent improbability that these people are making up similar type of accounts in relation to what occurred to them but then again ladies and gentlemen it's a matter for you at the end of the day. But, there [are] similarities in relation to how it occurred to each of the persons and these are factors that you can take on board in relation to the evidence ladies and gentlemen and I'll go through that in more details near the end of the case.

So, by having both of them joined together and giving their evidence you're in the position then to see the evidence in question, hear the evidence in question and adjudicate on the evidence in question and whether or not both of them are revealing similarities in relation to how this happened and on whether or not there

was a pattern or a system of abuse being perpetrated on each and both of them. I'm not going to go in as I say to the allegations of the abuse because you're going to hear that from the persons. So, as regards to this opening speech I'll just finish now [...]"

20. The suggestion of a volte face is made in circumstances where, when the evidence closed, it became clear that the prosecution was not contending that the trial judge should direct the jury that the complainants were capable of corroborating each other. It appears that this position was arrived at following discussions between prosecution counsel and defence counsel. Counsel for the then accused referred to the fact that at an early stage, he had referred to the possibility of difficulties arising out of the prosecution's opening remarks and in particular, the reference to a system or pattern of abuse. The judge's response was to indicate that, in her view, those remarks were at a sufficient remove from where they were then in terms of the trial. Counsel for the then accused acknowledged that it was for that reason that he was not making any application, but he added that if there had been disagreement as to how the matter would be dealt with in the judge's charge, he would have been arguing that the evidence in the case did not amount to "system evidence" as the nature of the allegations was very different and the *modus operandi* was different. Neither the arguments made in relation to this sparse or generic nature of the complaints, which we do not believe, in any event, to be justified, nor the arguments about the change in position on the part of the prosecution, causes us to doubt the fact that the judge was entitled to rule as she did on foot of the severance application.
21. Accordingly, this ground of appeal is rejected.

The Corroboration Warning

22. Ground (iii) of the grounds of appeal as originally filed on 29th January 2020 contended that the judge had erred in "failing to direct the jury appropriately as to the reasons for the directed verdicts of not guilty". However, the appellant's present legal team (not the team that appeared at trial) has filed a motion to substitute a new ground in place of what was ground (iii), being:

"Having regard to the nature and form of the indictment and the elapse of time since the alleged events, the trial judge erred in failing to give an appropriately strong warning to the jury on the danger of convicting in the absence of corroboration".
23. In fact, this ground was argued without objection and so we turn now to deal with it.
24. The starting point for consideration of this issue has to be that while there was no corroboration in relation to the complaints that had been advanced by Y, there was undoubtedly evidence that was capable of corroborating the allegations made by X. This

was specifically the case in relation to the evidence at trial of confessions by the appellant made to a number of family members, though, in fairness to the appellant, it must be said that the fact of such confessions was strongly denied. In those circumstances, the approach of the appellant at trial was to say that if the judge was going to identify potentially corroborative evidence, that she should go on to give a corroboration warning.

25. The judge dealt with the issue of corroboration in these terms:

“Now, the next area of law which I wish to address is what's known as corroboration and corroboration has a particular and technical meaning in law, members of the jury. It is evidence which confirms a material part of the witness's evidence implicating the defendant in the offence. So the first important thing about corroborative evidence is that it is independent in the sense that it comes from a source which is separate to the person who is to be corroborated and, secondly, it must be evidence which implicates the accused in the commission of any one of the offences with which he is charged. In this case there are items of evidence which are capable of amounting to corroboration, but whether or not it is corroboration is a question of fact to be determined by you. The first item of evidence which is capable of amounting to corroboration is the evidence of [X's mother], that when she confronted [the appellant] with the allegations that had been made by [X] that he confessed and he said that it had been done to him. And the second item of evidence which is capable of amounting to corroboration is evidence of an admission made to [Z, another family member] when she brought up the allegations with [the appellant]. Before you consider whether the evidence of [X's mother or Z] in fact amounts to corroboration you must first consider whether you accept in each case the account given by each of them as to what was said by the accused, bearing in mind that [the appellant] denies in each case that he made any such admissions in relation to [X]. In each case you will be required to determine the truthfulness and the reliability of that evidence. Now, as a matter of law in relation to the allegations made by [Y], there is no evidence which is capable of amounting to corroboration.

So, members of the jury, you should have regard to the presence or absence of corroboration in deciding whether or not it is safe to convict the accused based on the testimony of [X] or [Y]. Corroboration is not a requirement in order to convict in either case of [X] or [Y]. However, I am suggesting to you that you need to be especially cautious about acting on the uncorroborated evidence of either [X] or [Y]. So just to summarise the position in relation to corroboration, there is no corroboration available to you in the case of [Y]. There are two items of potential corroboration in the case of [X]. Whether or not they amount to corroboration is a fact to be determined by you and I have suggested to you that before convicting in the absence of corroboration, and that is the in the event that you conclude that there is no corroboration in respect of the evidence of either [Y] or [X], you may still convict if, having heeded by caution, you are nevertheless satisfied beyond a

reasonable doubt of the accused in either instance in relation to any of the allegations.”

26. Counsel for the then accused requisitioned. In doing so, he acknowledged that the judge had shifted away from the traditional directions that had once been given, but he submitted that rather than suggesting to the jury that they should be cautious, they should be directed as to the need for caution and warned of the dangers of convicting without corroboration, which the trial judge did not do. Counsel submitted that the trial judge should go much further than to suggest that a jury should be cautious, or to suggest that the jury take heed of her caution; the jury should be directed in that regard.
27. In response to the requisition, the judge recharged the jury as follows:
- “Now, the other aspect of the case where I may have been slightly loose in terms of the language that I used is in relation to the corroboration warning that I gave you and I had suggested to you that you be cautious before convicting in the absence of corroboration in relation to either [X] or [Y]. And in fact I should have couched that in slightly more robust terms because experience has shown that evidence of this kind has been proven to be unreliable. So there is a need for you to be very cautious in relation to your assessment of the evidence in the absence of corroboration if you decide that there is no corroboration in the case of [X] and I've already told you that there is no evidence in relation to [Y].”
28. The route taken to a corroboration warning in this case was a slightly unusual one, in that a request for a warning was advanced in somewhat conditional terms. The request asked that if the judge was going to say anything about corroborative evidence, that there should be a corroboration warning. The more usual approach would be to address, first, the question of whether a corroboration warning was desirable or necessary, and then to address the secondary question as to what evidence there was that would be capable of amounting to corroboration. If the question of a corroboration warning was not going to arise, then there would appear to have been no necessity to address the question of corroboration at all (see the decision of the Supreme Court in DPP v. Limen [2021] IESC 8 in that regard).
29. It does not seem to the members of this Court that the route followed was in any way disadvantageous to the defence. Indeed, the verdicts returned by the jury, which saw them convict in the case of counts involving a complainant where there was evidence that was capable of amounting to corroboration, and acquitting in respect of counts involving a complainant where there was no such evidence, might be interpreted as indicating that the jury had heeded and acted upon the judge's warning.

Application to Discharge the Jury

30. As we have seen, this was a case where the defence went into evidence. The second defence witness was V, an aunt of the appellant. When she was called as a witness, counsel for the prosecution asked her if she had ever had a phone call from a person called W; she said that she had. Counsel proceeded to ask: (i) if W had mentioned anything about Y, the second complainant, on the telephone, and (ii) if the witness had asked W, "why does [X] have to take [the appellant] to court?" and mentioned that he "got a JCB off him". The witness denied each of the matters raised with her.
31. W, the older sister of the first complainant, X, was not called as a witness for the prosecution. She has been living in Australia for many years. It emerged that on the day prior to being called to give evidence, V (the aunt of the appellant) had been in the courthouse and it appears her presence there was noted. On the basis that her presence might be explained by the fact that she would be giving evidence, X told the prosecuting Garda about a conversation that had taken place between V, the potential witness, and W, the older sister of the complainant. The prosecuting Garda, in turn, passed this information on to counsel for the prosecution who made use of it in cross-examination.
32. The issue of a telephone conversation between V and W had not been addressed in disclosure, nor was the defence made aware of the information provided to the investigating Garda and passed on to prosecution counsel.
33. The defence applied for the jury to be discharged, contending that the use of undisclosed material was unfair. It was said that if the information had been shared with them, instructions could have been taken from V and the defence would have been in a position to deal with the matter. Indeed, it might be that a decision would have been taken not to call her. It was said that the defence was disadvantaged by the manner in which matters developed. There was reference to judgments of the Court of Criminal Appeal in DPP v. Farrell [2014] IECCA37 and DPP v. Cull [1980] 2 Frewen 36.
34. When the issue was raised with her, the trial judge's approach was to accept that use should not have been made of the alleged phone conversation, but she felt that the real issue was how much harm had been done, if any. She listened to the witness's evidence on the DAR and formed a view that the questions put related to issues that had already been canvassed at trial, i.e. that the complainant, X, had received a JCB or Hitachi machine to "silence him". In the circumstances, the trial judge felt that there was no basis that would warrant a discharge of the jury as the reference to the telephone conversation did not have a significant effect on V's credibility in the eyes of the jury. She felt that she could deal with the issue in her directions to the jury by advising them that this was hearsay and that the prosecution could have called witness W and had not done so. Ultimately, in her charge, she dealt with it in these terms:

"Evidence of conversations between family members is not evidence which you can consider. There were a number of notable examples where hearsay evidence was inappropriately introduced and one such instance was the final witness on behalf of [the appellant], [V], who was cross-examined by [counsel for the prosecution] in relation to a conversation which was said to have occurred between her and [W].

And she maintained that the content of the conversation which [counsel for the prosecution] put to her was not in fact what was said by her. And in reaching your decision in relation to any one of the counts in the indictment, members of the jury, I am directing you to disregard any evidence specifically concerning a conversation between [V] and [W].”

35. We find it easy to understand how the information about the telephone call would have been passed along the line once V was seen in the courthouse. While it might be said that prosecution counsel should have shared the information that was becoming available to him with his colleague, we do see this as a counsel of perfection. In our experience, it is not unusual when a case is at trial for there to be informal communications between witnesses and Gardaí and between Gardaí and the prosecution team.
36. The fact that V was in the vicinity of the courthouse did not necessarily mean that she was going to be called to give evidence. It is not unusual for cases of this nature to divide families, nor is it, in our experience, unusual for members of the family to attend at the courthouse to offer moral support. It is probably the exception rather than the rule that those coming to court will be called to give evidence because it is often the case that people in that position will have no admissible evidence to offer, or certainly no evidence that takes the matter further.
37. We are entirely satisfied that this application for a discharge of the jury was properly dealt with by the trial judge. We agree with her assessment that little, if indeed any, harm was done, and that it was a matter that was fully capable of being dealt with by way of directions to the jury.
38. We reject this ground of appeal.

Conclusion

39. In summary, we have not been persuaded by the grounds of appeal advanced in oral and written submissions that we should doubt the satisfactory nature of the trial or that we should have any doubts about the fairness of the trial or the safety of the verdict.
40. Accordingly, as we are not in a position to uphold any ground of appeal, we will dismiss the appeal against conviction. There remains extant an appeal against severity of sentence.