THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[61/18]

Neutral Citation Number: [2021] IECA 52

The President

McCarthy J

Murray J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

NOEL KELLEHER

APPELLANT

JUDGMENT of the Court delivered on the 19th day of February 2021 by Birmingham P.

1. In late 2017, the appellant stood charged in the Central Criminal Court on an indictment containing 32 counts, each representing one form or another of sexual misconduct. On 6th December 2017, he was convicted on six counts of rape contrary to section 2(1) of the Criminal Law (Rape) Act 1981 (as amended); three counts of of oral rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990; one count of attempted oral rape contrary to common law; and three counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended). Subsequently, he was sentenced to a term of nine years imprisonment with the final year of that sentence suspended. He has now appealed against conviction. The grounds of appeal are:

(i) That the trial judge erred in acceding to an application by the prosecution to amend the indictment in relation to Counts 17 to 32 inclusive (excluding Counts 23 to 25 which had already been directed) such that the end date of the period for the alleged offences was then amended from 7th December 1991 to 31st August 1992, which amendment was sought and permitted after all the evidence had concluded and after the defence had made its closing address to the jury.

(ii) That the trial judge erred in all the unfolding circumstances relating to the deliberations by the jury, in deciding to give the majority direction pursuant to s. 25 of the Criminal Justice Act 1984, at a time when it ought to have been clear to the Court that the jury was going about their business in relation to the 32-count indictment in a thorough, sequential and workmanlike manner, and the Court should, in those circumstances, have permitted the jury to continue to deliberate without such direction at that point.

(iii) The verdicts of guilty in relation to the counts relating to offices at Mill Road and/or High Street, Clare, were perverse in the circumstances and/or against the weight of the evidence, and/or inconsistent with the verdicts on Counts 1 to 16.

(iv) That the cumulative effect of Grounds (i) to (iii) was such as to render the majority verdicts of guilty unsafe.

Background Facts

2. To put the grounds of appeal in context, it should be explained that the complainant, Ms. MR (not actual initials), was born in December 1977. Her account to the jury was that she had been subject to abuse over a period of years in the very late 1980s and early 1990s.

She told the jury that the offending commenced when she was about 12 years old, when she was asked to babysit overnight by the appellant in circumstances where the appellant's wife was in hospital for treatment. The complainant says that the first event, an incident of rape, occurred in the appellant's family home. Following on from that first allegation, she said that over the next number of months as she continued to babysit, the appellant, when driving her home, would detour to a location known as O'Keeffe's Oil Depot on the Drumcliffe Road, Ennis, where he raped and sexually assaulted her on a number of occasions. After the babysitting came to an end, the complainant says that she was prevailed upon to go and do some Saturday work in the offices of the appellant's auctioneering firm. She says that this happened over a number of months at two different offices which the appellant had occupied sequentially at Parnell Street and then on Mill Road, both in Ennis. The offending was said to have occurred before the complainant's 14th birthday. The 32-count indictment on which the appellant was arraigned alleged offending as having occurred between 29th April 1990 up to 31st August 1992.

3. The Court heard that an informal disclosure was made in late 2013/early 2014, followed by a formal complaint to An Garda Síochána in 2015. Following the formal complaint, the appellant was arrested in November 2015 and interviewed. In the course of interviews, he denied any sexual improprieties. In particular, he denied the initial alleged rape during the claimed overnight babysitting occasion, indicating that he believed that his wife was never in hospital overnight at any relevant point in time. He also denied the allegations in relation to untoward activity at O'Keeffe's Oil Depot. So far as the allegations in the auctioneering offices were concerned, he again denied that these allegations occurred and did not have any recollection of the complainant working in his office, but he did not rule out that some work experience might have occurred at some point. He indicated that he had difficulty

in identifying what type of work the complainant could have been doing at the time suggested, given her age.

4. It should be noted that the matter was first listed for trial in July 2017, but the trial did not proceed when scheduled as the defence raised an issue about disclosure and the requirement for a doctor, Dr. Concannon-Bluett, to prove a particular document. While the trial was initially put back for a number of days at that stage, it did not, in fact, commence that term because of other cases in the trial list having priority. In the intervening period, before the matter came on for trial, the mother of the complainant discovered in her family home a box of old materials and documents which included a reference letter dated 6th July 1992. The letter had been written by the appellant on behalf of the complainant, setting out that the complainant had undertaken work experience, involving two weeks' work, during the summer of 1991.

5. The guilty verdicts that were returned by the jury were in relation to Counts 17 to 19, 23 to 28 and 29 to 32. When arraigned, Counts 17 to 19 inclusive, and Counts 23 to 28 inclusive, were all laid as occurring on a date between 1st June 1991 and 31st August 1992. In relation to Counts 29 to 32 inclusive, they were laid as having occurred on a date between 1st April 1992 and 31st August 1992.

Applications to Amend the Indictment

6. After the evidence had closed, the defence did not go into evidence and after the closing address by the prosecution, the Court raised an issue about the evidential basis for Counts 20 to 22 inclusive. These counts were then the subject of directed verdicts of not guilty. In the course of these exchanges, the prosecution sought to amend the indictment. In particular, in relation to the counts that are now the subject of the appeal, the prosecution sought to amend the dates so that for each, the timeframe would run from 29th April 1990 to

7th December 1991. The defence objected, focusing their objections, in particular, on the commencement date being varied to 29th April 1990, but accepted that the commencement date for the counts in question could be amended to the start of the school year in September 1990. The judge ruled on the matter in relation to Counts 17, 18, 19, 23, 24 and 25, amending the date range to read between 3rd September 1990 and 7th December 1991. In the case of Counts 26 to 32, the dates were amended to read between 18th January 1991 and 7th December 1991.

7. Following the making of the amendments, the trial judge, having regard to the fact that defence counsel was about to make a closing speech, enquired as to whether the appellant wished to have time to consider the impacts, but defence counsel advised that the matters could be "recalibrated" in the course of the address as required. Counsel then proceeded with his closing address. That concluded the business of the day, and indeed, of the week, and the matter was then adjourned until the following Monday, when it was expected that the trial judge would deliver her charge. However, on that day, before the judge began her charge, counsel for the prosecution sought leave to make further amendments to the indictment. In particular, the prosecution wished to make a further amendment to the timeframe in relation to Counts 17 to 19 and 23 to 32 in order to vary the end date from 7th December 1991 back to 31st August 1992, the original end date. Counsel for the defence objected to this further application to amend on the basis that the application was coming very late in the proceedings, after the closing address had been made, and that it involved a reopening of a matter which had already been argued and ruled upon. The trial judge decided to accede to the application by the prosecution, commenting that the Court could not see how any injustice could be caused if it was to accede to the application to amend the indictment back to that which had originally appeared on the indictment. At the suggestion of the

prosecution, the trial judge offered the defence an opportunity to further address the jury, but the offer was declined.

8. During the course of the first discussion on amendments which, it will be recalled, took place after the closing speech by prosecution counsel and in the context of the judge raising a question about the adequacy of evidence on certain counts, the judge commented:

> "JUDGE: -- until I see if there's anything. I have to say this is something it would have been preferable if it were done before closing arguments.
>
> [Defence Counsel]: Well, I suppose in answer to that I had no interest in getting involved [in the issues about dates on the indictment]. I have a different argument all together that didn't require me to engage too much in the detail of the indictment.
>
> JUDGE: I am saying that in general terms, Mr Nicholas, rather than being specific.
>
> [Defence Counsel]: Indeed, absolutely. No, no but there are, I suppose, different stresses and tensions on different parties."

9. When offered an opportunity to consider the amendments that had been ruled on, defence counsel commented, as we have seen:

> "[Defence Counsel]: I might just recalibrate as I go on.
>
> JUDGE: Very good.
>
> [Defence Counsel]: Given that it's a denial it doesn't really -- it's not --
>
> JUDGE: No. Well, I have made the amendments in relation to --
>
> [Defence Counsel]: The one I did object to in fairness the Court held with me, that's the important one. I'm obliged."

The reference to "the one I did object to" was a reference to Count 1 on the indictment, which, on the complainant's narrative, occurred when she was babysitting at a time when the appellant's wife was hospitalised. In fact, there was evidence at trial that the procedure in question was dealt with by way of a day procedure and did not involve overnight

hospitalisation. There was also evidence that it occurred on 13th August 1991. The complainant's narrative seemed to have put the event sometime after her Confirmation in April 1990, and as she was coming to the end of her primary school education in June 1990.

10. This Court finds itself in complete agreement with the trial judge that it would have been preferable that the discussion in relation to the dates, as they would appear on the counts on the indictment, and ultimately would appear on the issue paper, had taken place before closing speeches. The situation that developed, involving an application to amend followed by an application to re-amend or further amend (in effect, to unamend), was less than optimal.

11. However, we also find ourselves in agreement with the trial judge's observations on Day 6 of the trial, 4th December 2017, when she commented that she could not see how any injustice could be caused if she amended the indictment, in relation to Count 17 onwards, back to its original end date of 31st August 1992.

12. When this issue originally surfaced, it was not an issue that particularly agitated the defence. Their interest focused on one count specifically, that being the count that referred to the first incident when the complainant was babysitting at a time when she believed that the then accused's wife was in hospital. The defence's interest in this count is understandable. It was a count in respect of which an amount of detail was provided and where the date on which it was alleged to have occurred was ascertainable. As defence counsel pointed out in relation to this count, his objections carried the day. Overall, we have not been persuaded that the judge's rulings were erroneous, or that by reason of them, it could be said that the trial was unfair or the verdicts unsafe or unsatisfactory. Accordingly, we dismiss this ground of appeal.

The Majority Verdict Direction

13. The second issue relates to the trial judge's decision to give the majority direction, the background to which is set out as follows. The jury retired for the first time at 14:43 on 4th December 2017 (Day 6) of the trial. The jury returned to court at 16:11 having deliberated for one hour and 12 minutes and, at that stage, in response to the usual question from the court registrar, indicated that they had not reached a verdict on which they were all agreed on any count.

14. The following day, the jury resumed its deliberations at 11:09. At 12:55, the jury indicated that they had a request for a transcript of the complainant's evidence. The judge explained that she could not provide a transcript, but would read all or part of the evidence of the complainant. The jury indicated that they required the entirety of the evidence read. There followed a lunch break taken between 14:17 and 15:17. The jury was then brought back to court at 16:34. At that stage, in response to the usual question by the court registrar, the jury indicated that they had agreed a verdict of not guilty on Count 1 only.

15. The jury returned to court the following morning and resumed their deliberations at 10:20. At 11:45, following a smoke break, the jury resumed deliberations. The judge indicated that it was her intention to give the jury the majority direction at that stage. The jury minder is recorded on the transcript as saying that the jury had been informed that the judge was sitting and had requested their presence in court and that the jury had requested two minutes. The jury was brought back to court at 12:40, having at that stage deliberated for six hours and eight minutes. In answer to the statutory question, the jury had indicated that they had reached agreement on a number of counts and returned not guilty verdicts on Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16. They further indicated through the registrar that they had not yet adjudicated on Counts 17, 18 and 19, or on Counts 23, 24 25, 26, 27, 28, 29, 30, 31 and 32. The judge then proceeded to give the majority verdict, after which the jury retired to resume their deliberations at 12:44. With the exception of what were described as

‘smoke breaks’, the jury appeared to have deliberated throughout lunch and returned at 14:07, by which point they had spent seven hours and 14 minutes in deliberation, and then returned majority 10:2 verdicts on the remaining counts.

16. The appellant places particular emphasis on the phrase “yet to adjudicate” uttered by the registrar in respect of certain counts when reporting on the progress made by the jury to that point. Indeed, the appellant goes so far as to say that absent the remark, it might be difficult to formulate and advance a ground of appeal. The appellant interprets the remark as meaning or, at a minimum, as being open to the meaning, that the jury had yet to consider or yet to deliberate on these counts. It is sometimes the case that those called on to read judgments are cautioned to avoid treating the language of the judge as if it was contained in a finance act. That applies with much greater force when what is in issue is an observation by a jury relating to the state of play as of a particular moment in time, and where the jury’s ability to describe the situation is constrained by the space available on the issue paper. More fundamentally, it is not clear to us that the phrase “yet to adjudicate” was the jury phrase, as distinct from the Registrar’s phrase. We have considerable doubts whether the jury would have recorded “yet to adjudicate”, or any comparable phrase, when providing what was, essentially, an interim report.

17. One way or another, the judge’s decision to inform the jury of the option of a majority verdict came at a time when the jury had been deliberating for a considerable period. There was no initial opposition from either side to the proposal and, even when the jury sought to delay the return to court, giving rise to the possibility, at least, that they were doing so for good and particular reason, there was no request to the judge to hold off from saying anything about majority verdicts. We have not been persuaded that the judge’s decision to inform the jury about the possibility of a majority verdict amounted to an error on her part, nor have we been persuaded that it rendered the trial unsatisfactory.

18. The appellant has made the point that the cumulative effect of the individual grounds is greater than the sum of the individual parts. The appellant draws the analogy of a vessel being struck by two torpedoes in quick succession. However, on the facts of this case, it is not an analogy of value; quite simply, both torpedoes missed.

19. In summary, we have not been persuaded to uphold either of the grounds advanced, and so, we must dismiss this appeal against conviction.