

**APPROVED**

**REDACTED**



**THE COURT OF APPEAL**

Neutral Citation: [2024] IECA 315  
Court of Appeal Record No. 77/2021

**President**

**McCarthy J**

**Ní Raifeartaigh J**

**BETWEEN/**

**THE PEOPLE (AT THE SUIT OF  
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

**PROSECUTOR/RESPONDENT**

**-AND-**

**M.D**

**ACCUSED/APPELLANT**

**JUDGMENT of the Court delivered on 14th of March 2024 by Mr Justice McCarthy**

1. This is an appeal against conviction. M.D, the appellant herein, was convicted on the 7th of September 2020 on six counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended, and on one count of meeting a child for the purpose of sexual exploitation contrary to section 3(2A) of the Child Trafficking and Pornography Act 1998, as amended. The complainant (“C”) might be described as the appellant’s “step-granddaughter” (his son having been in a relationship with the complainant’s mother). The assaults occurred on dates unknown between the 21st of April 2012 and the 20th of November 2014 (both dates inclusive). The offence of meeting a child for the purpose of sexual exploitation occurred on a date unknown between the 8th of November and the 21st of November 2014 (both dates inclusive). C was born on the 17th of April of 2000. The appellant was born on the 19th of September 1952.

2. There were originally nine counts before the court. Counts 9 pertained to meeting a child for the purpose of sexual exploitation. Counts 1 to 8 inclusive pertained to the sexual assaults. Counts 6 and 7 were dealt with by way of directed acquittals. The locus of the alleged or actual offences was the complainant's family home apart from the sexual assault the subject of Count 1 which had taken place at a public cinema.

3. The indictment in the final form (particulars only) as amended was as follows: -

**Count 1:** MD did in or about the 21<sup>st</sup> day of April 2012 at or about the building formerly known as the [REDACTED] Cinema [REDACTED], sexually assault one C, a female person.

**Count 2:** MD did on a date unknown between the 1<sup>st</sup> January 2014 and the 31<sup>st</sup> July 2014, both dates inclusive, in the sitting room at [complainant's family home], sexually assault one C, a female person.

**Count 3:** MD did on a date unknown between the 1<sup>st</sup> January 2014 and the 31<sup>st</sup> August 2014, both dates inclusive, in the kitchen at [complainant's family home], sexually assault one C, a female person.

**Count 4:** MD did on a date unknown between the 1<sup>st</sup> August 2014 and the 31<sup>st</sup> August 2014, both dates inclusive, and on an occasion other than that referred to at count 3 in the kitchen at [complainant's family home], sexually assault one C, a female person.

**Count 5:** MD did on a date unknown between the 1<sup>st</sup> August 2014 and the 20<sup>th</sup> November 2014, both dates inclusive, in a bedroom at [complainant's family home], sexually assault one C, a female person.

**Count 8:** MD did on or about the 20<sup>th</sup> November 2014 on an occasion other than that referred to at count 5 in a bedroom at [complainant's family home], sexually assault one C, a female person.

**Count 9:** MD did on a date unknown between the 8<sup>th</sup> November 2014 and the 21<sup>st</sup> November 2014, both dates inclusive, at [complainant's family home], meet C for the purpose of sexual exploitation, having met or communicated with her on at least two prior occasions.

#### **Complainant's Evidence**

4. The complainant alleged the first of the seven incidents giving rise to the seven counts on which the appellant was convicted occurred in 2012 when the appellant brought her to a cinema which was within a shopping centre. She described that the appellant asked her to buy a pair of tan coloured tights and gave her money to so buy them at a department store also within the shopping centre. The appellant then asked her to put the tights on and she stated that she went into a bathroom and did so – she had black leggings and a t-shirt on over them. She described that whilst sitting in the cinema, with the appellant sitting directly beside her, that he started to rub up and down her leg persistently (eight or nine times) throughout the movie. After the movie he then told her to take the tights off so that he wouldn't "*get in trouble*" and he took them away. CCTV footage was obtained by Gardaí

which showed the complainant going into the department store and buying the tights. The CCTV footage was played in court.

5. Subsequently, on returning home she informed her mother of the incident who in turn told her stepfather (the appellant's son); he in turn raised the issue with the appellant who admitted giving C the money for the tights but denied that anything untoward had occurred. We address his evidence in more detail below. The complainant reported the incident to the Gardaí but did not wish thereafter, at that stage, to pursue it. No suggestion was made that there was not ample evidence to support Count 1. All the subsequent offences occurred in 2014.

6. In respect of Count 2, she said that this occurred in the sitting room of her home "*maybe into the afternoon like going towards the nighttime*" that the appellant engaged in what "*would have been the same thing, kind of he'd be hugging or rubbing my leg or things like that until it got worse*". In particular she said that the appellant sat beside her and started to rub her leg at the top of her thigh "*...and everything else*". She got up and left the room after telling the appellant to stop. It will be seen that this count is widely drawn. Thus, it is plain from the context that this offence occurred before the end of July 2014 [i.e., before the offending "*worsened*"].

7. In respect of Count 3, in answer to counsel's question as to whether or not she recalled anything (further) untoward occurring, she said that "*it would have been maybe August that things started progressing*", going on to say that "*things got a lot worse, the things he was doing to me*".

8. She said that when the rest of the household had gone to bed she was in the kitchen where he grabbed her roughly by the wrist; he said "*we have something special*", she told him to "*stop, that she was underage and that [it] wasn't okay*". She said that she got angry with the appellant, he in turn did so with her and kissed her on the lips. He told her that she

looked “*really pretty*”. She said that she thought that the latter incident occurred in August 2014 and in particular “*it was the start of August maybe, I think, because I was due to be going back to school coming before September*”. Again, it will be seen that such count is drawn on the basis that the offence occurred in the August in accordance with the evidence and in that month.

**9.** In respect of Count 4 she described a further incident “*towards maybe the third week in August and that’s when things got really serious*”. Again, when the rest of the household had gone upstairs, the appellant approached her in the kitchen and “*was like feeling my stomach and everything else and he put his hand down my trousers and put his finger inside me [her vagina]*”. This continued for a number of minutes. She said that in the next weeks and months “*things got an awful lot worse from then, like he done more things to me*”, sometimes in her bedroom at night or in the kitchen. She described these as extending to putting his finger into her vagina, kissing and feeling her body. Again there was ample evidence to support this count which was clearly differentiated from Count 3.

**10.** On one occasion, he attempted to have sexual intercourse with her, having attempted to force her to have oral sex also on that occasion. After this incident, she said he went “*back to putting his finger inside me*”. These events are plainly reflected in Counts 5 and 8.

**11.** She accepted that she had what we might briefly call a dysfunctional family history and also that in April 2016 she sought to withdraw her complaint. She also gave evidence to the effect that the appellant frequently visited her home and stayed overnight affording details also as to where each person slept as to their social activities at night. She asserted that she was frequently left on her own with the appellant as the last one to go to bed – from time to time being responsible for “*locking up*”.

**12.** There is evidence of extensive electronic communications between the complainant and the appellant from the period of a highly sexualised nature in which he repeatedly

asserted his love for her. Although it was not in debate that a number of the messages were deleted, the earliest timestamped contact was the 25th of October 2014 and the final messages were timestamped as the 22nd of November 2014.

### **The Mother's Evidence**

**13.** The complainant's mother stated that she has seven children including the complainant. She stated that she moved into the current family home in 2014, the locus of Counts 2 - 9 on the indictment. She gave evidence that in respect of the first incident, she was made aware upon the arrival home of her daughter who appeared to be upset. After being told what had occurred, she contacted Gardaí and thereafter visited a garda station with the complainant but the complainant did not want to speak about what had happened and nothing arose from it. She said that she did not speak to the appellant about what had occurred but that her partner (the appellant's son had so done) and she couldn't really determine what the purpose of what happened really was about at the time. When they moved to their current home in 2014 the appellant and his wife frequently visited and would have had drinks at the house every weekend, often staying over. She described that the complainant went to bed at 9.30pm most nights and she always ensured that her children went to bed early so they did not stay up late when she, her partner and the appellant and his partner stayed up. She stated that in re-examination a decision was made to allow the complainant to be allowed to stay up later at night and this extension was one encouraged by the appellant.

**14.** She went on to describe an incident taking place in and around November of 2014 (the subject of Count 8) which was when she became aware that something untoward was taking place between the complainant and the appellant; she saw the appellant engaging in a sexual act with her daughter. She stated that she had presented a hotel voucher to the appellant and

his wife for the purpose of celebrating the appellant's wife's birthday. On the evening of that incident, the appellant and his wife visited the complainant's home for drinks before they set off to the nearby hotel to use the voucher for a meal and would return again after to stay overnight. This incident was accordingly described with a high degree of specificity as to date and the offences are accordingly "*bookended*", so to speak, by the reference to 2014 and that date (the 20th of November of that year).

**15.** More specifically, she said that before they left for the hotel, the appellant claimed to be feeling unwell and had gone upstairs. She described that went upstairs at a certain point to surprise the appellant but that upon arriving at the upstairs landing she saw that the complainant's bedroom light was on and could see that the appellant was there with the complainant. She observed that the appellant was on his hands and knees with the complainant stood before him and that he was kissing her stomach where her top had been lifted upwards. She stated that after seeing this, she went downstairs and didn't say anything initially. She waited for the appellant and his wife to leave to go to the hotel and then she explained what she had seen to her partner.

**16.** The complainant was also confronted as to what had occurred but she did not say anything at that time. The appellant and his wife returned later and stayed the night as had been earlier planned and it was only after the appellant and his wife left the next morning, that the complainant's mother sought to investigate matters further. She said that she had phoned a friend about the matter and started to search the complainant's room for any notes or material which might provide any explanation as to her relationship with the appellant. She described that this ultimately led to her going through the complainant's mobile phone, she found messages therein of an explicit nature which confirmed her concerns and thereafter she confronted the complainant in relation to this who she described as having broken down and confirmed she was being sexually abused by the appellant. She then went to report the

matter to Gardaí along with the friend who she had phoned about the matter and the complainant.

### **Evidence of Garda Lisa O’Gara**

17. Garda O’Gara gave evidence that on the 22nd of November 2014 she was on duty when she received a telephone call from the complainant’s mother and said that that the complainant’s mother was making a complaint against the appellant and a short time later she attended at the garda station with the complainant. Garda O’Gara then described speaking with them and that formal statement statements were made in due course and permission was given to Gardaí to take possession of the complainant’s mobile phone as part of the investigation. The appellant was arrested on the on the 11th of March of 2015 for the investigation of the offence and a warrant was executed to carry out a search of his phone. Garda O’Gara gave evidence that she interviewed the appellant after his detention. She also stated that his mobile phone was taken. The contents of the phone contact were put to the appellant and to put the matter shortly, he effectively denied all allegations put to him of any sexual relations between him and the complainant.

### **The Stepfather’s Evidence**

18. He gave evidence to the effect that the appellant visited the family home on weekends with his wife and a number of occasions there would be drinks until 1am or 2am when everyone would go to bed leaving the appellant and the complainant as the last two downstairs at the end of the night. He stated in respect of the first incident involving the purchase of a pair of tights, that he confronted his father about it and he had denied any wrongdoing, that he told him that he had the tights in his car as he believed the complainant’s mother would have been angered at the idea of the complainant having them. The stepfather



stated that as a result he went out to search the appellant's car after this and the tights were not there. He said that when he asked the appellant how this was so, the appellant told him he had binned them around the corner. The stepfather then recounted that as to the incident in November 2014, he was made aware thereof and his partner and the complainant went to the Gardaí about it the night after it had occurred.

### ***Grounds of Appeal***

**19.** We accordingly turn to the grounds and with respect to those pertaining to the appeal to conviction and in respect of those that are still being advanced, they are as follows: -

5. *The Learned Trial Judge erred in failing to withdraw the case from the jury;*
6. *The Learned Trial Judge erred in her charge to the jury;*
7. *The learned trial judge erred in law and in fact in failing to draw the jury's attention to important aspects of the defence case;*
8. *The learned trial judge erred in fact and law when they (sic) breached the Appellant's right to a fair trial pursuant to article 6 of the European Convention on Human Rights and/or the Constitution;*
9. *For these reasons, and such other reasons as may be advanced at the hearing, the said conviction of the Appellant is unsafe and ought to be quashed.*

Counsel for the appellant submitted by way of written submissions that the grounds of appeal can further be distilled as pertaining to “*the failure to withdraw the case from the jury*” and “*the charge to the jury*” and accordingly, we will deal with them in that particular way.

**“*The failure to withdraw the case from the jury*”**

**20.** At the conclusion of the prosecution case a number of applications were made on behalf of the appellant including that of an application for directed acquittals with respect to Counts 2, 3, and 9. This application was made on the 3rd of September 2020 (Day 3 of the trial).

**21.** It was contended in the trial court that the want of specificity as to when the incidents the subjects of Counts 2 and 3 occurred, meant the jury could not have been satisfied beyond a reasonable doubt that the offending occurred within the dates alleged. We have sought to set out the evidence above as to periods during which those occurred and we believe that taking the evidence in the round, there was sufficient evidence to allow a conclusion that the events, the subject of those counts, were committed during the relevant periods We need no need to address this further..

**22.** With respect to the last count, the statutory provision creating the offences is as follows: -

“3(2A) *Any person who within the State—*

*(a) intentionally meets, or travels with the intention of meeting, a child, having met or communicated with that child on 2 or more previous occasions, and*

*(b) does so for the purpose of doing anything that would constitute sexual exploitation of the child,*

*shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.”*

**23.** Section 3(2A) of the Child Trafficking and Pornography Act 1998 was inserted as part of a wider amendment to the Child Trafficking and Pornography Act 1998 made under section 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007. That latter Act established sexual exploitation, as it then comprised of during the period of offending, to mean the following for the purpose of establishing such an offence: -

*“‘sexual exploitation’ means, in relation to a child—*

*(a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,*

*(b) using the child for prostitution or the production of child pornography,*

*(c) inviting, inducing or coercing the child to participate in any sexual activity which is an offence under any enactment,*

*(d) the commission of any such offence against the child, or*

*(e) inviting, inducing or coercing the child to participate in or observe any activity of a sexual or indecent nature.”*

24. This application for a direction on this count was also rejected. The main contention here is that this is a criminal statute to be strictly construed and the offence is consummated only if an individual travels with the sole intention of doing so for the contemplated purpose. The judge ruled on this aspect of the direction application in the following terms: -

*“Finally, regarding count 9 on the indictment and in terms of count 9 the Director is relying on the... texts as part of the case in terms of the evidence for that particular count. In relation to the prosecution case, the prosecution maintains that the intentions of the accused expressed in the texts were declaratory of an intention to sexually exploit the then 14-year-old [C]. There was much repeated intention of sexual activity on the part of the accused man and bearing in mind he was both a regular and welcome visitor... along with his wife, to the home, the family home of... [C], noting that he travelled there on many occasions. The defence seek to rely on the incidents referenced elsewhere in terms of cases abroad. These are different facts and we don't know all of the circumstances of those particular cases nor of the particular offences that were alleged in terms of matters. All of the evidence suggests that [the appellant] was travelling to [C's home] to see his son and grandchild. In reality, and it is my opinion, he was also utilising the opportunity of those visits to meet with [C] alone and with an intention to gratify his sexual intent. In that regard, that count 9 also is a matter that will go to the jury in that regard.”*

25. The appellant contends that the purpose was to visit the house and hence travelling for the purpose of visiting his son and grandchild as, it is contended, held by the judge is fatal to conviction of the offence; it is said that the offences were opportunistic. We think that the judge was right to allow Count 9 to go to the jury on the basis that travel in the sense

contemplated can occur for the purpose of sexual exploitation even if there is another contemporaneous purpose. Individuals travel with multiple purposes in mind on a constant basis. We are not persuaded that when one reads the judge's observations in full she was saying that the sole purpose was what we might describe as a visit to see the family in an *innocent* sense especially having regard to view given by the trial judge that: "*In reality, and it is my opinion, he was also utilising the opportunity of those visits to meet with [C] alone and with an intention to gratify his sexual intent. In that regard, that count 9 also is a matter that will go to the jury in that regard.*" In any event and notwithstanding how the trial judge characterized the purpose is not of central importance; what is before the Court currently is whether there was sufficient evidence to leave this count to the jury. If there was, thereafter the issue of fact was for the jury and not the trial judge to determine (whether or not one of the purposes for which the appellant travelled was sexual exploitation). We are of the view that there was sufficient evidence of this purpose to warrant leaving this count to the jury.

**26.** Accordingly we see no error and we reject this ground of appeal.

***"The charge to the jury"***

**27.** Notwithstanding the fact that counsel for the appellant expressly said before the charge that it was not a delay case which attracted a delay warning, the judge spoke to the jury as to delay in her charge as follows: -

*"I should also advice you, ladies and gentlemen, that while efforts are made to allow an accused to effectively examine what you could describe as a former child witness or complainant, now an adult but formerly a child complainant, certain unavoidable difficulties do arise due to the length of time it takes for the case to trial. So, in this instance, it's approximately five years. So, bearing that in mind, at the time, the making of the complaint to the gardaí, there is no delay on anyone's part in terms of*

*the matter, how the matter progressed through courts. But you must remember, while a child witness may try their best to remember and answer all questions truthfully they may have, due to the delay in time, have difficulties remembering, and that clearly has an impact on the accused's ability to effectively to cross-examine the witness. So, this is another matter that you can consider for the purposes of your deliberating.”*

There was no requisition on this or otherwise on behalf of the appellant (and rightly so).

28. In this context we must have regard to *People (Director of Public Prosecutions) v Cronin (No 2)* [2006] 4 IR 329 where Kearns J stated as follows: -

*“Some error or oversight of substance, sufficient to grounds an apprehension that a real injustice has occurred, must be demonstrated before the Court should allow a point not taken at trial to be argued on appeal.”*

Kearns J went on to say: -

*“Without some such limitations, cases will continue to occur, where a trawl of a Judge’s charge years after the event, will be made to see if a point can be found which might have been argued or been the subject matter of a requisition, at the end of the Judge’s charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J when this case was in the Court of Criminal Appeal, this Court should abhor the practice and strongly discourage it.”*

29. This is a classic case for the application of this rule in circumstances where counsel expressly informed the trial judge that a delay warning was not being sought.

30. Counsel sought to advance the startling proposition that even in a case that did not hitherto attract a so-called delay warning because of lapse of time, the delay between offending and trial here should give rise to the necessity for an extension of the class of case in which a warning should be given. He thus sought to advance a new rule of law. We cannot contemplate this.

31. Furthermore, he contended that because the judge had chosen to make reference to the potential consequences of delay, the judge should have gone on to elaborate in accordance with the portions of the charge given by His Honour Judge Haugh in the well-known case of *People (Director of Public Prosecutions) v R.B* (unreported, Court of Criminal Appeal, 12th of February 2003) as approved of in *People (Director of Public Prosecutions) v P.J* [2003] 3 IR 550 and subsequent authorities.

32. The form of words used by the judge was for the assistance of the jury and the vindication of the appellant's rights. It was unnecessary for her to say it but it was beneficial to the appellant as it stood and there was no necessity to add anything to it.

33. There is no question therefore of a supposed fundamental injustice of the kind to allow the rule in *Cronin* to be set aside.

34. Therefore we reject this ground also.

### *Conclusion*

35. Accordingly, having rejected all grounds, we dismiss this appeal.

