THE COURT OF APPEAL

[112/2017]

Birmingham J.

Mahon J.

Edwards J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V.

J.D.

APPELLANT

JUDGMENT of the Court delivered on the 17th day of May 2018 by Mr. Justice Birmingham

1. On 15th March 2017, the appellant was convicted following a trial in the Circuit Court on three counts of sexual assault. Subsequently, he was sentenced to a term of three and a half years imprisonment with the final twelve months suspended. He has now appealed against conviction and sentence. This judgment deals with the conviction aspect only.

2. It is to be noted that the appellant had stood trial on ten counts, of these, eight were in the nature of generic or sample counts and two related to specific alleged incidents. The appellant was found not guilty in respect of seven counts, all sample counts, and guilty in respect of three counts.

3. Five grounds of appeal have been formulated in relation to the conviction aspect. These are:

(i) That the judge erred in allowing into evidence the DVD recording pursuant to an application under s. 16 of the Criminal Justice Act 1992;

(ii) that the judge failed to discharge the jury following a remark made during the opening of the case by prosecution counsel;

(iii) that the judge erred in refusing an application for a direction;

(iv) that the judge erred in failing to direct the jury to return a verdict of not guilty that had been made on the basis that the prosecution had failed to cross-examine the appellant when he gave evidence on his own behalf; and

(v) that the verdict was perverse with respect Counts 8, 9 and 10. In particular, that it was perverse to return a guilty verdict on Count 8 on the indictment, a sample count, while returning verdicts of not guilty on the other sample counts.

Nature of the Allegations

4. The complainant was a niece by marriage of the appellant, the daughter of his wife's brother, and the allegation was that he had abused her over a period of time when she was between the ages of seven to nine years. By the time of the trial, she was twelve years old. It is to be noted that the nature of the offending alleged consisted of touching and rubbing the outside of the vagina with a hand, under the underwear of the complainant. It was not alleged that penetration had occurred.

5. On 3rd October 2014, a complaint was made to Gardaí following a disclosure made by the complainant to her mother. On 13th November 2014, the complainant was interviewed by specialist Garda interviewers at Santry Garda station. Thereafter, the appellant was contacted and he attended at Blanchardstown Garda station in company with his solicitor on 13th

January 2015. He was arrested and detained, and while detained, interviewed on one occasion. He denied the allegations.

Grounds of Appeal

The Admission of the DVD (Ground 1)

6. Counsel on behalf of the appellant sought to exclude from evidence a DVD recording of the interview conducted with the complainant when she was nine years old at Santry Garda station on 13th November 2014. In essence, the appellant submits that the DVD should not have been admitted as it was unfair to the appellant. It is said that no warning was given to the complainant before she participated in the interview as to the consequences of telling lies. The appellant also makes a subsidiary point in that what is described as the 'Complainant Form' was filled in incorrectly or not fully completed. The judge ruled on the matter as follows:

> "[n]ow, in the Court's view, in terms of the circumstances in which the video recording was taken, there appears to have been no unfairness. It was taken in the suite. Both Gardaí were careful not to discuss the evidence at the clarification meeting and that, in the Court's view, was quite proper. The child then gave evidence, and the Court of course acknowledges that this is quite a serious statutory exception to the rule that normally witnesses have to give evidence live, as it were, before the Court. The defence submit that it is not in the interests of justice to admit the recording, first of all on the basis that the Gardaí were new to the procedure at the time, the form was not fully filled out. The Court accepts that that is probably not desirable, that the original Clarification Form was not filled out, but I am satisfied on both Gardaí's evidence that they considered all the factors within the

form and that it was proper for them to proceed as they did, bearing in mind that they are guidelines only, but I think that would be certainly in terms of the accused being on full notice regarding the process being invoked and essentially being adduced in evidence against him, that it would be desirable if the form was filled out, although I fully accept that the Garda has explained that in full . . . the defence rely on the judgment of O'Malley J. which was open to me previously, and in that case, the judge criticised the failure of the Gardaí to give a warning regarding not telling the truth, as to what the consequence would be. Both Gardaí gave evidence that it is not their practice to give such a warning, and again, these again are guidelines. The Gardaí both gave evidence in respect of their satisfying themselves that the child was capable of distinguishing truth from lies and indeed that they prepared questions along the lines of a child of the age of 9 years old, having met the complainant previously, and they conducted an assessment. Garda Cleary's evidence was that they conducted an assessment and had age-appropriate questions regarding that section of the interview, and Garda Tyding's evidence was that she was fully satisfied that the child was competent and was capable of distinguishing between truth and lies and she gave an example of the child's own assessment of what truth and lies were. The child was capable of giving an example of that. In the Court's view, the fact that there was no warning in these particular circumstances, where the child was 9 years old, I think it makes common sense that a child of 9 would be completely intimidated by being warned and I do not think it was unreasonable in these particular circumstances not to issue such a warning to a 9-year old child. In those circumstances, I find that the video recording will be

admitted and shall be admitted and the defence have not made out the case that it is against the interests of justice to do so."

7. It is to be noted that s. 16(1) of the Criminal Evidence Act 1992 provides that a video recording shall be admissible unless the Court is of opinion that in the interests of justice, the video recording ought not to be admitted. In the case of *DPP v. FE* (Bill No. 84/2013), Hunt J. as quoted in the paper 'Recorded Evidence for Vulnerable Witnesses, Practical Issues at Trial', delivered by Michael Bowman SC and Dr. Miriam Delahunt BL, at an Irish Criminal Bar Association seminar had said:

> "[t]he use of the word 'shall' in the section gives the provisions a directory or mandatory flavour, in that where the age or mental handicap qualifications are met, the relevant evidence shall then be given by the means specified in the section unless it shall not be in the interests of justice to do so."

The Court agrees that the section, as structured, envisages that in the ordinary way, the DVD will be available to the trial Court. In the course of the appeal hearing, members of the Court enquired of counsel for the appellant in what terms a nine-year old girl should be warned about consequences. The Court does not believe that it really received any satisfactory answer to that question. The Court agrees with the observations of the trial judge that common sense would suggest that a child of nine years would be intimidated by being warned of such consequences. In this case, it is clear from the transcript of the interview that the Gardaí went to very considerable lengths to establish that the complainant knew the difference between truth and lies and was fully aware of the importance of telling the truth.

8. As is evident from the ruling of the trial judge quoted above, the issue was approached by Gardaí in a careful and conscientious fashion. The Court is in no doubt that it was proper

for the trial judge to admit the DVD into evidence. This ground of appeal is accordingly dismissed.

Prosecution Counsel's Opening Speech (Ground 2)

9. The second ground relates to prosecution counsel's opening speech and what was really a slip of tongue by counsel when he said to the jury:

> "You've heard the charges this morning read out to Mr. D. He pleaded guilty to 10 charges – sorry, excuse me, sorry, sorry, that's a slip of tongue – he pleaded not guilty in respect of the 10 charges on the indictment".

On behalf of the appellant, it has been suggested that the slip may have caused some jurors to believe or to speculate that there were other offences with which Mr. D had been charged to which he had pleaded guilty. The Court does not see that suggestion as having any substance.

10. The Court is somewhat surprised that such a ground of appeal should be formulated, and more surprised still that it should have been pressed. The Court is in no doubt it is without merit.

The Application for a Direction (Ground 3)

11. At the close of the prosecution case, an application was made on behalf of the appellant to withdraw the case from the jury because of inconsistencies in the evidence. The trial judge ruled on the matter as follows:

> "[a]n application has been made on behalf of the defence whereby the Court is being asked to exercise its discretion to withdraw the counts from the jury herein on the basis of the inherent weakness and inconsistency in the prosecution

evidence. The Court is obviously familiar with the case of *Galbraith* and the case of the Court of Appeal in *The People at the Suit of the DPP v. M* has been opened to the Court by the prosecution. The *Galbraith* decision was analysed in the *M* case, and first of all, to apply the test of *Galbraith*, first of all, it is that if there is no evidence, that an element of crime alleged to have been committed the situation is clear, the trial judge should stop the trial. That is not the situation here, there clearly is evidence in relation to the counts on the indictment. The only evidence regarding timeframe appears to be in respect, we will call them the 8 counts, the two – not including the two specific counts, is the child saying that this conduct was going on for a period – for a couple of years. She does say that it also happened in the presence of her sister, who was born at the end of December 2011. The issue then regards the – whether that evidence is tenuous or is it sufficient evidence upon which the jury could be satisfied beyond a reasonable doubt regarding the timeframe in the indictment.

And in the Court's view, the assessment of the evidence if a matter for the jury itself. The Court can obviously charge the jury in respect of that, of what the evidence, and it is clear from the ruling in *Galbraith*, and indeed reiterated in the case of *M*, that matters should only be withdrawn from the jury where no jury, properly charged, could possibly convict on the evidence. The assessment of the evidence is a question for the jury itself and I am refusing the application."

12. On behalf of the appellant, attention has focused in relation to the last instance of abuse and what she had to say in relation to the same incident when cross-examined during the course of the trial. In the course of her Garda interview, the complainant had said:

". . . my Mammy kind of caught him a small bit because he was rubbing very high up my leg."

In the course of cross-examination, counsel drew the complainant's attention to what she had said in the video recorded interview. In particular, that she had said "but then she came in and, like, tried to stop him". Counsel asked "is that right?" The complainant responded "yes, by that I meant, I think, that my Mam came over. I don't think she saw that he had his hands down me, but she came up and then started rubbing my leg".

13. Slightly later in the cross-examination, counsel asked "you see, N, you remember that, but you don't remember your Mammy trying to stop JD " to which the witness responded "no, I can't remember what way I said it then, but if I was to remake the video now, I probably would have said that when she came in, she probably just saw his hand very high up my leg because he would have taken it out and put it high up my leg because he would have heard her coming in and then my Mam came over and I know that she started rubbing my leg then".

14. On behalf of the appellant, counsel submits that the account given in cross-examination was broadly consistent with the account given by the complainant's mother. In the Court's view, the evidence is open to the interpretation that the complainant's mother saw enough to have some concerns. This is an inference that arises from the fact that on the day following the incident, when the complainant's mother was driving her home from school, that she raised the fact that she had seen JD rubbing up her leg very high last night and that the complainant responded "yes, but if you promise not to tell anyone, I will tell you what really happened". Evidence in relation to the last incident and the fact that there are divergences between the account given in the Garda interview suite and in the trial, do not

have the significance contended for by the defence. On one view, what emerges from the evidence is that enough was witnessed on the Thursday evening to give rise to disquiet.

15. Another area pointed to relates to McDonalds. In the course of the Garda interview, the complainant had referred to McDonalds on two occasions. She said that she was touched on a number of occasions while travelling as a passenger in a car driven by the appellant. She identified one such car journey as having been a journey to McDonalds. At another stage in the interview, after she had described incidents that occurred in a restaurant in Wexford, she was asked whether she could remember any other places where it might have happened and responded "I can't really remember because he has been doing it a lot. He did it in McDonalds before". When asked which McDonalds, she said "I think it was one out in Finglas". Asked if she remembered how long ago that was, she said "it was when he was taking me out to his paramedic place which I think was this year".

16. In the course of the cross-examination at trial, counsel at one stage asked "and you say it happened in a McDonalds?" to which the witness responded "I can't remember", repeating that when asked whether it was the case that she had no recollection of that now. It must be said that McDonalds was not really central to the narrative and that the references to McDonalds were little more than passing references. The complainant was saying that she was regularly touched inappropriately in the car when she was a passenger and the appellant was driving. She gave as an example of this occurring on an occasion when she was going to McDonalds. Having described in some detail incidents in a restaurant in Wexford, when asked whether she could remember any other places that it might have happened, her response was that she could not really remember because he had been doing it a lot, going on to mention that he had done it in McDonalds. On one view, the fact that the witness at trial was saying that she did not remember McDonalds might be seen as enhancing her credibility. It

would, after all, have been very easy to have gone along with the suggestion that she had said that it had happened in McDonalds.

17. Overall, the Court is in no doubt about the fact that the trial judge was correct to take the view that there was evidence in the case that offences had been committed. Insofar as there were any differences in the accounts given in the Garda interview and under cross-examination, these were quintessentially matters to be addressed by a jury. The Court is quite satisfied that the trial judge was entitled to take the view that this was not a case for a direction, but was a case which was fit to be considered by a jury.

The Prosecution's Failure to Challenge the Defence Evidence (Ground 4)

18. The appellant says that the trial judge erred in failing to direct the jury to return a verdict of not guilty following an application made to her on the basis that the prosecution had failed to cross-examine the appellant when he had given evidence on his own behalf. The Court begins its consideration of this issue by observing that the prosecution did in fact cross-examine the appellant. The cross-examination covers some twenty pages of the transcript and took place over two Court sessions. In reality, the complaint made by the defence is that prosecution counsel did not at any stage say "I put it to you that you did the things alleged". In the Court's view, while of course counsel could have formally put the prosecution position in the way suggested, there was no absolute obligation on him to do so. In fact the appellant took the opportunity to restate in clear and trenchant terms that he was denying all the allegations made against him. For example, counsel for the prosecution said during cross-examination "[s]o, an allegation, a very serious far reaching allegation was put to you and your explanation to Gardaí was that this child, nine years of age, had received a sex education class and you believed that was the motive or that planted a seed in her head to make this

complainant against you". The appellants responded "[w]ell, I honestly don't know why this complaint was made against me but I can tell you that I did not do this in any way, shape or form". Overall, the Court is satisfied that the failure to formally put the prosecution case to the appellant during cross-examination certainly did not provide a basis for the judge directing the jury to find the accused not guilty. This ground of appeal therefore fails.

The Guilty Verdict on Counts 8, 9 and 10 on the Indictment are Perverse (Ground 5)

19. Counsel for the appellant have argued that the verdicts in respect of Counts 8, 9 and 10 on the indictment are perverse. It was submitted in so far as Count 8 is concerned, that there was no rational basis on which it could be treated differently than the first seven counts on the indictment where there were verdicts of not guilty. In response, the prosecution pointed to the fact that both the defence and the trial judge had been at pains to tell the jury that there were ten counts on the indictment and that each required separate consideration.

20. Counts 9 and 10 related to two specific incidents. The former count related to an incident alleged to have occurred in County Wexford on the occasion of a family holiday. The latter count concerned an event that was said to have occurred on the day before disclosure was made.

21. The appellant says that the remaining eight counts were all sample counts and the evidence in relation to them was the same and that, accordingly, it is not logical that verdicts of not guilty should have been returned on seven and a guilty verdict on one. It is the case that the jury was told, both by defence counsel and by the trial judge, that the counts on the indictment were separate counts. In the Court's view, the verdicts of the jury must mean that they were satisfied beyond reasonable doubt in relation to the two specific counts, and also satisfied beyond reasonable doubt that on at least one occasion in the quarter preceding the

final incident, that abuse had occurred. Given the evidence given by the complainant, it was open to the jury to be so satisfied.

22. It is to be noted that the complainant expressed some uncertainty about when the activity began and when the first incident occurred. Asked by Gardaí in the course of the interview whether she could remember the first time it happened, she responded "no, because for as long as I can remember, he's been doing it. I know it's kind of usual for a baby, like, if you're changing a nappy, but when I got out of nappies, I think he did it then, but for as long as I can remember he's been doing it". She did, though, it must be said, in response to a further question, indicate that she was speaking about a pre-school period. It may be that uncertainty about the starting point was a factor in the not guilty verdict, in any event, the Court is firmly of the view that the appellant has not established that the verdicts were perverse and refuses to uphold that ground of appeal.

23. In summary, then, the Court rejects all of the grounds of appeal. The Court has not been persuaded that the trial was unfair or that the verdict is unsafe.

24. Accordingly, the Court dismisses the appeal.

Redaction Undertaken
FH

George Birmingham
16/7/2018