UNAPPROVED JUDGMENT

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Record No: 205/2019

Neutral Citation: [2021] IECA 187

Birmingham P.

Edwards J.

Kennedy J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

T. O'B

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 1st of July, 2021.

Introduction

1. This is an appeal by the appellant against his conviction by a jury in The Circuit Criminal Court on the 11th of July 2019 on eight counts of indecent assault following a three-day trial.

The circumstances of the case as established in evidence

Evidence on which the parties expressly agree.

2. The appellant's written submissions contain a summary of the evidence led by the prosecution, with which the respondent takes no issue. Accordingly, it is convenient to adopt it (in suitably redacted form) for the purposes of this judgment.

- The complainant was born on [a date in 1967 provided in evidence – for purposes of anonymisation we do not propose to refer to it with greater precision]. The complainant's older sister was married to the appellant.
- The complainant's mother moved to England following the death of her husband, the complainant's father, in 1975.
- The complainant remained in the family cottage in a rural location in County Tipperary, under the care of her sister and the appellant, for a period of 18 months before joining her mother in England.
- During this period of time, when aged between 6 and 10 years old, the complainant was subject to sexual abuse by the appellant at different locations in the place in which she lived including the family cottage.
- Nine counts of indecent assault were preferred on the indictment, the first two of which referred to specific incidents and read that on a date unknown between the 21st December, 1973 and the 11th April 1975 in Co. Tipperary, the appellant did indecently assault the complainant.
- The remaining counts were charged as sample ones, for three-month periods on various dates between the 11th April 1975 and the 31st December 1976, in Co.

Tipperary, the appellant did indecently assault the complainant.

- Evidence of another incident of misconduct was led which was not charged on the indictment, i.e., that the appellant approached the complainant when she was aged 4 at a time she was using an outside toilet at the appellant's then place of residence and masturbated in front of her.

Other evidence adduced relevant to issues raised on the appeal

3. During her evidence in chief the complainant testified that she was one of seven children, and that at the time of her father's death she was living with her mother and father, and two of her older brothers, in the family cottage in a rural village. By that stage the remainder of her siblings had reached adulthood and had married and left home. Her father, who had been wheelchair bound, had been ill for many years and had been nursed by her mother. Following her father's death her mother had health problems, involving anxiety, stress and depression and had received medical advice to seek some respite. Accordingly, her mother left the family home and the village in which they lived and went to take up work in England, leaving the complainant and her brothers in the care of an older sister, M.

4. M. was married to the appellant. They had two children of their own, a boy and a girl, and prior to the mother's departure for England had lived in a house of their own in the same village as that in which the family cottage was located.

5. This other house was to assume a relevance in the following context. Immediately following prosecuting counsel's opening speech to the jury, defence counsel raised a preliminary issue with the trial judge in the absence of the jury, concerning evidence which the prosecution proposed to adduce concerning an incident which had occurred at a

christening held at this other house when the complainant was aged approximately 4 years. Defence counsel objected unsuccessfully to this proposed evidence claiming that it represented inadmissible evidence of misconduct not charged, and asked that the trial judge should rule it inadmissible.

6. The proposed evidence the subject matter of that unsuccessful objection was subsequently given by the complainant before the jury in the following terms:

> *A. ... This occasion at that house, it was a christening of one of their children and I believe that it was the christening of their son who would have been born when I was four and a half, five maximum.*
>
> *Q. And you were telling us about the toilet facilities?*
>
> *A. Yes, the toilet facilities. There weren't any in the house so I had to go outside to relieve myself and at the back of the house, there was like a shed and I went outside the back and everybody was still in the house, the family gathering and what have you. And I slipped out the back to relieve myself and chose to go in the shed. And there was a door on the shed and I pushed it out a bit. I didn't push it fully out because it was quite dark but I pushed it out as much as I could and then I began to have a wee.*
>
> *Q. Mm-hmm?*
>
> *A. And while I was squatting down having a wee, that's when my sister's husband* [T O'B] *came out and he looked inside around the door and saw me and then moved inside the door into the shed and continued to watch me. Now, I had been drinking a lot and it was a long wee and unfortunately I couldn't stop weeing. So I kept on weeing and he got his penis out and he was watching me have a wee and he was playing with himself. At that point, I finished the wee and just as I was getting up, my sister who is his wife came out and saw him looking at me and she basically scolded*

me and said something like I was a very dirty girl. What on earth was I doing? And she said to him what did he think he was doing and I don't remember what he replied but all I remember is feeling very scared and I pulled my pants up very quickly as I could and as I left the shed, my sister grabbed me by the arm and called me a -- is it all right to say what she said exactly? She called me a dirty bitch and slapped me across the face. And then she went on to say that if I went inside -- that I shouldn't anything and if I went inside and said anything, you know, that I would be to blame and I would be sent away.

7. The complainant testified that the arrangement upon their mother going to England was that the complainant's sister M, and her husband the appellant, would move in to the family cottage, together with their two children, to take care of the complainant there. The evidence was somewhat equivocal as to what were to be the care arrangements in respect of the complainant's two brothers, who were also still living in the family home. According to the complainant the brothers and the appellant did not get on, and after the mother had left the appellant would not allow them to continue to reside in the family home. We will return to this aspect of the evidence later in this judgment as it has a relevance to an issue raised on this appeal.

8. Before doing so however, and to maintain the chronology in which matters unfolded at the trial in so far as possible, it is necessary to refer to the fact that the complainant gave the following further evidence at a relatively early stage of her evidence in chief:

PROSECUTING COUNSEL: Q. Now, can you tell the jury what happened to you when you were left in the home with [T O'B] *and your elder sister?*

A. When my mother left you mean?

Q. Yes?

A. Yes. Well, the abuse continued when my mother left. You know he was -- [T O'B] *was and I believe still is an alcoholic and when my mother left, I was obviously in the sole care of my sister* [M] *and her husband. And I witnessed many times violent*

Q. Well --

A. -- *incidents* --

Q. We're just dealing with that happened to you?

A. Mm.

Q. If you can just concentrate on that as far as --

A. Well, okay.

Q. As far as you were concerned, as a young girl --

DEFENCE COUNSEL: Just at this stage an issue arises.

9. The jury were sent out at this point and in the absence of the jury defence counsel applied unsuccessfully for a discharge of the jury on the grounds that the witness had given inadmissible evidence of misconduct by the accused other than that charged, namely that the complainant had portrayed the accused as someone who was an alcoholic and a violent alcoholic.

10. The nature and circumstances of the indecent assaults described by the complainant in her evidence as having been perpetrated on her by the appellant are uncontroversial in the context of this appeal. However, in summary she gave evidence of the appellant groping her, of him putting his hand inside her pants, of him touching her genitals, of him digitally penetrating her vagina, of him taking out his penis and making the appellant touch his penis, and of him attempting to get the complainant to take his penis in her mouth.

11. The complainant had given evidence that M and the appellant shared the downstairs front bedroom in the family cottage and that originally she used to sleep downstairs in a back bedroom behind theirs but later moved to sleeping in the loft with her niece and nephew (i.e.,

the appellant and M's two children). She was cross-examined by defence counsel at some length concerning the sleeping arrangements and was asked, *"-- what was the logic of you moving upstairs and leaving a free room in the house, if you get me, and you moving in with your nephew and niece upstairs, causing even more disruption?"* This gave rise to the following reply and ensuing exchanges:

> *A. Well, as a child my Mum had left the house. So, now my sister and her husband had come to live in the house and my mother had given my sister -- well, she'd put me in her charge. Okay? So, let me tell you this. As I child I remember that everything changed. Everything. Because it wasn't all about me anymore. Do you know what I mean? Because most of the time it was just me and my Mum, because my Dad was sick or when he'd passed away. My brothers were -- yes, they were entitled to stay at the house because it was their home but they very rarely did. So, then all of a sudden my Mum went and my sister and her husband have taken over the whole cottage and everything and my sister, to be honest with you, didn't really care for me and I didn't know why. She just didn't.*
>
> *Q. JUDGE: Now, the thrust of the question I think was to do with your brothers. So, can you tell us about them?*
>
> *Q. DEFENCE COUNSEL: Yes. I don't really understand how that answers my question and I think that's what the judge is saying to you?*
>
> *A. But what are you saying exactly?*
>
> *Q. What I'm saying is if you moved up to the loft, all right, with your niece and nephew?*
>
> *A. I was either told to go up there because they were up there -- you see, my niece and nephew, they loved me, they did and I loved them and because they saw me as like -- I suppose they saw me as a big sister and I suppose they wanted me to sleep*

up there. So, before I had the option of picking where I wanted to sleep myself, I think they sort of, like, said, "Sleep up there with me" you know, that sort of thing. "Sleep up there with us."

Q. JUDGE: I think, Mrs [complainant's name], *what we -- as regards the first question but what happened your brothers after your mother left for England?*

A. Well, unfortunately when my mother left for England, then my sister and her husband moved into the house and then that was when everything changed, like I said, and that unfortunately meant that my brothers were no longer welcome there.

Q. DEFENCE COUNSEL: Well, maybe we'll get on to that in a bit but it doesn't mean they had disappeared, if you understand me. They still had to stay somewhere and they were --

A. They were living rough. They were living like feral children. They were, honest to god.

Q. Okay. Did you see them from time to time?

A. Do you know, when my sister and her husband moved into the house, right, during the day on odd occasions they'd turn up for something to eat, like stray cats, and my sister, right, would make them a quick sandwich and a cup of tea and she'd tell them that they couldn't stay any longer. They weren't allowed to stay in the house anymore and that [T] *wouldn't -- doesn't want them around and they had to go. So, they knew that* [T O'B] *didn't want them there and they never came anywhere near the house when he was anywhere near the house or in the house. They waited to see that he was away before they ever approached the house for a sandwich or a meal.*

Q. And the back room wasn't their room at all according to you?

A. I don't know what -- I don't know. What do you mean?

Q. Well --

A. They were never allowed to stay in the blooming -- sorry. They were never allowed to stay in the house, in their own family home, ever again as soon as [T O'B] *moved in.*

Q. Okay. So, there was a spare room in the house which was your room and you moved up to the loft?

A. I remember sleeping in the loft room with my two little -- yes, niece and nephew and there was obviously a spare room and I can tell you that spare room was used a lot by my sister.

Q. Okay. Well, just in relation to -- what I'm suggesting to you is that the boys were actually sleeping in the back room?

A. When?

Q. When your sister moved into the house?

A. No, she wasn't -- they weren't. They were never in the house ever again to sleep.

Q. Well, they were

A. Never. Never slept again in that house.

Q. Okay?

A. Do you know what, they turned up at the house once -- once, right? And he saw them and unfortunately it was late at night, okay, and he had his friend with him.

Q. Well, just --

A. No. No. You wanted me to tell you why they weren't allowed in the house and why they weren't sleeping there.

Q. Okay?

A. He tried to kill them.

DEFENCE COUNSEL: I just wonder. An issue arises at this stage, Judge.

12. At this point, defence counsel applied unsuccessfully for the jury to be discharged on the basis that the jury had heard yet further inadmissible evidence of misconduct not charged, namely evidence of what is characterised in the appellant's written submissions to this court as the "attempted murder" of the complainant's two brothers by the appellant.

Amendments to the indictment, and the relevant dates

13. The prosecution having closed its case, there was an application by prosecuting counsel to amend the dates pleaded on counts no's 3, 4, 5, 6, 7 & 8 inclusive. As already alluded to, Count No 3 as originally pleaded had bracketed the offending covered by that charge as occurring between the 11th day of April 1975 and the 30th of June 1975. The prosecution sought, and were allowed, to amend those dates to between the 1st of January 1976 and the 31st of March 1976, with consequential amendments then also being required and allowed to counts no's 4, 5, 6, 7 and 8 to provide for successive three month periods. Accordingly, the bracketed dates as amended became:

Count No 3: 1st of January 1976 to the 31st of March 1976

Count No 4: 1st of April 1976 to the 30th of June 1976

Count No 5: 1St of July 1976 to the 30th of September 1976

Count No 6: 1st of October 1976 to the 31st of December 1977

Count No 7: 1st of January 1977 to the 31st of March 1977

Count No 8: 1st of April 1977 to the 30th of June 1977

14. There was no amendment to the dates bracketed in counts no's 1 and 2

15. Having regard to the complainant's date of birth as provided in evidence the offences covered by the eight counts in question, taking account of the amended dates, can now be said to have occurred when she was between 6 and 9½ years of age.

Grounds of Appeal

16. There are three grounds of appeal, namely:

1) The trial judge erred in law and in fact in admitting background evidence on the basis of *McNeill* jurisprudence.
2) The trial judge erred in law and in fact in refusing to discharge the jury upon receipt of misconduct and bad character evidence in relation to the Appellant.
3) The trial judge erred in law and in fact in acceding to an application, at the close of the Prosecution case, to amend Counts 3 - 8 of the indictment exclusively.

Ground of Appeal No 1.

17. This ground of appeal relates to the trial judge's refusal to rule the proposed evidence concerning what had happened at the christening in the other house when the complainant was aged approximately 4 years to be inadmissible.

18. The prosecution had argued that the controversial proposed evidence should be admitted as relevant and necessary background material to give context to, and render coherent, evidence concerning the later physical abuses of the complainant said to have been perpetrated by the appellant. In that regard, the prosecution had called in aid the Supreme Court's decision in *The People (Director of Public Prosecutions) v McNeill* [2011] 2 I.R. 669 as supporting their case that evidence adduced for such purposes could be lawfully admitted.

19. The prosecution did not contend that the complainant's evidence concerning the abuses charged would be incomprehensible without this evidence but made the case that what had happened to the complainant as a little girl when she was 4 years old was the beginning of a grooming situation, a matter that required to be appreciated by the jury. The accused's conduct involving the complainant at the christening was said to be capable of conveying the impression to her that this type of behaviour in the presence of a child was normal, and whereby she would not thereafter see sexualised behaviour from the accused towards her as

particularly wrong or out of place, and would be more likely to go along with his suggestions, as she appears to have done.

20. Moreover, it was said that in terms of a factual narrative the events which occurred at the christening when the complainant was approximately 4 years old were very much part of her full story. This was a shocking and distressing incident that stood out in her memory as a starting point. No assault took place at that time. What occurred was that she was urinating when T O'B came out to the shed, looked inside and moved inside the door of the shed to masturbate as he watched her on the toilet. The result of this being seen by another adult was that the complainant was called *a dirty bitch* and was slapped across the face and told that if she said anything that she would be to blame and would be sent away.

21. This, it was submitted, was very much the start of incidents in the narrative of the complainant which progressed to the physical sexual abuse alleged in the indictment against the appellant.

22. The prosecution was adamant that their application to admit this evidence was not based upon, nor could it have been based upon, any general propensity to commit offences on the part of the accused but that it did go to the start of the grooming relationship and his interest in this particular child.

23. In response, defence counsel argued, and re-iterates before us, that the prior misconduct at the christening does not fall within the grounds defined in *McNeill* for admission of background evidence. Counsel refers with specificity to the judgement of Denham J in *McNeill* and contends that the learned Supreme Court judge identified relevant considerations when determining whether to admit background evidence, to include:-

> *"(i) consideration of whether the background evidence is relevant to the offence charged;*
>
> *(ii) consideration of whether background evidence is necessary to make the evidence*

before the jury complete, comprehensible, or coherent. Whether without such evidence the evidence may be incomplete, incomprehensible or incoherent;

(iii) consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself a ground for excluding the evidence;

(iv) consideration of whether the background evidence may be necessary to show the real relationship between persons".

24. She points out that the judgment further stated that:-

"The test to be applied by the court in considering whether background evidence should be admitted was, whether the evidence was relevant and necessary. The test was not that it would merely be helpful to the prosecution to admit the evidence".

25. Further, the Supreme Court held the evidence in that case was not wrongly admitted as it was relevant and necessary to explain the relationship between the complainant and the appellant and rendered comprehensible the actions of the complainant.

26. We are asked to note that Mr. Justice O'Donnell J stated, inter alia, that: -

"It was being admitted as it was an intrinsic part of the story necessary to understand the circumstances in which the complainant said she was abused over a protracted period by the accused".

27. Moreover, Mr. Justice O'Donnell J had further explained that: -

"It was not a valid objection to the evidence in the case that it post-dated the first offence. The evidence was adduced as background to, and establishing habit, repetition and conditioning in respect of, the subsequent offences".

28. Counsel also draws our attention to the fact that, referring to the decision in *R v W* [2003] EWCA Crim 3024, which had addressed how a jury should be charged a jury in the event of background evidence being admitted, Denham J had cautioned: -

"This is a clear warning to a jury of the nature of the evidence of the incidents in issue, of the admission to make the account complete and comprehensible, and to explain the "grooming" of the young person. The warning describes the relevance of background evidence to explain the coercion and manipulative relationship. It is a useful precedent"

29. Defence counsel submitted, and again submits, that having regard to jurisprudence enunciated in *McNeill*, it could not be said, regarding the appellant's trial, that the jury would have been given a false or misleading impression by hearing only that the events charged on on the indictment had taken place. Neither could it be plausibly contended that the admission of the controversial proposed evidence, as background evidence, was necessary to put the jury in the general picture about the characters involved and the run up to the alleged offence. The proposed evidence was neither connected in time, place nor circumstances to the facts alleged.

30. The trial judge had ruled on the application as follows:

"JUDGE: Well, I have often said that juries make the best decisions on the basis of evidence that is relatively complete and not on the basis of evidence where many matters that are relevant are lacking. The State case here is that there was grooming from a very early age of this child by the accused. It is certainly true that the matter complained of here is not the subject of a criminal charge and it is certainly true that it is not exactly the same as the matters that are the subject of the nine counts in the indictment, but we're dealing here with a child who was, as I understand it, around about her fourth birthday and the State case is that this was something which was grooming to the extent that she would not find sexualised behaviour on the part of this adult unusual, something that when she was at an age where she was simply not in a

position to make moral decisions about conduct. And it seems to me for that reason to be necessary.

And that is one of the matters referred to in the test at paragraph 50 of the judgment of Mrs Justice Denham wherein she refers to evidence being necessary to make the evidence before the jury complete. It is of course not necessary to make it comprehensible or coherent but those matters are used -- those tests are used disjunctively. Another test that she refers to is consideration of whether the background evidence may be necessary to show the real relationship between the relevant parties. I am bearing in mind the sample direction as it were from R v. W which was approved by Mrs Justice Denham in the McNeill decision and I'm having regard to what she said, having set out what that passage was. She said, "This is a clear warning to a jury of the nature of the evidence of the incidents in issue, of the admission to make the account complete and comprehensible and to explain the grooming of the young person. The warning describes the relevance of the background evidence to explain the coercion and manipulative relationship. It is a useful precedent."

So I'm also aware that there is evidence which might be viewed by the jury as corroborative in relation to this incident. I take your point, I note the point rather, made by [Defence Counsel] *in relation to that, that it is not necessarily in all the circumstances fully corroborative and the jury will hear that evidence and make their own decision on it but it is certainly capable of being fully corroborative in relation to that so I deem this proposed evidence admissible."*

31. Counsel for the appellant maintains that the arguments and reasons put forward by the trial judge for the introduction of the material in controversy as background evidence, does not meet the threshold prescribed by the Supreme Court in *McNeill* regarding the admissibility of misconduct evidence. She says that while the trial judge found that the evidence was necessary to demonstrate the unusual relationship between the complainant and the appellant the trial judge's reasons do not withstand rigorous scrutiny or analysis. Adducing evidence of an altogether different nature to the allegations to be tried, occurring two years earlier, in an entirely different familial backdrop, neither established *"habit, repetition or conditioning in respect of the offences"* nor could it be deemed *"an intrinsic part of the story necessary to understand the circumstances in which the complainant said she was abused over a protracted period"* . Without the proposed evidence, the jury could not have had any lack of understanding of the true relationship between the parties.

32. Moreover, counsel has submitted, the evidence in question does not constitute grooming in the usual or stereotypical way, by virtue of being an isolated incident as opposed to an ongoing coercive, manipulative and unusual relationship between an adult and a young child in the period before alleged abuse.

33. We have reflected carefully on the arguments advanced by both sides and have concluded that the trial judge was correct to admit the evidence on the basis of the *McNeill* jurisprudence. In our judgment a jury could reasonably view the reprehensible incident at issue as gateway conduct by means of which the appellant endeavoured to sexualise a very young child who would have had no concept of sexual mores and concerning what was or was not normal or acceptable in that regard. The jury could regard it as an attempt to normalise for the complainant sexual conduct in her presence, and potentially involving her. Moreover, it is evidence, not of a general propensity towards child abuse, but of an unhealthy interest in this particular child and of a grooming of her in that context. It was therefore an

intrinsic part of the story and in so far as this evidence potentially establishes grooming or conditioning of a child who it is claimed was later sexually abused by the person who so groomed or conditioned her, it is was both relevant and necessary evidence to put before the jury so that they might have the complete picture.

34. In the circumstances we dismiss ground of appeal no 1.

Ground of Appeal No 2

35. There are two facets to this ground of appeal. The first relates to the trial judge's refusal to discharge the jury in response to the complainant's characterisation of the appellant as being alcoholic and violent. The second relates to to the trial judge's refusal to discharge the jury in response to the complainant's assertion that the appellant had tried to kill her brothers. We will address each separately.

The characterisation of the appellant as alcoholic and violent

36. Defence counsel maintains that this evidence had the potential to undermine and/or diminish the appellant's presumed innocence. She maintains that it was incurably prejudicial and that the jury should have been discharged. She says that no warning to the jury could cure the harmful impact of the jury learning that, at the relevant time, the appellant was a violent alcoholic, committing acts of violence within his home where the sexual abuse is alleged to have occurred.

37. Further, counsel submitted, the context in which the prejudicial evidence arose was in direct response to a question from the respondent prosecutor, requesting particulars of what happened the complainant when she was left in the home with the appellant. Far from being a throw away remark, the prejudicial evidence had the appearance of being an intrinsic component of the story and true character of the persons involved.

38. The application for a discharge was opposed on the grounds that any prejudice arising from the evidence in question could be addressed by warnings and directions to the jury from

the trial judge. Prosecuting counsel agreed that it was regrettable that this evidence had been heard by the jury but he argued that it did not merit resorting to the "nuclear option" of discharging the jury.

39. The trial judge agreed, stating:

" JUDGE: Well, the discharge of a jury, the Higher Courts have said many times, is something that should only be should ever come about in quite exceptional circumstances and this does not meet that criterion in my view. It is regrettable most certainly and I propose to tell the jury that they should put out of their mind what they heard in relation to Mr [T O'B] *from the lips of the witness in relation to what she said, in relation first of all to Mr* [T O'B]*'s relationship to alcohol and secondly, what she said in relation to scenes of violence. I'm not quite sure that she said that she equated Mr* [T O'B] *with those scenes of violence but certainly that matter was left hanging there but in the Z case, the Supreme Court, a unanimous Supreme Court of five, did say and this is something that has been followed many times since after probably the greatest media furore that has ever taken place in this State, did say that jurors can be expected to take proper directions and to act on those to overcome the sort of prejudice that might arise from hearing extraneous matters. So I propose I rule against you, Ms* [Defence Counsel], *but I will say to the jury -- I will speak to the jury briefly when they come back out.*

40. When the jury returned, the trial judge addressed the jury, stating:

"JUDGE: Ladies and gentlemen. Yes, the jury have a number of questions. I'll deal with those in a moment, Mr Foreman, ladies and gentlemen. First of all, you heard something from the witness just before we broke there in relation to the accused man and his relationship to alcohol and you heard reference to scenes of violence. You must put matters like that out of your minds completely. We're dealing here with very

specific matters and you have quite enough on your plate to deal with those. I would ask you not to be in any way influenced by what you heard in relation to that and to concentrate very much on the nine counts that are on the indictment here and on those only. I see you nodding."

41. The case made on this appeal is that the manner in which the trial judge dealt with the issue was inadequate and insufficient. We have no hesitation in rejecting that argument. We consider that the trial judge dealt with the issue entirely correctly, and that on no view of it would a discharge of the jury have been justified. While counsel for the appellant has asserted that the prejudice was irremediable, we regard that as hyperbole in the circumstances of the case. It was entirely remediable and was properly remediated by the trial judge's instructions to the jury.

42. In the circumstances we have no hesitation in rejecting this facet of the complaint embraced in ground of appeal no 2.

The evidence that the appellant had tried to kill the complainant's brothers

43. In relation to this facet to the complaint, defence counsel had applied again for a discharge of the jury in the following terms:

"DEFENCE COUNSEL: Yes, Judge. The witness has just said that my client tried to kill her brothers. Now, I acknowledge that I was pursuing the topic of the presence of the boys in the room but in my respectful submission to the Court the answer that the witness gave did not match or really flow from that particular question in relation to what was happening in the house. It simply could be left at they weren't welcome at the house or something of that nature and I say this in circumstances where we already had the reference yesterday to violence in relation to my client and an issue arose in respect of it. So, in my respectful submission to the Court the witness was told at that stage, because I specifically suggested to [prosecuting counsel]*that he*

speak to the witness in relation to violence in the house and seeing matters of violence. So, she knew the parameters of the evidence she was giving. So, in my respectful submission to the Court again is suggesting (sic) *it is a step too far and in those circumstances I'm asking the Court to discharge the jury."*

44. The trial judge said that he did not need to hear from prosecuting counsel and ruled:

"JUDGE : … The answer arose out of cross-examination. There was persistent -- there was persistent questioning of the witness in relation to the boys and presumably on the basis that the boys were still living in the house and the witness repeatedly denied that that was so and as I say this answer did not arise from examination-in-chief. It arose from cross-examination. Now, it of course paints the accused man in a bad light but this is a case where he is being accused of very serious offences, offences that are viewed indeed more seriously than crimes of violence by society as a whole and that being so it's appropriate. Now, having said that I would of course ask [defence counsel] *to bear that in mind with regard to questioning such as this but again I'd ask* [prosecuting counsel] *to have a brief word with the witness to ensure that there's no further reference to violence or the matter that arose yesterday, the relationship* [T O'B] *has with alcohol."*

45. Once again, we have no hesitation in ruling that the trial judge dealt with this issue correctly and indeed impeccably. While the trial judge felt it unnecessary to hear from prosecuting counsel, we note that in his submissions on this appeal prosecution counsel suggests that it is of some significance that the words *he tried to kill them* could refer to a heavy hiding rather than attempted murder. Prosecuting counsel says that the DPP does not accept that it amounted to an allegation of attempted murder. The precise meaning of the phrase in the context in which it was uttered was not pursued by either party. It is said that the prosecution did not pursue it in re-examination because it did not form part of the prosecution

case. Equally, it is surmised that the defence did not pursue what was meant by the words used because presumably they did not want to emphasise the unexpected evidence. No evidence was given, nor were any questions asked, concerning any actual injuries sustained and it was submitted that to suggest that the jury would literally interpret the words spoken as describing an actual attempted murder was not merited. We think that these points are well made.

46. As we have said many times, the necessity to discharge a jury because some prejudicial evidence has gone before the jury will be rare. Juries can be trusted to follow instructions and directions given to them by the trial judge. What occurred in this instance was manifestly capable of being addressed by appropriate interventions by the trial judge. The trial judge had already told this jury to put suggestions that the accused was violent out of their minds. After the trial judge had indicated that he was not disposed to discharge the jury on account of the reference to *"he tried to kill them"*, there was no request by either side that this earlier instruction should be specifically re-iterated. We are in no doubt that the trial judge dealt with the issue appropriately.

47. In the circumstances we have no hesitation in also rejecting this facet of the complaint embraced in ground of appeal no 2.

48. We are not therefore disposed to uphold ground of appeal no 2.

Ground of Appeal No 3

49. This ground comprises a complaint that the trial judge erred in law and in fact in acceding to an application, at the close of the prosecution case, to amend Counts 3 - 8 of the indictment.

50. We have considered the circumstances in which the amendments were made as disclosed by the transcript. There was no specific prejudice to the appellant. The complainant's core account concerning what she said happened to her did not depend on

dates. The amendments in no way prejudiced the appellant's ability to defend the case. It also has to be born in mind that the complainant was seeking as an adult to recall and give evidence concerning events that had happened when she was just a young child and it was entirely reasonable that there might be some uncertainty as to dates. She was unshaken however in relation to her core allegations concerning the abuses that she maintained had been perpetrated upon her by the appellant. We are satisfied that it was appropriate for the trial judge to accede to the prosecution's application to amend the indictment, and that he was not in error in doing.

51. In the circumstances we also reject ground of appeal no 3.

Conclusion

52. The appeal must be dismissed.