THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[30/21]

Neutral Citation Number: [2021] IECA 238

The President

Edwards J

Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOROF PUBLIC PROSECUTIONS

RESPONDENT

AND

FN

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 25th day of August 2021 by Birmingham P.

1. On 22nd December 2020, the appellant was convicted in the Central Criminal Court of the offence of sexual assault. Thereafter, on 29th January 2021, he was directed to undergo a period of probation supervision. The appellant had stood trial charged with two offences: (i) an allegation of rape contrary to s. 4 of the Criminal Law (Rape) Amendment Act 1990 (as amended) of a four-year old boy ('X') in respect of which the jury disagreed, and (ii) a count of sexual assault, on which a conviction was recorded and which is now the focus of this appeal, where the assault was alleged to have been committed against a six-year old boy ('Y') who is the older brother of X, the complainant in the first count. The sexual assault aspect involving Y concerned an allegation that the appellant, a 14-year old boy at the time of the alleged incident, was guilty of sexual assault where the allegation was that he had slapped a

six-year old boy on his bare buttocks up to nine times, having taken down the boy's pants and underpants.

2. The grounds of appeal are as follows:

(i) That the trial judge erred in law and in fact in refusing the application on behalf of the accused for an order dismissing count 2, being the charge of sexual assault, on the basis that there was not a sufficient case to put the accused on trial for the said charge;

(ii) That the trial judge erred in law and in fact in permitting the complainant to view a DVD of an interview with him in circumstances where there had been a significant delay of some 20 months between the making of the recording and the playing of it prior to trial;

(iii) That the trial judge erred in law and in fact in permitting the playing of a DVD of an interview as the direct evidence of the complainant in circumstances where there had been a significant delay of some 20 months between the making of the recording and the playing of it at trial;

(iv) That the trial judge erred in law and in fact in determining that the complainant was capable of giving an intelligent account and therefore giving evidence at the trial;

(v) That the trial judge erred in law and in fact in refusing to halt the trial of the accused in relation to the charge of sexual assault on Y due to prosecution delay in progressing matters;

(vi) That the trial judge erred in law and in fact in refusing to grant the application for a direction made on behalf of the accused in relation to the charge of sexual assault, given the evidence on the charge, and in particular,

where it was accepted that there was no evidence of any sexual motive or indecent intent on the part of the accused; and

(vii) That the trial judge erred in law and in fact in refusing to give a corroboration warning to the jury in relation to the charge of sexual assault.

3. Grounds (i) and (vi) are linked, and essentially, the point made is that there was no specific evidence as to the motive of the accused in doing what he did. It is said that the actions are as consistent with chastisement as with an assault motivated by indecency. In response, the Director says that the actions in question, which involved taking down pants and underpants and then striking the complainant, had been seen and should be seen by right-thinking people as indecent assault

4. So far as the issue about permitting the complainant to view the DVD is concerned, the argument advanced is that the delay between the recording of the interview and the playing of the interview was very considerable and the concern had to be that, as a result, the complainant would give evidence, not by reference to what he remembered of the incident, but by what he recalled watching on the video. It is argued that this rendered an effective cross-examination impossible. On behalf of the Director, it is said that in the ordinary way, any witness is entitled to refresh their memory before trial and to read the statement that they had made. Permitting the complainant in this case to view the video was simply to afford him equality of treatment with every other witness. In the course of the appeal hearing, this ground of appeal was, in effect, subsumed into the delay grounds.

5. In relation to the delay argument, which is at the heart of a number of the grounds of appeal, the Director says that the delay was not such as to require the halting of the trial. the Director was prepared to acknowledge that depending on how any cross-examination at trial progressed, it was not impossible that it might become an issue at that stage. However, in fact, there was no cross-examination, and so the question of halting the trial did not arise.

6. So far as the corroboration warning is concerned, the Director says that there was nothing in the case to oust the general discretion of the trial judge and to give rise to a situation where there was only one way in which a discretion could be properly exercised, that being by giving a corroboration warning. In fact, there was nothing in the case to raise doubts about the complainant as a witness. However, in the heel of the hunt, the ground of appeal relating to the absence of a corroboration warning was not pursued.

7. In essence, therefore, on the hearing of this appeal, there were only two grounds pursued: whether and in what circumstances motive can become relevant, in particular whether motive is relevant where there is any ambivalence as to the nature of the activity engaged in; and the second ground relating to the delay in the prosecution of the case. It is not said that the delay was exceptionally lengthy if viewed in isolation, but it is said that the delay is very significant indeed when the complainants are very young, and in this case, it is said that there was a further element in that not only were the two complainants very young, but the complaints were being made against a minor.

Background

8. To put the grounds of appeal in context, it should be explained that the appellant is now 16 years of age. He was 14 years of age at the time of his alleged offences and his arrest in respect of them. The complainant, Y, was six years of age at the time of the alleged offence and was a child of eight years at the time of the trial. The appellant and complainant are neighbours.

9. The mother of the complainant ('Mrs. Z') gave evidence at trial that on 14th April 2019, her son had disclosed to her that the appellant had "hurt" him the previous evening. Mrs. Z contacted An Garda Síochána on 15th April 2019, and on the following day, the complainant attended a Sexual Assault Treatment Unit with his mother, but he refused to be

fully medically examined. On 24th April 2019, specialist child interviewers conducted what was described as a clarification meeting with Y and his parents at their home. Then, on 1st May 2019, Y was interviewed in a specialist interview suite. In the course of the interview, Y provided a narrative that the accused was directing him to go, first, one way, and then another way, and that he (the complainant) was confused. He told of how the accused pulled down the complainant's trousers and pants and smacked him on the 'bum' with his open hand nine times. In the course of the interview, the complainant also made reference to an occasion when he and the appellant were playing, or fighting with sticks, playing 'the little Star Wars'. It appears that having viewed the interview, the investigating member, Detective Carol Quinn, felt that a further interview should be conducted, but the mother of the complainant was not agreeable to this suggestion.

10. On 25th June 2019, the appellant was arrested at his home on suspicion of having committed the offence of rape on 14th April 2019 and the offence of sexual assault on 13th April 2019. He was brought to a Garda station where he was interviewed in the presence of his father and a solicitor and exercised his right to silence.

11. In April 2020, the appellant was charged with the two offences and he was returned for trial approximately a month later on 27th May 2020. The matter was given priority in the Central Criminal Court and a trial date was fixed for 7th December 2020.

12. At the start of the trial, there was an application made pursuant to s. 4E of the Criminal Procedure Act 1967 (as amended) to have the charge of sexual assault that the accused was facing dismissed. In advance of this application, the defence requested that the prosecution should particularise the indictment in respect of the charge of sexual assault. This was done and the particulars provided were that the sexual assault was committed by "smacking his bare bottom with your hand".

13. In the course of the application, the defence pointed to the fact that the accused was 14 years of age at the time of the alleged offence while the complainant was six years old, and drew attention to the fact that the interview had mentioned the two boys playing together and engaging in play fighting, including fighting with sticks. It was pointed out that the smacking occurred in circumstances where the complainant's account was that he was being directed to "go" one way, and then another way. On behalf of the defence, it was argued that there was no suggestion whatever of any sexual connotation or sexual gratification in what had occurred.

14. The prosecution argued that the nature of the incident was a matter for the jury to decide upon. The judge ruled on the matter as follows:

> "If admitted and accepted by the jury, the proposed evidence discloses that when the complainant was six years old and he was 14 years old the accused partook in an incident in a field in which he pulled down the complainant's trousers and underpants, then pushed him on to his stomach on to the ground whereupon he used his hand to repeatedly slap the complainant on his bare buttocks.
>
> The application made to the Court is by its nature a pretrial application which is not concerned with credibility but only with the sufficiency of the case so disclosed. The legal test to be applied is set out with admirable concision by Professor O'Malley at paragraph 4.16 of his leading textbook on sexual offences second edition where he states that the question is, 'Always whether the circumstances (of the assault) when objectively viewed were indecent.'
>
> The test to be applied therefore is an objective test as to the presence or absence of circumstances that would render the assault a sexual assault. It follows from this, as is

pointed out by Professor O'Malley, that there is no requirement to prove the presence of sexual desire or sexual gratification on the part of the defendant. Taken at its highest the proposed evidence upon which the prosecution relies discloses not merely an assault but also antecedent and surrounding circumstances which include the removal of clothing that covered the complainant's intimate parts, the exposure thereby of those intimate parts and the inappropriate touching thereafter of the buttocks so exposed. I am satisfied that the attendant circumstances of the alleged assault, when objectively viewed, were such as to render it a sexual assault. Being satisfied as to the sufficiency of the prosecution case, I will refuse the application."

15. Later in the trial, following the closing of the prosecution case, the issues that had first been canvassed in the context of the s. 4E application were rehearsed once more in the context of an application for a directed acquittal. At this point, counsel for the defence drew attention to the fact that the mother of the complainant had described the accused as immature for his age and more like a nine or ten-year-old child. It was submitted that this immaturity went to the motive of the accused in a case where it was suggested there was ambiguity as to whether the assault was in fact indecent or served an indecent purpose.

16. In exchanges between counsel for the defence and the trial judge, the judge made reference to the fact that the pulling down of the trousers and underpants would have exposed genitalia and the buttocks area. Counsel for the defence contended that there was no evidence to suggest that the complainant's genitalia were exposed and pointed out that the complainant was in fact lying down on his stomach.

The Present Appeal

17. The appellant has drawn attention to the commentary in Thomas O'Malley, *Sexual Offences*, 2nd Ed., (Round Hall, 2013) at para. 4–16, where it is stated:

> "Motive may sometimes be relevant when deciding whether the circumstances surrounding an assault were such as to render it a sexual assault. Some assaults are so obviously indecent because of their overtly sexual nature or connotations that no ambiguity arises. A person who deliberately touches the sexual organs of another without that other's consent clearly commits a sexual assault. At the other end of the spectrum a person who commits an assault with no obvious sexual connotation is not guilty of indecent assault even if the act was performed for purpose of sexual gratification." (footnotes omitted)

The appellant also refers to the case of *R v. George* [1956] Crim. L.R. 52., cited by Professor O'Malley, which involved a situation where the accused had, on a number of occasions, removed the shoe of a young girl. He admitted that he did so for sexual gratification, but the trial judge ruled that the circumstances of the activity were not, by any reasonable standards, indecent, and that therefore no indecent assault had been committed. To the like effect was the case of *R v. Thomas* [1985] 81 Cr. App. R. 331, where the defendant was alleged to have touched the edge of a girl's skirt and rubbed it. The prosecution saw it as a 'borderline' case, but the Court of Appeal was of the view that even if there was an assault, it was not objectively indecent.

18. Professor O'Malley comments (at para. 4–16):

> "The question is always whether the circumstances, objectively viewed, were indecent. To cite a well-worn example, a man who forcibly stripped a woman of her clothes in public would be guilty of indecent assault even though his motive might have been revenge or merely a desire to embarrass her. Motive becomes relevant when there is some ambiguity as to whether the circumstances should be regarded as indecent. This is most likely to happen where one person applies force or inflicts

some violence on another in circumstances which suggest more than one possible explanation for the act."

19. The appellant places particular reliance on the decision of the House of Lords in the case of *R v. Court* [1989] A.C. 28. That was a case where the accused struck a 12-year old girl several times on the buttocks outside her shorts. When asked why he had done so by police, he replied, "I don't know – buttock fetish". The House of Lords took the view that on a charge of indecent assault, the prosecution must prove that the accused intentionally assaulted the victim and also that he intended to commit an assault which right-minded people would consider indecent. Commenting on this, Professor O'Malley says that:

> "For the purpose of establishing the latter element—intention to commit an *indecent* assault—evidence of motive is admissible. This, of course, might operate to the benefit as well as the detriment of a defendant in a case where the outward act was motivated by something other than an indecent purpose."

The appellant says that seeking to apply the principles that emerge from *R v. Court* to the present case, what is clear was that there was no direct evidence as to the motive of the accused, and that indeed, prosecution counsel had conceded as much in response to a query from the trial judge. It was said that the context in which the slapping took place – *i.e.,* after the accused had been giving directions to the complainant to go one way and then another, which directions had not been followed – was consistent with chastisement. The appellant says that one cannot lose sight of the fact that the slapping incident took place in the context of a history of sham-fighting between the complainant and the accused.

20. In the course of his ruling, the trial judge felt that the case of *R v. Court* was distinguishable on the basis that in that case, the slaps had occurred over clothing. Indeed, it is clear that the trial judge was significantly influenced by the removal of both outer clothing and underwear.

21. In this Court's view, the trial judge was correct in taking the view that the appropriate legal test to be applied was whether or not the circumstances of the assault, when objectively viewed, were indecent. If the situation were otherwise, the stripping of a woman by way of revenge or to embarrass would not be an indecent assault. That is not to say that motive is irrelevant, but in most cases – and this was one – there will be no direct evidence of motive. Insofar as motive is a consideration, it is a matter to be inferred from the state of the evidence. It seems to us that factors which have to be considered include the fact that physical chastisement (the alternative explanation offered) is not a normal and accepted part of life in Ireland in 2020/2021. Insofar as it was an issue that was canvassed, the appellant was never in *loco parentis* and never someone who could have lawfully administered chastisement, even when the concept of lawful chastisement formed part of our law. Furthermore, the complainant had never done anything which could ever have merited chastisement. We do accept that the appellant's youth at the time was relevant, as was the history of sham-fighting, but it seems to us that, in the round, these were all matters to be considered by a jury and were not such as to demand the withdrawal of the case from the jury, either by way of a s. 4E application or by way of a directed acquittal. In the circumstances, we will dismiss this ground of appeal.

22. At trial, and again before this Court, the appellant referred to a number of English authorities relating to delay in cases involving very young complainants. In the case of *R v. Powell* [2006] EWCA Crim. 3, the complainant was three and a half years of age at the time of the offence. The specialist interview of the child took place nine weeks after the date of the alleged offence and the trial took place some seven months later. In the Court of Appeal, Baker LJ commented (at para. 41):

> "41. Explanations can be found for each element of the delay in this case. However the plain fact is that where a case depends on the evidence of a very young child it is

absolutely essential (a) that the ABE interview takes place very soon after the event and (b) that the trial (at which the child has to be cross-examined) takes place very soon thereafter. As the expert evidence in this case showed, very young children simply do not have the ability to lay down memory in a manner comparable to adults. Looking at this case with hindsight, it was completely unacceptable that the appellant should have been tried for an offence proof of which relied on the evidence of a 31/2 year old when the trial did not take place until over nine months had passed from the date of the alleged offence. Special efforts must be made to fast-track cases of this kind and it is simply not an option to wait weeks for example for forensic evidence to become available."

23. In *R .v Malicki* [2009] EWCA Crim. 365, the complainant was four years and eight months of age at the time of the alleged offence. On this occasion, the complainant was actually interviewed the day after the alleged offence. However, the trial did not commence until fourteen months later. The Court of Appeal saw this as "serious delay". Richards LJ made the following observations (at para. 18):

"18. We share the concerns expressed in that passage. The complainant in the present case was a year and a half or so older than the complainant in Powell , but she was still very young. The video interview in the present case was prompt, but the overall delay until trial was much greater. The problem in such a case as it seems to us is twofold: first, the risk that a child so young does not have any accurate recollection of events fourteen months previously (that is almost a quarter of her life ago); secondly, the even greater risk that if she is shown the video of her interview just before the trial and during the trial, as she must be, all she is actually recollecting is what was said on the video, and that she is incapable of distinguishing between what was said on the video and the underlying events themselves. It seems to us to be a near impossible

task to undertake an effective cross-examination in those circumstances when the cross-examination must depend for its effectiveness on probing what actually happened in the course of the incident itself and immediately after it, not just going over what the complainant said in her interview. These problems go beyond the normal difficulties of recollection with an adult witness or an older child.

19. It is plain that this case did not receive the expedition it could and should have had. For the purposes of the appeal it does not matter where the fault lay."

24. The appellant places particular reliance on the observations of Richards LJ and essentially repackages the complaint about the fact that the complainant was permitted to view the video by saying that the mischief was that if the child was cross-examined, she would have drawn on what she had viewed on the video rather than her memory of the incident. However, in a situation where, in this case, there was no cross-examination of the complainant, and so the only account was that given to the specialist interviewers on 1st May 2019, this point has less direct force than it might have in other cases.

25. For her part, the Director submits that the period of 20 months between the alleged incident and trial did not involve any apparent or specific prejudice to the appellant. She says that the delay was not egregious and points to the steps taken to bring the case on for trial. The case was given the earliest date available in the Central Criminal Court, a date that was less than two months after it had appeared in the List to Fix Dates, and it was pointed out that the timescale achieved cannot be divorced from the fact that the case was listed for trial during a pandemic and at a time when the conduct of jury trials was considerably restricted by reason of travel restrictions and the need for social distancing.

26. In our view, there can be no doubt about the fact that cases involving very young complainants, and/or very young accused persons should be prioritised. This is all the more so when both complainants and the accused are very young. However, in the present case, we

have not been persuaded that there was any prejudice arising from the delay. At one level, the allegation was a very straightforward one with a contemporaneous complaint. Unlike some other cases, it was not a question of a young complainant seeking to describe a prolonged pattern of behaviour where the basis narrative could get lost among the detail. It also seems relevant to us that the only account that the jury heard was the account to specialist interviewers. There was no cross-examination so the question of the ability to conduct a meaningful cross-examination being compromised by the lapse of time has not been established, though it is the case where the decision not to cross-examine was taken against the background of a particular timescale. The evidence in chief of the complainant from the meeting with the specialist interviewers was unchallenged, save for an assertion by defence counsel to the jury to the effect that the accused denied outright all allegations made against him in respect of complainant Y. Insofar as an alternative explanation for the incident was canvassed, that what occurred was in the context of chastisement, a theory for which there was no evidential basis, the appellant was not prevented from pursuing that theory by the passage of time. Overall, we have not been convinced that the judge fell into error in declining to halt the trial by reason of the lapse of time and we dismiss this ground of appeal.

27. In summary, we have not been persuaded by either of the two substantial grounds argued and we must dismiss the appeal against conviction.