THE COURT OF APPEAL

[75/22]

The President
Edwards J.
McCarthy J.

BETWEEN

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

RESPONDENT

AND

G.N.

APPELLANT

JUDGMENT of the Court delivered on the 21st day of March 2024 by Birmingham P.

Introduction

1. On 31st March 2022, the appellant was found guilty of nine counts of sexual assault, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended. Subsequently, on 6th April 2022, he was sentenced to an effective term of eight years imprisonment. He has appealed the conviction and also appealed against the severity of sentence.

The Conviction Appeal

2. So far as the conviction appeal aspect is concerned, two issues which had been raised in the Court of trial relating to admissibility of evidence have been raised again before this Court. The first issue relates to the admissibility of so-called background evidence. On this point, the appellant has been content to rely on his written submissions. The second issue raised on the appeal against conviction is the trial judge's decision to admit evidence to be introduced pursuant to s. 16 of the Criminal Justice Act 2006 (the "2006 Act").

3. Before turning to the details of the two grounds of appeal relied on, it is necessary to say something about the background to the trial and conviction.

Background

4. The appellant stood trial charged with the sexual abuse of his younger sister, DN. The offending was alleged to have occurred between 2010 and 2016, at a time when the appellant was an adult, being aged between 18 and 25 years at the time, and while the complainant was a child, aged between 10 and 16 years. The appellant was found guilty by a unanimous jury on counts three to nine, and by a majority of 11:1 on counts one and two. Count one had alleged that on a date unknown, between 7th December 2010 and 6th December 2011, at a specified location, a

dwelling, the appellant had sexually assaulted DN by rubbing her hand against his penis. Count two alleged that on a date other than that specified in relation to count one, at the same location, he had sexually assaulted DN, a female under 15 years, by thrusting up against her.

5. The trial Court heard that the complainant was the only girl in the family and that she had four older brothers. The accused, now appellant, was the second son. The third son was two years younger than the appellant and he suffered with spina bifida and was wheelchair bound, and then there was a fourth son. The family home had four bedrooms. The jury heard that the complainant had slept with her parents until she was seven years of age, and she then moved into what had been the appellant's old bedroom, but in fact, the young girl did not like to sleep alone, and so she would sometimes leave her own room and join her parents, or indeed, would go to the room occupied by her two eldest brothers. The Court heard that she would willingly, and it must be said, entirely innocently, have climbed into the bed of the appellant when she was ten years of age. The Court heard that at a time when she was aged ten, she was having a nightmare and got into the bed of the appellant. He commenced rubbing her hand against his penis. He was wearing his boxer shorts. She became uncomfortable and left the bed. She did not understand the events. Then, sometime later that year, when she was ten years old, she returned, again, innocently, to the bed, and there was another incident whereby the appellant was thrusting his erect penis up against her rear. She got out of bed, and on the complainant's account, the appellant threatened to rape her. There followed what might be described as generalised abuse. The appellant then began touching the complainant's breasts and grabbing her bottom. This occurred when she was aged eleven years and was the subject of counts three and four.

6. In the run up to an athletics event which was scheduled to take place in August 2014 in which she was due to compete, the complainant went to see JN (her wheelchair bound brother) in his room, with a view to discussing her training programme, but when she arrived, her brother was watching TV with the appellant. The appellant placed his hand on her breast and placed his hand between her legs. She says that a week later, when she returned once more to see her brother, JN, the appellant was there again, and on this occasion, he kicked her legs apart and made indecent suggestions, indicating a desire to digitally penetrate and rape her. These incidents were captured by counts five and six on the indictment. From this time, the complainant took to wearing a blanket as she went about the house.

7. The jury heard about an incident on 16th June 2015, when there was an episode of Grey's Anatomy on television. The complainant and the appellant were watching the programme in the sitting room of the family home. The appellant was on the sofa and the complainant was on the floor, using headphones. The appellant began making sexualised comments, and when the complainant got up to leave, it became apparent that the appellant was masturbating and that he had no clothes on. The appellant grabbed the complainant, and he pulled her down on top of him. The complainant ran away, but he followed her, naked, continuing to masturbate. This incident was the subject of count seven on the indictment.

8. Then, there was an incident when the complainant was in transition year. On this occasion, the appellant, the complainant's brother JN, the complainant and the complainant's mother were in the house. The appellant was listening to the radio and an incident arose whereby the complainant wanted the radio turned off. The complainant cut the power at the fuse box, at which point the

appellant pushed her against the wall and put his hand on her throat and said he would rape her. This incident was covered by count eight on the indictment.

9. The final count on the indictment, count nine, referred to an occasion when the appellant's girlfriend and her parents called to the house. The complainant came back from training and her dad told her to say hello to their visitors. In the corridor leading to the kitchen, the appellant slapped her bottom and said, "[g]o in there now and strut your stuff, show them what you've got".

10. At the end of May 2018, Gardaí met with the appellant by agreement. He agreed to participate in a voluntary interview under caution with a solicitor present. At interview, the appellant denied all the allegations and maintained that the complainant was never in his bed, that he never touched her in a sexual way, and denied there was any sexual aspect to their relationship. Some months later, in August 2018, the appellant was arrested and detained, and in the course of detention, a further short statement was taken.

Background Evidence

11. This issue arose at an early stage of the trial. Having opened the case to the jury, but before actually calling evidence, the prosecution indicated that it wished to adduce in evidence the nature of the behaviour of the appellant towards the complainant over the entire period of the offending. There followed what was in effect a *voir dire* relating to this issue. The judge was not required to hear evidence during the course of the *voir dire*, but instead, the judge was brought through the complainant's statement of proposed evidence. If the jury was to hear this statement, they would be made aware of the fact that the appellant was in the habit of making sexualised comments towards his younger sister. It was these sexualised comments that had been the subject of particular attention, though the jury would also be hearing about the fact that the appellant would regularly masturbate and would allow the complainant to see him engaged in this activity, including being engaged in this activity while watching pornography.

12. In most instances, though perhaps not in all, the activity which the prosecution wanted the complainant to be permitted to describe would not have amounted to criminal activity. The prosecution contended that it would be artificial and contrived if the complainant was confined by the trial judge to giving evidence in relation to nine individual incidents. They said it was more appropriate that the jury would hear evidence of the nature of the relationship and of the development of the relationship between the appellant and the complainant over the period of offending. This, it was suggested, was necessary to explain the dynamic of the offending that was occurring, and it also established the sexual attraction that the adult accused had for his underage sister. The judge ruled on the matter in these terms:

> "Well, the test in this application is whether the evidence is relevant and necessary and also relates to whether the matter is really in issue. I think that if this evidence was excluded, it would create an unreal situation and the evidence before the jury would be incomplete and incomprehensible, I'll allow the evidence."

Decision

13. This was not a case where, on any view, what was being sought to be achieved by the prosecution was to suggest to the jury that the appellant was likely guilty of the crimes charged because he had engaged in other activity or because the other activity said something about his character. While the proposed evidence has been considered under the rubric of background

evidence, in the context of the case, it was really more in the nature of evidence of surrounding circumstances. Whatever label was to be applied, we do think that if the jury did not hear the evidence, they were being denied a complete picture. In our view, there could have been no justification for asking the prosecution to edit the complainant's narrative by excluding relevant material. The evidence to which objection was taken was both relevant and necessary and had the effect of providing context for what the complainant had to say in relation to the nine specific incidents charged. We have no hesitation in rejecting this ground of appeal.

Evidence Admitted Pursuant to s. 16 of the 2006 Act

14. During the course of the Garda investigation into the complainant's allegations, a statement was taken from JN, the brother of the complainant and the appellant. The statement was taken by Detective Claire Dennehy. The statement was taken in the usual fashion and included the usual declaration:

> "I hereby declare that this statement is true to the best of my knowledge and belief, and that I make it knowing that if it is tendered in evidence, I will be liable to prosecution if I state in it anything which I know to be false or do not believe to be true".

The statement as read out in the trial Court said:

> "My name is [JN]. I am 24 years old and living at home with my mum [B], Dad [G], brothers [J], [C] and sister [DN]. I was born with spina bifida and I am wheelchair bound. I have other medical complications too. I am aware of an allegation my sister [DN] has made about my brother [GN]. Growing up, myself and [DN] have always been very close… During the last few years, I have seen and heard [GN] making inappropriate comments to [DN]. What he was doing was not normal between a brother and sister. [DN] would avoid him constantly. He would make 'Mmm' noises to her about the way she was dressing and looking at her bottom and chest in a sexual way. [DN] would nearly always have a blanket around herself to hide her body from [GN] looking at her. At times he would even walk around the house playing with himself. I have seen the way [GN] acted around [DN] and it wasn't normal for a brother to be like that around his sister."

15. JN was a reluctant witness at trial. He did not attend, although subpoenaed, and a warrant was issued by the trial judge for his arrest. The warrant was issued on 29th March 2022, the first day of the trial, and was executed the following morning. When called as a witness, in response to counsel for the Director, JN confirmed his identity and his date of birth and the identity of his parents. He confirmed growing up with three brothers and a sister. He was asked "[a]re you aware of the relationship that [GN], your brother, had with his sister [DN] growing up?" to which he answered "yes". He was then asked, "[d]o you want to tell the jury about that, please, [JN]?" and he answered "[n]o". At that stage, prosecution counsel indicated that he would have to make what he described as a double application, first to establish that the witness was hostile under the procedure in *Taylor*'s case (*The People (Attorney-General) v. Taylor* [1974] IR 97), and second to proceed under s. 16 of the 2006 Act. An introductory question was put to JN, to which there was no response, causing the judge to observe "[t]he witness is mute". Counsel then asked, "[a]re you willing to answer questions?" to which the answer was "[n]o". Counsel asked, "[d]o you intend on answering any questions here today?" to which the witness responded "[n]o".

16. In the course of the legal argument that followed, counsel on both sides of the Court addressed the provisions of s. 16 of the 2006 Act. In the course of his submissions, counsel on behalf of the appellant made the point that it was abundantly clear that there was no opportunity to cross-examine the witness. Counsel stressed that the section provided that the statement was not to be admitted if the Court was of the opinion that the admission was unnecessary having regard to other evidence given in the proceedings. Counsel submitted that there was other evidence in the Court which had been permitted by way of evidence of background or circumstance from the complainant which rendered this evidence unnecessary. It is this argument that has been repeated before this Court.

17. After the judge had ruled on the matter, counsel for the appellant prepared to cross-examine the witness. Counsel began the exercise by introducing himself, stating that he was acting for the witness's brother and that he wanted to ask a few questions, if the witness did not mind. At that stage the witness interjected, "I refuse to answer any questions" and repeated the assertion that he was refusing to answer any questions on a number of occasions.

18. Before this Court, the appellant has rehearsed the arguments that the evidence of JN was not necessary. The statutory provision in issue is s. 16(4) of the 2006 Act. So far as is material, it provides:

> "(4) The statement shall not be admitted in evidence under this section if the court is of opinion—
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> (a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or
>
> (b) that its admission is unnecessary, having regard to other evidence given in the proceedings."

The way the subsection is structured means that the evidence will not be admitted if the trial Court comes to form the opinion that the admission of the evidence is unnecessary, having regard to other evidence given in the proceedings.

19. The appellant has drawn attention to the case of *DPP v. Murphy* [2013] IECCA 1. Attention is drawn to para. 28 of the *Murphy* judgment in which McKechnie J. spoke in these terms:

> "There is one further aspect of the prohibitory provisions which should be mentioned. As with the risk of an unfair trial and the justice requirement of subs. (4)(a), a court is also precluded from admitting a statement if 'having regard to other evidence in the proceedings' such is unnecessary (subs. 4(b)). The key, therefore is 'necessity'; evidence which is merely supportive, useful, helpful or even desirable is not sufficient. It must be essential in a material and substantive respect. This obviously means that every statement, certainly from different witnesses, must, at this time of assessment, be critically judged against the existing evidence. Anything less will not be in compliance with the 'necessity' test."

20. The *Murphy* case was dealing with what it described as a relatively new provision. It referred to the fact that, to the Court's knowledge, there had been only one case to date in which issues of voluntariness and reliability had been considered, that being *DPP v. O'Brien* [2011] 1 IR 273. It does seem to us that the partial quotation and partial paraphrase offered by the Court of

Criminal Appeal. which was also a summary of the provisions, does not reflect with absolute accuracy the wording of the statute. The statute stipulates that the statement shall not be admitted in evidence under the section if the Court is of opinion that its admission is unnecessary, having regard to other evidence given in the proceedings. This has morphed somewhat in the decision of the Court of Criminal Appeal which states that a Court is precluded from admitting a statement if, "having regard to other evidence given in the proceedings", such is unnecessary. To the extent that any nuance of difference is to be identified between the statutory provision and the Court of Criminal Appeal's paraphrase, we will be guided by the statute. In any event, it seems to us that any consideration of the question of necessity in the context of this case would inevitably lead to a conclusion that the evidence of JN was critical evidence, which, in the context of the case, was absolutely necessary. The complainant had given evidence in relation to nine specific incidents. She had put those incidents in the context in the manner in which the appellant conducted himself *vis-à-vis* her, over the years of the offending conduct. The statement from her brother, JN, provided powerful support for what the complainant had to say. The statement of JN becomes even more significant if regard is had to the fact that the appellant, when speaking to Gardaí, both during a cautioned voluntary interview, and when detained, denied the wrongdoing and had denied conducting himself in the manner described by the complainant. We have absolutely no hesitation in concluding that the evidence, in the context of this case, having regard to the other evidence in the case, was necessary, indeed absolutely necessary. For that reason, we dismiss this ground of appeal, and in doing so, dismiss the appeal against conviction.

The Sentence Appeal

21. The sentence hearing took place on 6th April 2022. It is of some note that, in the course of his plea in mitigation, counsel on behalf of the appellant had referred to and argued against the imposition of consecutive sentences.

Sentencing

22. In the course of his sentencing remarks, the judge addressed the question of the aggravating factors. He saw these as being the breach of trust between an older brother and a younger sister, the fact that the offences commenced when he was 18 years of age and the complainant was ten years of age, and that they continued until he was aged 24 and the complainant aged 16. The judge commented that this was a brother who the complainant considered her protector. He referred to the fact that the appellant was an adult at all times during the period of offending. He referred to the duration of offending, describing it as a campaign that went on for over seven years. The judge referred, as another aggravating factor, to the effect it had on the victim, that she had felt isolated, was not believed at home and that she had contemplated suicide. He commented that most of the offences were individually at the lower end of the scale, but he referred to a "cumulative element of a campaign" against the complainant. He said regarding counts one and two, when the complainant was ten years of age, he was identifying a headline or pre-mitigation sentence of four and a half years. Regarding counts three and four, sample counts, he was identifying a headline of three and half years, he saw counts five and six as meriting a headline sentence of four years. Likewise, for count seven, the judge saw four years as the appropriate headline sentence. Count eight, which involved grabbing the complainant's throat

and threatening to rape her, the judge identified a sentence of four and a half years. Count nine, the slapping of the complainant's bottom, merited a sentence of three and a half years. The judge observed, "… [i]n view of the length of time over which these offences took place, I think it is necessary to have a consecutive element to the sentence, and I'm making counts 1 and 2, which were when she was ten years of age consecutive, giving a sentence of nine years".

23. The judge said he then had to consider the mitigating factors. The appellant had no previous convictions, and the judge had regard to the appellant's personal circumstances and work history, referring to the fact that, as he recalled, the appellant had been milking cattle for a farmer, and had a partner and a son aged 16 months at the time of the sentence hearing. The judge then said "[a]pplying the totality principle, I'll reduce the sentence by one year to eight years, and the sentence [is] to be backdated to the date when he went into custody".

Arguments on Appeal

24. In contending that the sentence was unduly severe, counsel is firstly critical of the decision of the trial judge to provide for consecutive sentences. More generally, counsel says that while the judge identified mitigating factors, he did not apply them. Counsel says there was no discount in the case for the absence of previous convictions and that the judge skipped what was described as the middle part of the sentencing process *i.e.* the intermediate step of adjusting the headline or pre-mitigation sentences identified by reason of personal circumstances. Instead, the judge moved straight from a consideration of a headline or pre-mitigation sentence, which involved a decision that an element of consecutive sentencing was required, in order to give consideration to the totality principle, without addressing at all the question of what adjustment should be made to the headline sentence by reason of the appellant's personal circumstances. The judge is criticised for losing focus, and failing to address the need for a sentence that was proportionate.

Discussion and Decision

25. In the view of this Court, the duration of offending, that spanned the period from when the complainant was a prepubescent child, through her early teenage years and into her middle/upper teenage years, meant the judge was entitled to take the view that an element of consecutiveness was required. While the maximum sentence for the individual cases was 14 years, the judge took the view that the individual offences, taken in isolation, would have been towards the lower end. His reference to the cumulative elements of a campaign explains why he felt consecutive sentences were appropriate. In other cases, a judge might opt to impose the effective sentence on a single count and to reflect the fact that there was a pattern of offending by upping the single effective sentence. Given that the judge felt that most of the offences he was dealing with **individually** were at the lower end of the scale, it is understandable if he did not see that as a realistic option (**emphasis added**).

26. Overall, we are of the view that the judge was entitled to take the view that an element of consecutive sentencing was required. As we have seen, having concluded that consecutive sentences were required, the judge identified an effective headline or pre-mitigation sentence of nine years. In the ordinary way, the judge would then apply mitigation. It must be said that the mitigation which was available in the present case was limited. There was no plea, no expression of remorse, and indeed, not even an acceptance of the verdict of the jury. It is true that there were no other convictions recorded against the appellant, but in circumstances where the jury had

concluded that he had been offending over a six- or seven-year period, this was of more limited significance than might have been the case in other situations. The judge did not specifically adjust the headline or pre-mitigation sentence to reflect mitigation. Instead, he moved to address the totality principle, and at that stage, adjusted the effective headline or pre-mitigation sentence of nine years at which he had arrived by one year. Had he adjusted the headline or pre-mitigation sentences, aggregating nine years, to eight years, and then addressed the question of totality, it is unlikely that he would have found that any further adjustment was required. Given the seriousness of the offending – in particular, the duration of the offending – it cannot be said that the sentence which had been arrived at was a crushing sentence or one that was, in all the circumstances, excessive. We have to ask ourselves whether the sentence finally arrived at, an effective eight years with lesser concurrent sentences, was excessive. Did it fall outside the judge's margin of appreciation? Was the sentence arrived at outside the available range? We are of the view that, while a marginally lower sentence might have been considered, the sentence actually imposed was not so severe as to fall outside the available range.

27. In these circumstances, we are dismissing the appeal against severity of sentence.