THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 139
Record Number: 133/17

Birmingham P.
McCarthy J.
Kennedy J.

APPROVED

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

C.C

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of May 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. On the 3rd April 2017, the appellant was convicted of three counts of indecent assault contrary to Common Law.

Background

2. The counts on the indictment relate to offences between 1977 and 1979. The evidence concerned the sexual abuse by the appellant of his son during that period. The complainant, who was born in 1963, worked and lived on the premises of a chip shop owned by his father. The complainant stated that events of a sexual nature began shortly after he began to work fulltime in the shop. He was touched inappropriately on occasion and assaulted in the bedrooms upstairs which included being gagged and restrained on occasion as well as penetration of his anus and mouth by the appellant's penis.

3. Count three on the indictment also referred to assaults but the location was that of a caravan belonging to the appellant. The complainant stated that the appellant would return from the pub inebriated and anally rape him. He stated that the assaults were rougher due to the appellant's inebriation.

4. The complainant made his first statement to the Gardaí in March 2004 and the appellant was interviewed in December 2004. The appellant was subsequently out of the jurisdiction between 2005 and 2013 and his surrender was sought under the European Arrest Warrant procedure and the appellant returned to the jurisdiction in October 2013.

Grounds of appeal

5. The appellant puts forward seven grounds of appeal in his notice of appeal but in written and oral submissions the focus is on a singular ground of appeal relating to a corroboration warning.

Submissions of the appellant

6. Prior to speeches and charge, counsel for the appellant made an application for a corroboration warning. This application was predicated on alleged inconsistencies in the evidence of the complainant at trial. These inconsistencies related largely to the timeframe given by the complainant, the locations of the assaults and the late introduction of an allegation concerning the appellant's then partner.

7. In relation to the timeframe of the offences as given by the complainant, counsel for the appellant noted that the complainant provided 13 statements, that he gave different timeframes in different statements and in a prior trial. In his first statement in 2004 the complainant stated he was abused in the shop and the caravan in 1974 when he was aged 11. He then went on to withdraw this complaint in 2013 and then some months later made

another statement in which he said the abuse occurred in the shop between 1973 and 1977 when he would have been between the ages 11 and 14. During the previous trial the complainant stated that this statement was correct, however in the course of this trial in his direct evidence the complainant stated that he was in the shop for four years between 1976 and 1980 and the abuse occurred during this period, between the ages 13 and 17. When confronted with these inconsistencies during cross-examination, the complainant adopted the position that this abuse occurred as a continuum in the shop from 1974 to 1980.

8. In relation to location, counsel for appellant pointed out that there was also inconsistency in terms of where within the shop did the abuse occur and whether it occurred mostly in the back bedroom or the front bedroom.

9. In relation to the appellant's partner, the complainant alleged that his father forced him to have sexual intercourse with his father's partner at the relevant time. This allegation did not surface until the complainant's final statement to Gardaí in March 2017 and counsel for the appellant argued that such a dramatic allegation so late in the day cast serious doubts on the complainant's reliability.

10. The trial judge ruled as follows on the issue of the corroboration warning: -

> "JUDGE: -- I tend not to give corroboration warnings, but I will say that there is no independent evidence and that there is no corroboration, so that -- and I usually do that in the context of the delay warning, to say that you don't have any independent evidence of these events and to tell them that corroboration is independent evidence tending to link, so I will certainly say that to them, but I -- it seems to me that --
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> MR DEVALLY: Very well, Judge, just to avoid any doubts --
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> JUDGE: Yes. Yes.
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> MR DEVALLY: -- the decision as to what you say to the jury, of course I would abide --

JUDGE: Yes.

MR DEVALLY: -- but I think there is either a corroboration warning, in other words, the warning is the corroboration warning, or there's a decision that there is no requirement for the warning.

JUDGE: Yes, well, that is the -- I am -- that is the decision --

MR DEVALLY: I just want that to be clear for the transcript, yes.

JUDGE: -- I am making, but what I do -- what I will say is that there is no independent evidence, that in certain sexual cases you might have forensic evidence or you might have independent evidence and that there isn't independent evidence in this case --

MR DEVALLY: Very well.

JUDGE: -- which would corroborate the account of the complainant and, as you both know, that's not an unusual scenario in these types of cases. So, that would be my proposal in relation to that, so that you can tailor your closings to take that into account."

11. The appellant submits that the ruling given by the trial judge was insufficient in the circumstances as it did not show any engagement with the evidence in the case as required by section 7 of the Criminal Law Rape (Amendment) Act 1990. The appellant submits that it is only possible to discern if a trial judge's discretion has been exercised on a correct legal basis if there is a reasoned basis given. The appellant refers to *The People (DPP) v. Dolan* [2007] IECCA 30 where Kearns J. observed as follows: -

"This court is therefore left in the position that, while a ruling of considerable significance was made in the course of this case, it cannot deduce from anything in the ruling of the learned trial judge that there was a reasoned basis for his decision not to give the warning. The Court would stress that during the course of a trial it

> cannot be expected that the trial judge will give an elaborate judgment on every legal issue which arises for his ruling, but every important ruling must at least disclose a decision judicially made, that is to say, one which is reasoned and based on legal principle. Regrettably, the ruling in the present case cannot be seen as meeting either requirement."

12. It is accepted that in the subsequent case of *The People (DPP) v. Ryan* [2010] IECCA 29 the Court expressed the view that *The People (DPP) v. Dolan* [2007] IECCA 30 did not lay down a universal rule that a reasoned ruling must always be given but it is submitted that instances where a reasoned ruling would be unnecessary must be exceptional. The appellant further notes that in *The People (DPP) v. Douche* [2014] IECA 20, the Court stated that the decision in relation to a warning must be "susceptible to analysis on the basis of whether it is, indeed, a decision judicially made."

13. The appellant submits that no reason for refusal of the corroboration warning can be gleaned from the decision, save that the trial judge "tends not to give corroboration warnings". The appellant notes that in *The People (DPP) v. Wallace* (unreported C.C.A. 30th April 2001), Keane CJ stated: -

> "...the express legislative provision for the abolition of the mandatory warning, if I can call it that, must not be circumvented by trial judges simply adopting a prudent or cautious course of giving the warning in every case where there is no corroboration or where the evidence might not amount, in the view of the trial judge, to corroboration."

14. It is submitted that by the same token, a trial judge cannot fetter her discretion by refusing to give a corroboration warning as a matter of practice.

15. The appellant further submits that even if the trial judge had made the same decision following an engagement with the evidence such a decision would have been "clearly wrong

in fact" as the scale of the inconsistencies and variations in the evidence and accounts provided by the complainant went well beyond what one would normally associate with an allegation of this type.

Submissions of the respondent

16. The respondent refers to *The People (DPP) v. Wallace* (unreported C.C.A. 30th April 2001) where Keane C.J. referred with approval to the decision in *The People (DPP) v. JEM* [2001] 4 IR 385 and stated: -

> "...the express legislative provision for the abolition of the mandatory warning, if I can call it that, must not be circumvented by trial judges simply adopting a prudent or cautious course of giving the warning in every case where there is no corroboration or where the evidence might not amount, in the view of the trial judge, to corroboration. That would be to circumvent the clear policy of the legislature and that, of course, the courts are not entitled to do."

17. The respondent submits that the complainant gave a clear outline of the sexual misconduct alleged. It is accepted that there was variation in the complainant's recollection of dates and locations but the complainant did his best to recall the details in the context of what he described as ongoing abuse at the time when he was a child. Such inconsistences, it is submitted, do not mean that the complainant's account was untruthful, and the assessment of the complainant's reliability was a matter to be considered by the jury. It is submitted that the trial judge highlighted the inconsistencies in the complainant's evidence in her charge to the jury and she made it clear that there was no independent evidence and that they could only convict if they accepted the complainant's evidence beyond a reasonable doubt.

18. The respondent submits that the trial judge was well within her discretion in refusing to give a corroboration warning. In relation to the form of the ruling given, the respondent

refers to The *People (DPP) v. Gillespie* [2009] IECCA 157 where the Court held that there was no formal form of ruling required. The respondent also refers to *The People (DPP) v. Ryan* [2010] IECCA 29 which casts doubt on the assertion in *The People (DPP) v. Dolan* [2007] IECCA 30 that there is a universal requirement to give a reasoned ruling for a refusal to give a corroboration warning. The respondent submits that the reason for the trial judge's refusal was clear after hearing submissions and there had been discussion on the matter before the trial judge issued her ruling.

19. The respondent submits that the trial judge correctly considered all the evidence before her and highlighted the inconsistencies in the evidence. The respondent submits that the decision not to refer to corroboration was a judicially considered decision based on the evidence and was in accordance with section 7 of the Criminal Law Rape (Amendment) Act 1990. It is submitted that the conflicts in the evidence, which were not out of the ordinary of this type of historic sexual abuse, were matters appropriately left to the jury and any reference to an explanation of corroboration would have been confusing to the jury when there was no corroboration.

Discussion

20. Section 7 of the Criminal Law Rape (Amendment) Act 1990 provides in full: -

> "**7.**—(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and

accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.

(2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."

Exercise of Discretion

21. In essence it is said by Mr Delaney SC on behalf of the appellant that the trial judge's decision not to give a corroboration warning was not made on a legally valid basis.

22. Prior to speeches and charge, rather than replicating the submission made, Mr Delaney relied on the grounds which he put forward in an unsuccessful application for a direction. Those grounds are effectively threefold, namely; repeated errors regarding dates, errors regarding locations, and, an allegation of a different character introduced in a statement made in March 2017.

23. The trial judge in refusing to give a corroboration warning stated:-

"I tend not to give corroboration warnings, but I will say that there is no independent evidence and that there is no corroboration, so that -- and I usually do that in the context of the delay warning, to say that you don't have any independent evidence of these events and to tell them that corroboration is independent evidence tending to link, so I will certainly say that to them, but I -- it seems to me that --

MR DEVALLY: Very well, Judge, just to avoid any doubts --

JUDGE: Yes. Yes.

MR DEVALLY: -- the decision as to what you say to the jury, of course I would abide --

JUDGE: Yes.

MR DEVALLY: -- but I think there is either a corroboration warning, in other words, the warning is the corroboration warning, or there's a decision that there is no requirement for the warning.

JUDGE: Yes, well, that is the -- I am -- that is the decision"

24. It is said that the above extract demonstrates a failure to properly comply with the terms of s.7 of the 1990 Act. While Mr Delaney argues that the error in this case is not of the same magnitude as in *The People (DPP) v. Dolan* [2007] IECCA 30, he says that it is nonetheless a significant error demonstrating, in effect, a policy or a practice on the part of the trial judge.

25. We do not agree. It is clear from the language of the trial judge that she was not satisfied to give a corroboration warning as a matter of course or as a matter of routine. In our opinion, that is in compliance with the evolving jurisprudence in this area, which means that warnings will usually only be given in circumstances where there is some evidential material which takes the case out of the ordinary and provides an evidential basis for a warning, as was the position in *The People (DPP) v. Hanley* [2018] IECA 175.

26. As a general rule, a trial judge should not give a corroboration warning as a matter of course or routine. That position should only be departed from where there is good reason for so doing and where there is an evidential basis for the warning.

27. We are not persuaded in the present case that the trial judge exercised her discretion in a manner which did not comply with the statutory provision. It is apparent from a reading of the transcript that she engaged fully with the evidence, this is evident from the fact that she questioned counsel on the minutiae of the evidence in the course of submissions.

28. The terms of her ruling do not indicate, in our view, a decision which was made without a consideration of the evidence, she was clearly alert to the evidence, and, while stating that she does not 'tend' to give a warning, this does not mean that she is *never*

disposed to give a warning, which would be indicative of a 'practice' but simply that she does not routinely give a warning.

29. This is correct, in our view, in that, as we have stated, a judge should not give a warning simply from an excess of caution, rather a judge should not be disposed to give a warning unless there is significant evidential material that requires a corroboration warning. As stated by the Court of Criminal Appeal in *The People (DPP) v. Wallace* (unreported C.C.A. 30th April 2001):-

> "[T]he express legislative provision for the abolition of the mandatory warning....must not be circumvented by trial judges simply adopting a prudent or cautious approach of giving the warning in every case where there is no corroboration or where the evidence might not amount, in the view of the trial judge, to corroboration."

The Director's Position at Trial

30. It is said the Director adopted a particular stance regarding the issue and reliance is placed on the following submission by counsel for the respondent, Mr Devally SC: -

> "Judge, I'm not going to advocate strongly one way or the other, I don't think it is my role necessarily, but it would appear firstly that I think the law has been fairly stated to you. I would, I suppose, be sure to make it clear that the category of this witness should not prompt any application for there being a warning, in other words, that it's a sexual matter or that it's an old matter or that it's a matter that doesn't have possible corroboration. I think the kernel now, really, in the wake of these cases, is there shouldn't be a knee-jerk imposition of corroboration warning, just because of the category of witness, **it was really about whether something in the evidence shows a basis for a question mark, even though I'm not advocating there is such a question mark in reality, there is a basis that could justify the warning and**

the basis is, I should point it out, I believe exists not in the dates and so on and so forth, but in the perhaps additional or evolving nature of the complaints, as given narrative over the period since they were first recollected in 2004. That is an evidential basis upon which one could, and I am not suggesting that I would --

JUDGE: Well, I don't have those statements. I mean, they're not in the evidence, they've been referred to, all right, but --

MR DEVALLY: I'm talking about a basis upon which --

JUDGE: Yes.

MR DEVALLY: -- I'm not advocating very strongly, Judge." (Our emphasis)

31. Mr Devally contends that it was made quite clear on the behalf of the Director that no position was being taken, that the statutory provision leaves the issue to the discretion of the trial judge. He emphasised that he underlined the necessity that there exist an evidential basis for a corroboration warning.

32. With this submission, we agree. The terms of the statute are very clear, the issue is one entirely within the discretion of a trial judge, and indeed there must be, in the view of this Court, an actual evidential basis before a warning may be given.

Was a Warning Required?

33. Mr Delaney says that this is not a case where the option is open to this Court to find the judge erred by failing to comply with the terms of the statute, but nonetheless finds that a warning was not required.

34. It is said, on one aspect of the argument, that this is not a case where there was an error or mistake regarding dates or location but was a much more egregious situation. It is contended that the complainant, when confronted with erroneous material, changed his

evidence from time to time in order to address the failings and that it is a case which called out for a corroboration warning.

35. In the present case, as we have stated, we are satisfied that the trial judge exercised her discretion in compliance with s. 7 of the 1990 Act. The law concerning a corroboration warning has evolved over the years, and, is by now, well established. In *The People (DPP) v K.C* [2016] IECA 155 at para.25, Birmingham J. (as he then was) stated: -

> "The starting point for consideration of this issue is that the decision to issue a warning or not is a matter for the trial judge's discretion. The Court will be slow to intervene with the exercise of that discretion by a trial judge and a court will intervene only if it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact."

36. Accordingly, each case must depend on its own facts.

37. The facts in this case are not on a par with those in *The People (DPP) v. Hanley* [2018] IECA 175, where the issue concerned the suggestion that the complainant in a re-trial had modified her evidence in order to accord with forensic evidence. While the suggestion is advanced in the present case that the complainant altered his evidence when he was confronted with different evidence given by him either in a previous trial or in the present trial, this is not, as we have said, of the same order as in *Hanley.*

38. It seems to this Court that this was something of a borderline case. The emergence, late in the day, of allegations involving the appellant's partner, does tend to take the case some distance. We recognise that another judge, or indeed the members of this Court, if dealing with the matter at first instance, may have exercised their discretion in a different way than the trial judge. However, that is not the issue for this Court. The issue is whether the manner in which the discretion was exercised was an impermissible one. We have

examined the terms in which the trial judge exercised her discretion, and the evidence underpinning such exercise, and we are not persuaded that there was an impermissible error.

Terms of a Corroboration Warning

39. Finally, Mr Delaney relies on the dicta of O'Donnell J. in *The People (DPP) v. CC* [2012] IECCA 86

> "Furthermore the jury were given no instruction on how to deal with such evidence if they were not satisfied that it related to the same incident. Third, the warning on corroboration was not in this court's view sufficient to convey the essence required by the law once it is decided, within the court's discretion, to give such a warning. To say that "the law requires care and caution to be exercised before you arrive at a view of guilt" is likely to be confusing, since a jury might well consider that they were obliged to exercise care and caution before coming to a view of guilt in any case. It is not clear what was added by these words. Furthermore, all warnings given to juries are an attempt to give to a jury approaching a one-off task something of the general experience of courts. Thus whatever language is used, it is necessary to convey to a jury that the law considers it dangerous to convict in the absence of corroboration, because by definition these offences occur in private, or at least in circumstances of some furtiveness, and there have been occasions where evidence apparently plausible, has subsequently been shown to be untrue. Accordingly, over and above the degree of care and caution they would normally expect to exercise in coming to a verdict of guilt beyond any reasonable doubt, the jury should recognise that it is the law's experience that it is dangerous to convict on the uncorroborated evidence of a complainant, and should only do so when, having considered the warning, they nevertheless feel a very high degree of assurance that the evidence is

true. Unless something of this nature is conveyed to the jury, there seems little benefit in giving a corroboration warning at all."

40. We recognise that where a corroboration warning is given by the trial judge, it must be given in terms which are capable of being fully understood by the jury in order to have the required impact. The legislation makes it clear that the terms of the warning are entirely within the discretion of the trial judge and will be dependent on the facts of the case. It is for the trial judge in each case, where a warning is considered appropriate, to decide how best to convey the need for care. The strength of the warning is entirely fact dependent and the language used to convey the necessary message is for the trial judge. However, in the present case, the judge decided *not to give a corroboration warning at all*. Accordingly, the question of what language she might have chosen to use, had she been giving a warning, does not really arise.

41. The trial judge took the view that she would make the jury aware that there was no independent evidence, that is, independent of the complainant's evidence. She did so and, moreover, in her concluding remarks, she highlighted for the jury the inadequacies and discrepancies relied upon by Mr Delaney. This was not a corroboration warning; the trial judge simply decided to advise the jury as to the absence of independent evidence.

Decision

42. In the circumstances, we are not persuaded that the trial judge failed to properly comply with the terms of s. 7 of the 1990 Act; moreover, it is clear that the judge did not give a corroboration warning and had indicated this in advance of her charge. She, therefore, was at large as to how she addressed the issue of the absence of independent evidence, if indeed she decided to address this issue at all. She chose to do so and advised the jury of that fact.

43. Accordingly, the appeal is dismissed.

Kelly Kennedy

26th June 2020