THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2020] IECA 220

[258/19]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PK

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2020 by Birmingham P.

1. On 24th May 2017, the appellant was convicted on a single count of sexual assault and has now appealed against that conviction. The Notice of Appeal refers to a single ground which was that the judge erred in refusing to permit the defence to cross-examine the complainant in respect of the contents of a diary, which the defence contended was authored by the complainant herself, in circumstances where the document contained evidence of ill-will towards the appellant and was thus relevant to her potential motive in making the complaint of sexual assault and contradicted her evidence that they had a good relationship. To put this ground in context, it should be explained that the complainant was the daughter of the appellant. She was 19 years of age at the time of the alleged offence and lived with her father in North Cork.

2. There was also a motion before the Court seeking leave to add and argue an extra ground, which was that the judge erred in his treatment of corroboration in his charge to the jury, erring, in particular, in permitting the jury to consider whether the distressed demeanour of the complainant corroborated her account and erring in failing to warn the jury of the weakness of that potential corroboration. We will deal with that matter in due course.

The Evidence at Trial

3. Before turning to address the existing and proposed ground of appeal, it is necessary to say something about the evidence at trial. The trial was concerned with events that occurred on the evening of 24th December 2017, into the early hours of Christmas morning. In the run-up to Christmas, the complainant had been socialising extensively; the appellant, to a lesser extent. He was a coach driver, and this was a busy period for him. The parents of the complainant had been separated for some years and the complainant was living in her father's home. On the evening of Christmas Eve, 2017, she and the appellant called to a neighbour's house to deliver Christmas presents. They had some drinks there. They also spent some time at the house of the complainant's sister, located in a nearby North Cork town. There, the appellant was delivering a kart which he had been making or assembling for his grandson. Again, they had some drinks there and travelled home together. According to the complainant, on returning home, they watched television for a short period and then the complainant went to bed. Her bedroom was located downstairs, and the bedroom of the appellant was located upstairs. She said that she woke at approximately 3 a.m. to find that somebody was in bed with her, and that she was being digitally penetrated. Her underwear and pyjama pants had been lowered down below her hips. She saw that the person who was in bed with her was the appellant. According to the complainant, she fled from the house in her pyjamas and socks that she had worn to bed. On the account of the complainant, the appellant came to the front door and apologised, saying he had been asleep.

4. Once confident that the appellant had returned to his own bedroom, the complainant returned to the house to collect some belongings. She then tried to make contact with a number of friends who had cars, and eventually, a friend of hers, SH, responded to a text. The complainant met with her in the village where they both lived and went to her house. The friend, SH, gave evidence of meeting the injured party, of a disclosure that was made to her, and of the injured party's demeanour; she was upset and crying. The mother of SH also gave evidence of the complainant arriving at her house in an upset state, of Gardaí being contacted, and of assisting her at the house.

5. The appellant was detained and interviewed. Contact had been made with Gardaí after the complainant had interacted with SH and her mother. The appellant denied wrongdoing. He said that he had been asleep, and he expressed disgust at the content of the allegations made against him. During the course of the trial, the appellant gave evidence, again denying the allegations and saying that he had been asleep in his room and he had not gone into the complainant's room at all after she went to bed. He said that there had been an argument that night about the complainant wanting to keep her dog in the house, and that, at one stage, the complainant stormed out of the house in her socks before returning back to her room. He said that the first he knew of the allegations was when the Gardaí came to his house the following morning.

The Diary Entries

6. Before commencing her cross-examination of the complainant, counsel, who was then appearing on behalf of the appellant, raised a number of issues with the judge. The second issue that she raised related to diaries found in the complainant's bedroom. The exchanges that followed, which culminated in a ruling by the trial judge, gave rise to the existing ground of appeal. It is convenient to set out those exchanges here:

"Defence Counsel: … [t]here were diaries found in [Ms. K's] bedroom, Judge. There are certain parts of those diaries that I may put to her. My instructions are that these were found in her room and that these are her diaries, but perhaps in the absence of the jury, she might be asked were they her diaries, Judge…to authenticate them. Maybe she'll deny that they are hers…

Judge: Are you saying you were given these by the prosecution?

Prosecution Counsel: No, Judge.

Defence Counsel: […] These were – so, the parties lived together, Judge.

Judge: Pardon?

Defence Counsel: The parties obviously lived together.

Judge: Exactly. father and daughter.

Defence Counsel: Yes, so that these items were in her bedroom, Judge, and

Judge: Found by her father?

Defence Counsel: And other members of the family.

Judge: Found by her father[,] the accused?

Defence Counsel: Yes. Well, I understand, in fact, they may have been found by a sister and given to the father.

Judge: And given to the father, the accused, yes?

Defence Counsel: Yes, but in any event, Judge –

Judge: What's their relevance?

Defence Counsel: Well, they show a certain level of trouble. Some of the entries are, for example, saying, raising issues.

Judge: Are you dating these now [Counsel]?

Defence Counsel: They don't have date[s] on them but they have for example 'hate Dad' and 'dumb. Dad's favouritism. He's disrespectful. Driving me crazy. Unequal'.

Perhaps you'll feel they're not relevant but they do, I suppose, indicate a certain, well there's [an] issue in relation to a sister 'Bitch' 'Stuck up' I think 'Thick' 'Fake' 'I forgive you all' 'You've pressed the self-destruct button' , 'I wanted to die'. Look, I know they are personal issues, Judge, it's just that they were in her bedroom. I don't know if they were indicative of a statement of mind.

Judge: [Prosecution Counsel]?

Prosecution Counsel: Well, Judge, what I would say first of all is, these were not prosecution exhibits that were given in the normal course by way of disclosure to the defence. In that sense I'm a complete stranger to these items. Number 1, my friend would have to show the relevance of these to the allegations of sexual assault before the Court. I say in what she has described, I don't see any relevance per se, as a first issue. As a second issue, they are not authenticated in any way. My friend would have to show by evidence who the authors of these are and the chain of evidence as regards the diary. It seems to me that this is a sister who has taken them from the bedroom of the complainant. I would have concerns, Judge, I'm not consenting to the use of the diary. If the Court directs otherwise, I think first of all that the Court will have to be satisfied that these diary entries are relevant, and secondly, the Court will have to be satisfied that they are authentic and that the chain of evidence in relation to them is in order.

Defence Counsel: And in that regard -

Judge: On the second point [Counsel]?

Defence Counsel: Pardon?

Judge: On [Prosecution Counsel's] second point?

Defence Counsel: Yes, well I would propose in the absence of the jury –

Judge: No, sorry, are you in a position to call evidence in due course as to the foundation, as to the veracity of the document?

Defence Counsel: I'll just take instructions in relation to that. What I had simply proposed to do was to ask the young girl, are they your diaries, did you write this, in the absence of the jury, and if she did, and that was acknowledged, then that I would have thought would have, I suppose, dealt with the authenticity, or who wrote them. If she doesn't admit it, well then, Judge, it's a matter for the Court as to whether I could admit them or not. I would imagine I would be in difficulty at that stage. I'm simply proposing to –

Judge: On that point have you got instructions?

Defence Counsel: My client is actually reluctant to bring another daughter into this fray, Judge. I'm being really forward, I'm trying to cross all the t's.

Judge: Understood.

Defence Counsel: I'm not ambushing anybody.

Prosecution Counsel: And, in fairness, [my colleague] spoke to me yesterday about these matters.

Judge: That's fair enough. Most proper and fair and thank you both for that.

Defence Counsel: I would just propose asking the girl…if they are hers and [if] she acknowledges it, that's one thing, and if she doesn't, Judge, then that's another and then the Court has a difficult decision to make.

Judge: Thank you. Anything further, [Prosecution Counsel]?

Prosecution Counsel: Just very briefly, Judge, I think the relevance has to be established first by my friend. I don't think that the relevance has been established. I see my friend's point in relation to if the girls accepts this is hers, that's one issue, but there's a third issue in terms of privacy. These are private documents, just like

her clothes in her bedroom would be private. Again, she may wish to assert privacy over this.

Judge: First and foremost, I have say – [Defence Counsel], do you have something further to say?

Defence Counsel: I suppose, Judge, this is a family relationship.

Judge: I understand.

Defence Counsel: It is a situation of a relationship with a father and daughter. You know, if there is, I suppose, a background of perhaps issues within that relationship, it may be relevant, Judge.

Judge: Thank you. First and foremost, ignoring or putting to one side the basis upon which this 'evidence' was obtained, I'm not going there, suffice to say the Court would be extremely concerned that this type of evidence could be obtained in this type of way with regard to private matters relating to a complainant which could be delivered directly to the accused, either through another family member or directly by himself. Putting that to one side, the Court must look at what's before this jury, nothing else. Yes, background can be important. Yes, the Court understands there's a familial background to the circumstances of this allegation. However, the Court is not at all satisfied as to the relevance of such documents, purported documents. The Court would not be satisfied that they would be put to the complainant at this stage. We'll see how your cross-examination goes, [Counsel], and if it becomes obvious, it may, that there are issues, I put it no more than that, then you may wish to speak to me again in the absence of the jury as to whether perhaps they may be relevant.

Defence Counsel: Very good, Judge.

Judge: But at this juncture the Court cannot see how they could be relevant, and that again is also parking to one side how the veracity of these documents could be proven if they were denied.

Defence Counsel: I think I would be in difficulty if they were denied.

Judge: And at that stage they are mentioned before the jury and can't be taken back from the jury.

Defence Counsel: I'm not going to mention anything without clearing it.

Judge: I understand. The issue is, if you go there – if she says they may be hers or she might have written part of it or something like that, then we are in difficulty again. So I accept you are doing everything, your proposal was to do it without the jury, but the Court would be concerned that they're even entertained in the mind of the complainant in the absence of the jury before she goes into cross-examination, it may be mentioned later before the jury which would cause us further difficulties. I'll let the matter proceed in the normal course and you may be – feel free, [Counsel], if you think it becomes obvious that they may become relevant, then you have the option of mentioning it to me again in the absence of the jury.

Prosecution Counsel: Just to be clear on behalf of the prosecution, the objection is not to stymie my friend's cross-examination.

Judge: Understood.

Prosecution Counsel: Clearly she has full instructions and whatever she seeks to put on foot of her client's instructions, we have no difficulty with that whatsoever, it's simply the diary entries, I do not want them to be produced before the complainant, save a different order is made by the Court.

Judge: Exactly. Thank you. For the formality of the record, I am refusing your application to put these diaries to the complainant at this stage of the trial."

7. On behalf of the appellant, it is said that the threshold of relevance ought not to be set at an unduly high level, nor should the defence be unduly fettered. It is said that if the contents of the diary had been placed before the jury, that it would have offered support for the defence's position which was that the complainant had made an unfounded allegation while intoxicated, angry and upset with her father. It is said that the judge fell into serious error in resisting the suggestion that the complainant should be asked in a *voir dire* as to whether she was the author of the diary because of a fear that she would then have the issue in the forefront of her mind and might later mention it before the jury.

8. The respondent submits that the ruling of the Court in relation to the diary entries was preliminary in nature and that the door was never closed on the matter being reopened by the appellant, should he have chosen to do so, before the conclusion of the cross-examination of the complainant. The Director says that this emerges clearly from a number of observations of the trial judge. It is pointed out that the judge had said specifically:

> "I'll let the matter proceed in the normal course, and you may - feel free, if you think it becomes obvious that they may become relevant, then you have the option of mentioning it to me again in the absence of the jury."

It is said that the interim nature of the ruling was further underlined when the judge stated:

> "For the formality of the record, I am refusing your application to put those diaries to the complainant **<u>at this stage</u>** of the trial." [Emphasis that of respondent]

The Director stresses that there was never any intention to stymie or fetter the cross-examination on behalf of the then accused. The Director points to the fact that, at trial, the appellant's legal team obviously entertained real doubts about the relevance of the material. The Director says that there was a detailed cross-examination, and indeed, robust cross-examination of the complainant, focusing on aspects of her relationship with her father.

Issues dealt with in the diary were canvassed, though without reference to the actual diary itself. It was pointed out that the complainant was cross-examined about whether her father had favourites and had responded that she did not think her father had favourites, but that she thought he was hard on all of his children. It is said that this was an opportune time to seek to revisit the diary when there was a denial that her father had favourites when the diary appeared to express a grievance about the fact that her father had favourites, but no application to revisit the diaries was made.

9. We are struck by the conscientious, responsible and professional manner in which all involved, trial judge and counsel on both sides, approached the issue. Notwithstanding that, it does seem to us that the outcome of the discussions that took place was less than ideal. Counsel on behalf of the respondent has emphasised the fact that the judge's ruling was not a final one, but rather, in the nature of an interim or preliminary ruling. That is true to a certain extent, but it does not address the difficult position in which it placed cross-examining defence counsel. Counsel was aware of the existence of material, but did not know whether she would be in a position to resort to it when cross-examining. This must have caused her to hesitate before putting questions less she put propositions and find herself bound by the answer. To take one example, she was constrained from putting it to the complainant that she hated her father, or asking the complainant whether she had ever expressed the view that she hated her father when she did not know whether she could resort to the material in the diary entries. It seems to us that despite the best of intentions, what emerged was unsatisfactory.

10. It was never established whether the complainant was or was not the author of the diary and it was never established whether there was material in the diaries which crossed the threshold of relevance. Certainly, with the benefit of hindsight, it would seem preferable had the issue of authorship been determined, had defence counsel proceeded with her cross-examination without prior restraint, but realising that there could be objections to particular

lines or lines of questioning on the basis of relevance, and that there was also the possibility of the complainant's privacy rights being invoked. One intervention by the trial judge during the course of discussion with counsel is instructive. At one point, the judge said:

> "[t]he issue is, if you go there…if she (the complainant) says they may be hers or she might have written part of it or something like that, then we are in difficulty again. So I accept you are doing everything, your proposal was to do it without the jury but the Court would be concerned that if they are even entertained at all in the mind of the complainant in the absence of the jury, before she goes into cross-examination, it may be mentioned later before the jury which would cause us further difficulties.
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> . . .
>
> I'll let the matter proceed in the normal course…feel free, [Counsel], if you think it becomes obvious that they may become relevant, then you have the option of mentioning it to me in the absence of the jury."

Insofar as the earlier part of these remarks would seem to indicate that the judge was concerned that if matters were probed with the complainant in the absence of the jury, that this would impact on her, perhaps causing her to make reference to the matter in the presence of the jury and perhaps causing the trial to be derailed, it seems to us that however well-intentioned, that the judge was being over-cautious in that regard.

The Corroboration Issue

11. This was not a case where there was a formal application for a corroboration warning, nor was there any discussion in relation to corroboration between judge and counsel before closing speeches and charge, as often happens. However, while there was no discussion in relation to the question of collaboration prior to closing speeches, the issue was raised by the

judge after counsel had made their closing speeches and before he charged the jury. This was the exchange that took place:

> "Judge: As regards my charge, I don't think it's a case for a full corroboration warning.
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> Prosecution Counsel: I don't believe a corroboration warning is appropriate, in the circumstances, Judge. The prosecution's position is that there clearly is evidence capable of amounting to corroboration before the jury and therefore a corroboration warning is not necessary, in terms of demeanour, distress and also the socks in the photographs, in fact, Judge, could amount to corroboration of her testimony.
>
> Judge: What is your view, [Defence Counsel]?
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> Defence Counsel: Well, I would approach corroboration carefully, Judge. I think that the aspects of my friend's –
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> Judge: Oh I am not saying I am not treating it carefully, Counsel
>
> Defence Counsel: Yes. Of course you are, Judge, but –
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> Judge: I have been thinking about it all morning and in fact yesterday evening, as well, when I was dealing with the other issue.
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> Defence Counsel: Yes.
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> Judge: There is evidence which is capable of being treated as corroborative by the jury.
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> Defence Counsel: But it has to be –
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> Judge: I can't go beyond that.
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> Defence Counsel: I suppose you, Judge, with – in respect there is an alcohol context to it and how reliable that is, Judge
>
> Judge: I can't go there, [Counsel]. This lady said she was asleep.
>
> Defence Counsel: But, Judge –

Judge; And this offence woke her up. I can't go beyond that and I will not go behind it and I will be telling the jury the fact that somebody is asleep does not mean that they are consenting. All of that has to be –

Defence Counsel: There was no suggestion made of that Judge, but obviously –

Judge: Sorry, Defence Counsel, there is no acknowledgement to date by the accused that if the offence took place as alleged that it was a sexual assault. So, therefore I must go through those particulars with the jury.

Defence Counsel: Yes.

Judge: And I will do so. But my issue is, there is a recent complaint from her, the telephones…the texts I should say and what she said to her friend and, let's be clear about this, there was a complaint made to guards within an hour and half or maybe two hours at the outset. Based on the telephone records, these two ladies, that's [SH] and the complainant, were in each other's company around 4.55/5[pm], if you follow the text messages 'I am coming close. I will be with you shortly'. And then there's a complaint made to the guards within an hour of that. So, we have all those issues. I can go into it in some detail but if I do I am wondering if I am going to be of any great benefit to the accused.

Defence Counsel: Mm hmm

Prosecution Counsel: Judge, I think you should explain corroboration to the jury.

Judge: Yes.

Prosecution Counsel: And it's only capable – it's something that is capable of –

Judge: Exactly

Prosecution Counsel: But it is for them to decide. I think that's the fairest way to do it.

Judge: I will just give the two words. I will say in fairness, and I'm open to what you say to me after lunch, these type of cases can result in fabricated – you know, these sexual offence type of cases there are cases where fabricated allegations have been made and there is one word against the other and it is for you then to ascertain whether there is corroborative evidence or not, I will give that but I won't go that it would be dangerous or unsafe to convict and go into the full-blown corroboration warning.

Defence Counsel: No

Judge: I can't say that in this case.

Defence Counsel: No, Judge.

Judge: Because there is evidence capable of being corroborative.

Defence Counsel: There is and I think it is a little bit jaundiced evidence given that some of the –

Judge: Well, that's a matter for the jury.

Defence Counsel: Yes, it's a matter for the jury.

Judge: But it is capable of being treated by the jury as corroborative so therefore I can't give a full-blown corroborative warning…unless you can persuade me otherwise after lunch. I can give the few words – the few sentences about the recent complaint."

The issue of corroboration first surfaced in the trial during the course of the closing speech by counsel for the prosecution. She dealt with the topic as follows:

"[y]ou may all have read about cases where somebody makes an allegation of sexual assault and it has happened 20, 30, even 40 years ago. In those cases it is simply one word against the other, and I suggest to you, Ladies and Gentlemen, that is not one of those cases that you are dealing with because, I suggest to you, ladies and

gentlemen, if I am wrong, I will be corrected on this, but I suggest to you that there is corroborative evidence. There is evidence that is independent that supports or strengthens the oral testimony of [Ms. K] to the effect that this occurred and what I am specifically drawing attention to here is the evidence. It is independent of [Ms. K] because it's coming from two other witnesses. It is coming from [SH] and [SH's Mum], who you heard from yesterday. There is evidence of [Ms. K] having been in a distressed state shortly afterwards, very close in space and time and I suggest to you that is something that is capable of corroboration. Again you will be directed on this in due course. You will recall that [Ms. SH] said that when she met [Ms. K] in the [named village] close to the pub that [Ms. K] fell into her arms, crying, and again, [SH's Mum], she witnessed the demeanour of [Ms. K] again when [Ms. K] returned to the [H] household and she says that she was crying, she was distressed."

Later, in her charge to the jury, having dealt with the issue of corroboration once more, she did so, having addressed the topic of recent complaint. She said:

> "[Recent complaint evidence] is not independent corroborative evidence but it is evidence that goes to weight and consistency. I say there is corroborative evidence though and I have told you that before. The evidence of her distress. These are other people who saw her saying she was visibly distressed. 'She fell into my arms crying. She was crying. She was upset'. That is capable of amounting to corroboration of what she said. What is also capable of amounting to corroboration in my respectful submission is, she said, 'when this happened to me, I got up and I ran out the door. I didn't even stop to put on shoes'. And she said, 'when I did manage to get back into the house, I threw off the socks' and she describes the colour of them, I think I got the colour wrong and she threw

them off but she identified them in the photograph and we can see those socks on the bedroom floor. I say that is corroborative of her account as well."

12. In his charge, the judge dealt with the matter as follows:

"[y]ou have heard reference to a word called corroboration. What is it? Corroboration has received [many] definitions but the definition I like to put is as follows, and you have heard, in fairness to both counsel, describing it to you, corroboration is evidence separate from the evidence of the alleged victim which confirms in some material way that the alleged offence was committed and that the accused committed it. The important aspect of that definition is that it is separate from the evidence of the alleged victim. It must be separate and independent to be corroborative.

Members of the jury, you have heard evidence, both through exhibit and by oral evidence, of what we call recent complaint, in other words that the alleged victim, [Ms. K], made a complaint as soon as possible after the alleged offence to a third party. You will have heard the evidence, as I said, through phone logs, if I can call it that, which is the exhibit in front of you, and from her friend, [S]. That is evidence of the alleged victim making a complaint. Now because it's evidence coming from her it cannot be corroborative. However, it is conduct that you can look at, that her conduct in so complaining is consistent with her testimony but it is not corroborative.

Members of the jury, experience has shown that complainants in sexual cases do sometimes tell an entirely false account which is very easy to fabricate but extremely difficult to dispute. Such accounts may be fabricated for all sorts of reasons and sometimes for no reason at all. An allegation of sexual assault may be fabricated for a hidden motive. However other cases involve completely

> truthful allegations. This means you must scrutinise the evidence of Ms. K and all others…particularly if you are of the view that there is not any other independent evidence implicating the accused in the commission of the offence alleged. You must look to see if there is such independent evidence implicating the accused in the commission of the crime, in other words is there what is called corroboration, and it has been put to you by the prosecution that you can find such corroborative evidence in the evidence of [SH] and her mum as to the state of distress of the complainant, the alleged victim, as described by them and also [Prosecution Counsel] points to the presence of the two socks on the floor in the photographs which is again separate from the evidence of the accused. It comes by virtue of the Garda photographs. Having considered all of this carefully, this evidence, you are entitled to convict if you are satisfied beyond a reasonable doubt that you can rely on the evidence of the complainant, the bottom line."

13. The appellant says that the judge's treatment of corroboration was wholly inadequate. He says that it is doubtful whether, on the facts of the case, the demeanour of the complainant could be regarded as corroboration. He says the context has to be considered. The appellant had given evidence of a row that took place between himself and the complainant resulting in her storming out of the house before returning and going to bed. The complainant had contacted her friend, SH, by text, to say she had been touched by her father. She said that she was outside her house, crying. It is said that regardless of which version of events was correct, that in either situation, the complainant would present as distressed to the appellant. If the complainant's version was correct, then it is understandable that she would be distressed. However, if her account was fabricated, then it was to be expected that she would appear to be distressed.

14. Counsel on behalf of the appellant did not really address the issue of the presence or absence of corroboration in any very elaborate way in the course of her closing speech. Her observations in this regard were confined to saying on one occasion:

> "[o]nce an allegation is made, it is actually difficult to defend it. You know we are in a classic 'he said, she said' situation, and I know my friend has pointed to matters that she thinks are corroborative but there's lots of outside issues here that I think are equally worrying.
>
> . . .
>
> Now, you had a number of text messages made and telephone calls and I know my friend is asking you to say that that is corroborative but it is corroborative of upset."

In fact, in this observation, she misstates the position of her colleague who had never suggested that the fact of the complaint was corroborative and would later be clear that the judge should specifically direct the jury as to the limitations of recent complaint evidence.

15. The final reference to corroboration, and perhaps the most significant, was when defence counsel said:

> "[a]nd I know my friend has referred to [SH] being corroborative and her mother. They actually had two different accounts, her mother and herself, about what happened. Her mother said she was very close to [SH], that they had a good relationship but when the girls came home they didn't tell the mother what happened. The mother went away to bed. They rang the guards without discussing it with her. She only became aware of that afterwards. [SH], herself, had been drinking . . ."

16. The appellant has placed particular emphasis on the decision in *DPP v. Mulvey* [1987] IR 502. We do not see that case as laying down any general or absolute rule that a judge must always tell a jury that evidence of distress is weak corroboration. It must be appreciated that

the decision was given against a backdrop of a mandatory requirement to give a corroboration warning, a requirement that was dispensed with more than 30 years ago. There would be many cases now when the judge will not find it necessary to say anything whatsoever on the topic of corroboration. In the present case, that option was effectively withdrawn from the judge as a result of the way the topic was raised during the closing speech of prosecution counsel. This case provides another example of why it is desirable that the issue of corroboration and what, if anything, is going to be said in relation to it, should be the subject of a brief discussion between counsel and the trial judge before closing speeches and charge.

17. Having been forced into a situation of having to say something on the topic of corroboration, it seems to us that what the trial judge chose to say was less than entirely satisfactory. Having accurately explained the concept of corroboration to the jury, the only assistance the trial judge gave to the jury as to what was capable of constituting corroboration was to remind them that it had been put to them by the prosecution that the jury could find corroborative evidence in the evidence of SH and SH's mother as to the state of distress of the complainant, the alleged victim, and also that prosecution counsel points to the presence of two socks on the floor in the photograph. Apart from saying what the prosecution position was, the trial judge did not balance this by referring to what the defence position was, though, in fairness to him, the defence positon had not been spelled out in any great detail, so he was at that disadvantage. Neither did he offer any guidance in terms of his own view as to whether either or both of the matters pointed to by the prosecution could, in fact, potentially amount to corroboration. Neither was entirely free from doubt.

18. So far as the distress is concerned, it might have been explained by distress post-argument about the dog, though, no doubt, the prosecution would say that the narrative for which they contended was altogether more plausible. However, insofar as the wet socks are concerned, both narratives involved the complainant leaving the house in socks without

shoes, and both alternative narratives would explain the wet socks. It seems to us less than satisfactory that the jury should have been reminded that the prosecution were contending that the socks were corroborative, when they clearly were not, a fact that was readily conceded on the hearing of this appeal.

19. We note that there were no requisitions on the issue of corroboration, and ordinarily, that is a matter to which we would pay particular attention. However, in the circumstances of this case, we think that the absence of requisitions can, at least, in part, be explained by the discussions that took place post-speeches and pre-charge. There, the judge observed that there was evidence capable of being corroborative. When counsel responded, referring to the fact that there was a little bit jaundiced evidence given, she was interrupted mid-sentence and before she could elaborate further on her reservations. It seems to us that in those circumstances, it is understandable if counsel took the view that the issue of the evidence being available for consideration by the jury had been determined by the trial judge.

Final Remarks

20. Overall, we take the view that whilst this was a finely-balanced case, it was, indeed, an unusual case. We say that because the experience of the members of the Court has been that while cases involving a pattern of interfamilial sexual abuse are by no means uncommon, that cases involving a single allegation without any background are rare. We find ourselves feeling a degree of disquiet, both as to the manner in which the issue as to the diary was dealt with and as to the treatment of corroboration in the trial judge's charge. It might be that neither on its own would have been sufficient to cause us to have any doubts as to the fairness of the trial or the safety of the verdict. However, the combination has given rise to unease, to a degree that we cannot say confidently that the trial was fair and satisfactory and that the verdict was safe.

21. Accordingly, we feel that we must quash the conviction. We will arrange to have the matter listed in the coming days to deal with any application there may be in relation to whether a retrial should be ordered.