



**THE COURT OF APPEAL**

**Record Number 7/18**

**Edwards J.  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**TMCD**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 25th day of February 2020 by Ms. Justice Kennedy**

1. This is an appeal against conviction. The appellant was found guilty of a count of rape contrary to s.4 of the Criminal Justice Rape Amendment Act, 1990, a count of sexual assault contrary to s.2 of the Criminal Law Rape Amendment Act, 1990 and a count of robbery contrary to s.14 of the Criminal Justice Theft and Fraud Offences Act, 2001. A *nolle prosequi* was entered in relation to a count of defilement contrary to s.31 of the Criminal Law Sexual Offences Act 2006.

**Background**

2. The events in question took place on 4th March 2014 in Arklow, County Wicklow. The appellant was known to the injured party who was sixteen years of age at the time. On the date in question, the injured party agreed to meet a friend from school and the appellant on her way to a youth club. When she met up with the two boys the appellant asked her to go down a laneway with him. The injured party was reluctant to do so but she proceeded down the laneway with the two boys. The appellant then pushed her against a wall, she pushed back and he began rubbing his penis outside his trousers. He began pushing up against her while she continually attempted to get away. At one stage the appellant pulled down the zip of her jacket and he bit her on her right breast area, this caused the injured party to double over in pain and the appellant used this opportunity to pull down her leggings and underwear and bend her over and insert his penis into her anus. The incident ended when the appellant indicated that the guards

were there and the boys ran down the laneway. At this point the injured party noticed that her phone had been taken from her pocket. An employee of a local shop noticed she was in distress and the Gardaí were called in relation to her stolen phone. The phone was retrieved by the Gardaí and returned to her

3. Initially the injured party reported to the Gardaí that her phone had been robbed from her. She later asserted to her mother that she had been raped at which point she made a complaint to the Gardaí. She did not report that the appellant had struck her, that there was digital penetration or that a friend, J.McD was present, until she made her second statement in 2016. A full examination was conducted at the Sexual Assault Treatment Unit at the Rotunda Hospital, which examination confirmed that she had suffered a bite to her right breast.

#### **Ground of Appeal**

4. One ground of appeal was advanced at the hearing which concerned the failure of the trial judge to give a corroboration warning.

#### **Submissions of the parties**

5. In written submissions the appellant says that the trial judge erred in failing to exercise his discretion to give a warning given the nature and seriousness of the offence, the age of the injured party and the omissions in her initial statement.
6. It is fair to say that in oral submissions Mr Devally SC for the appellant emphasised the evolving nature of the complaints and in particular the failure to recount that the appellant struck the injured party in her initial statement to the Gardaí, thus resulting in this information being unknown when she was examined in the Sexual Assault Treatment Unit. We merely observe at this point that the injured party was fully examined in the course of that examination and the bite injury was noted. The nurse from the unit was cross-examined and agreed that she was not informed of the physical assault by the injured party.
7. Reliance is placed on *The People(DPP) v. Dolan* [2007] IECCA 30 where the Court held that a trial judge in such cases should give reasons as to why he or she is not exercising the discretion. However, in our view Dolan is not relevant in the present case as the issue of a corroboration warning was not canvassed before the trial judge. Mr Gageby SC for the respondent makes two arguments. Firstly, that as the issue of a corroboration warning was not canvassed at trial and the decision in *The People(DPP) v. Cronin (No.2)* [2006] 4 IR 329 applies. Secondly, he says that a corroboration warning did not arise as there was evidence capable of amounting to corroboration, that being the bite mark.
8. In written submissions in relation to the perceived inconsistencies, the respondent argues that this was not two inconsistent statements made by the injured party but rather a first incomplete statement which was later fleshed out and an explanation was offered by the injured party as to why her first statement was missing certain details.

#### **Discussion**

9. Section 7 of the Criminal Law(Rape) (Amendment) Act, 1990 vests a discretion in a trial judge whether or not to give a corroboration warning. In the normal course of events the issue of a warning is canvassed with the trial judge before speeches and charge. No application for a corroboration warning is made in many instances on a consideration of the evidence adduced. This may come about where there is evidence capable of amounting to corroboration of a witness's testimony, and the legal team may not wish to highlight the fact of such evidence.
10. The reasoning which gave rise to no such application being made in the present case is unknown. Ordinarily an explanation is offered on affidavit by the previous legal team as to why such an application was not made. In fact, *Cronin (No 2)* requires, in general, such an explanation to be given.
11. In the present case the appellant was legally represented by an experienced legal team. We surmise that it is readily apparent why no application was made for a corroboration warning but of course we cannot say this with any degree of certainty.
12. However, the fact remains that no application was made. Kearns J. in *The People(DPP) v. Cronin (No.2)* [2006] 4 IR 329 said as follows: -

"It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial and the rulings made therein, and not with other suggested errors or oversights which may pre-date the trial or may have been amenable to remedy in some other manner."
13. As stated, no application was made for a corroboration warning. Moreover, the issue was not raised in requisition with the trial judge at the conclusion of his charge. The question therefore arises as to whether any fundamental injustice arose as a result of the absence of a corroboration warning. This was not a case where the appellant was unrepresented, rather it was a case where he was fully represented and where it appears to this Court no stone was left unturned.
14. Moreover, it is clear that there was evidence which was capable of amounting to corroboration and even if the issue of a corroboration warning was raised in advance of speeches and charge, it was not a case in our view where the trial judge's discretion to grant a warning would necessarily have come down in favour of the appellant.
15. In conclusion we are not persuaded that there is any force in the appellant's argument. We are satisfied that the principles in *The People(DPP) v. Cronin (No.2)* [2006] 4 IR 329 apply and we are not persuaded that the verdict is unsafe and accordingly the appeal against conviction is dismissed.