**THE COURT OF APPEAL**

**[153/20]**

The President

Edwards J

McCarthy J

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**T MCD**

**APPELLANT**

**JUDGMENT (*Ex tempore*) of the Court delivered on the 21st day of March 2022 by Birmingham P**

1. On 14th February 2020, following a trial in the Central Criminal Court, the appellant was convicted of two counts of rape and two counts of indecent assault. Subsequently, on 29th June 2020, he was sentenced to a term of ten years imprisonment, with one year suspended. That, it should be explained, was the effective sentence imposed, there were lesser concurrent sentences in respect of certain counts. The convictions that were recorded were on foot of majority verdicts of the jury and the appellant has now appealed his conviction to this Court.

2. By way of background, it should be explained that the complainant and the appellant are first cousins. The complainant, SH, was born in 1975 and the appellant was born in 1960. They live in the West of Ireland, and from time to time, the appellant carried out casual farm work on the complainant's family farm. At issue at trial was a series of alleged sexual offences committed between June 1982 and September 1984 during the summer months of that period. The alleged incidents are linked to activity on the farm, including driving a tractor and assisting in haymaking on the part of the appellant. The complainant was aged between 7 and 9 years at the time of the alleged offending and her first complaint to Gardaí was in early 2016, which was somewhere between 32 and 34 years after the alleged abuse. It is to be noted that the appellant was charged in respect of offences involving, not just the complainant, but also alleged offences involving her two older sisters. When the matter first came to trial, a direction was granted in respect of the offences involving the older sisters. Then, at that point, the jury was discharged and a fresh trial ordered in respect of the offences involving the complainant, SH (nee W). This

trial took place on 11th, 12th and 13th February 2020, and the majority guilty verdicts was returned on 14th February 2020.

3. The grounds of appeal advanced are as follows:

(i) That the verdict of the jury is unsafe, in particular, having regard to the evidence of the complainant, which contradicted her Garda statement and the indictment, and thus the verdict of the jury was unsafe and unsatisfactory.

(ii) The trial judge's direction to the jury in relation to how they should consider the issue of delay, and in particular, the behaviour of the complainant in this regard and the prejudice to the appellant, were inadequate and/or confusing.

(iii) That the trial judge erred in failing to discharge the jury during the course of the complainant's evidence during which the complainant gave entirely contradictory evidence of offences having occurred in one location, when the indictment and her Garda statement indicated an entirely different location.

(iv) That the judge erred in not withdrawing the case from the jury after the complainant's evidence materially contradicted her initial statement of complaint to the Gardaí as well as the indictment, further irreparably prejudicing the right of the appellant to a fair trial.

(v) That the trial judge erred in failing to adequately and sufficiently direct the jury that there was no corroboration whatsoever in the case.

(vi) That the trial judge's directions in relation to the presumption of innocence in relation to the offences at trial were wholly insufficient in the context of the earlier evidential contradictions of the complainant.

(vii) That the trial judge erred in permitting the jury to have the entirety of the complainant's evidence read back to them during the course of their deliberations, having regard to the fact that this was a single witness case and that her testimony was the only evidence as to fact in the case, which the jury had heard only two days previously, and in circumstances where the reading of the evidence leant same undue weight and did not account for the tone and body language of the complainant during her time in the witness box, thereby over-emphasising the weight, reliability and credibility of the complainant's evidence.

(viii) That the trial judge failed to protect the appellant's constitutional right to a fair trial, and as a result of the aforesaid rulings, irreparably prejudiced the jury against the appellant by the admission of the aforesaid matters.

(ix) That the verdict of the jury was unsafe in all the circumstances of the case.

4. The written submissions on behalf of the appellant have grouped the grounds, and the Director, in replying, has adopted a similar approach and we will do likewise. The first

series of grounds, as bundled, are described in the submissions as 'Prejudice to the Appellant from the Contradictory Evidence of the Complainant'. The grounds in this regard are focused, in particular, on two aspects; a degree of inconsistency on the part of the complainant as to whether two particular incidents had occurred on the same day or not. Secondly, what is said to be the taking of contradictory positions in relation to the location of incidents. This argument is advanced on the basis that the complainant on occasion used the phrase "up the field" and on another occasion used the words "back the field". The respondent, for her part, says that the grounds now advanced are without merit and she points to the fact that there was no application for a direction at the end of the prosecution case. Attention is drawn also to the fact that the inconsistencies which are now pointed to were brought to the attention of the trial judge in the context of a request for a corroboration warning. In these circumstances, the Director says that the matters now raised are quintessentially matters which fell within the province of the jury.

5. The Court concludes that these were indeed jury matters. The fact that there was no application for a directed verdict of not guilty is telling. That there were certain inconsistencies in the evidence was the focus of much attention at trial, indeed, it was an issue which was dealt with in some detail by the trial judge in the course of her charge. In the Court's view, there can be no question at this stage of now concluding that there should have been a directed verdict of not guilty when no such verdict was sought, nor can there be any question of concluding that the jury should have been discharged. Again, not an issue that was canvassed by reference to these inconsistencies.

6. The next issue, then, is the reading back of the evidence. This issue arises in circumstances where the jury requested to be reminded of the complainant's evidence and specifically requested that the transcript be provided to them. The appellant says that the judge erred in reading back the testimony of the complainant in circumstances where the jury had heard the evidence only two days previously. It is said that the effect of the reading of the evidence leant it undue weight and did not take account of the tone and body language of the complainant during her time in the witness box, and so served to emphasise the weight, reliability and credibility of the complainant's evidence. It is said the situation facing the trial judge was that the jury had requested a transcript. All were agreed that the transcript could not be furnished. There was then a discussion focused on two identified options, namely, that the trial judge would read her note of the evidence or that the trial judge would read the transcript. A copy of the transcript was available to the trial judge, Ultimately, what happened is that the judge read the transcript. At this stage, the Director points to the fact that counsel for the appellant did not raise any objection to either proposed course of action, and specifically, it did not raise any objection to the course of action that was ultimately followed, and in fact, counsel at the time commented "it's a matter for the Court".

7. The situation is, as we have seen, that the jury made a request for the transcript of the complainant's evidence, something, it has to be said, that is not unusual. It would have been almost unthinkable that that request would simply be refused. If that was not going to happen, it was a situation of making a choice between the available identified options.

The reading from the transcript had certain advantages. It was comprehensive and complete, in that it gave a full record of what had been said in both direct evidence and in cross-examination. In the nature of things, notes taken by a judge or any other participant in a trial are usually less comprehensive, will often focus on the highlights, or the fact that a specific event is said to have occurred or not to have occurred. It also has to be borne in mind that the transcript was being read to the jury who had seen and heard the complainant give evidence, they had seen her give her direct evidence and seen her being cross-examined, so the effect of the reading was to provide an opportunity for jurors to be reminded of what they had seen and heard earlier in the trial. The Court is not persuaded that there was any error on the judge's part in the way in which she dealt with the request from the jury.

**The Delay Warning**

8. The appellant contends that the trial judge's directions in this regard were inadequate and/or confusing. In particular, the trial judge is criticised for not addressing the question of why the complainant delayed so much in coming forward with the allegations.

9. For her part, the Director draws attention to the fact that there was no requisition in relation to the adequacy of the trial judge's warning and says that this now gives rise to what, in summary, are sometimes described as Cronin issues, but she says, that in any event, the trial judge's charge in this regard was impeccable. It was detailed and it explained the difficulties facing the appellant at both a general and at a specific level. It was a warning that was obviously influenced by and shaped by the charge delivered by the late Judge Kevin Haugh in DPP v RB, which was subsequently approved by the Court of Criminal Appeal. It seems to us, reading the transcript, that the judge was conscious of the need to draw the attention of the jury to the difficulties that are presented to the defence by cases that involve long delay, and in particular, long delay in the context of what are sometimes referred to as historic sex cases. The judge did so by reference to the RB case, what might now be described as model charge, at the time nobody heard that charge delivered felt there was any difficulty in the way the judge was approaching her task. Reading the transcript, this Court would see the charge as being, in many ways, a classic one and we see no basis for condemning the approach taken by the trial judge.

**The Corroboration Warning**

10. The appellant says this was a case where the trial judge had agreed to give a warning, and that being so, it was therefore necessary that the warning given should be clear and unmistakable (see DPP v PJ [2003] 3 IR). The appellant, in the course of written submissions, drew attention to the warning that was approved in the case of DPP v

O'Connor [2002], and says that this was a case where the warning was more robust and altogether more appropriate than what the judge had to say in the present case.

11. Once more, the Director points to the fact that there was no requisition in relation to the terms in which the corroboration warning was given, but again, the Director says that in any event, the warning given was an entirely appropriate one. She draws attention to s. 7(2) of the Criminal Law (Rape)(Amendment) Act, which states in terms that if a judge does decide to give a corroboration warning, then it is not necessary to use any particular form of words in so doing. Again, we are struck by the fact that nobody who had heard the charge had any difficulty with it at the time. Our reading of the transcript leaves us in no doubt that this aspect of the charge was a perfectly proper one.

12. Those, then, are the grounds that were the subject of submissions, oral and written, and we have not been persuaded to uphold them. Neither are we persuaded to uphold any of the other grounds of appeal. We have not been persuaded that the trial was unfair or that the verdict was unsafe.

13. In those circumstances, we must dismiss the appeal.