



## THE COURT OF APPEAL

Neutral Citation: [2024] IECA 316  
Record Number: CCAOT0014/2022

McCarthy J.  
Kennedy J.  
MacGrath J.

**BETWEEN/**

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

**RESPONDENT/**

**- AND -**

**L.C.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 19<sup>th</sup> day of December 2024 by Ms. Justice Isobel Kennedy.**

**1.** This is an appeal against conviction. On the 1st of October 2021, the appellant was convicted of 31 counts, comprising 15 counts of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990, 8 counts of anal rape, and 8 counts of oral rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act 1990.

**Factual Background**

**2.** The incidents were alleged to have occurred when the complainant was between the ages of 13 and 18. The appellant was a neighbour of the complainant and was approximately 20 years older. The appellant operated a small business adjacent to his residence, where the complainant was employed by the appellant on a part time basis. According to the complainant, the alleged assaults took place over several years, both at the appellant's property and at another nearby location owned by the appellant's family.

**3.** Approximately 20 years after the alleged offending began, the complainant reported the allegations to An Garda Síochána, and the appellant was later charged.

**4.** A jury was impanelled on five occasions. The first trial resulted in the jury being discharged following the prosecution opening. The second trial commenced the following day, but again the jury was discharged on the application of defence counsel concerning an aspect of the complainant's testimony. The third trial also resulted in the jury being discharged following a contention that a Garda witness had given evidence of belief concerning the complainant's testimony. The jury disagreed in the fourth trial and appellant was convicted on the fifth occasion on counts 1 to 31.

### **Grounds of Appeal**

**5.** Seven grounds of appeal were initially contained in the notice of appeal, however, the appellant sought to add an additional ground by notice of motion. This concerned the procedural history to the conviction; specifically, the fact that the appellant had been placed on trial on four occasions prior to the trial, the subject of the within appeal. It is contended that proceeding to a fifth trial breached the appellant's right to a fair trial in due course of law and amounted to an abuse of process.

**6.** Grounds 2 – 7 were abandoned at the oral hearing. This Court is asked to consider ground 1 in amended form and ground 8, the subject of the motion.

**7.** The appellant also sought to amend ground 1 by the addition of a further sub-ground by Notice of Motion at the oral hearing. The Director has no procedural objection to the formal addition of either ground, but objects to the substance of each new ground.

**8.** Consequently, while several grounds of appeal were originally filed, there are now in essence two grounds before this Court, comprising the amended ground 1, which now has two parts, and ground 8. In short, this appeal is confined to:-

- (1) A contention that the trial judge invited the jury to infer that the alleged abuser referred to in a complaint was the appellant;
- (2) The trial judge did not give a clear corroboration warning and;
- (3) Proceeding to a fifth trial amounted to an abuse of process.

**9.** Ground 1, as originally filed, contended that the trial judge had erred in admitting the evidence of a witness (Ms. M) to whom the complainant had made a complaint of previous sexual abuse. The evidence was admitted to rebut an imputation of recent fabrication made by the appellant during Garda interviews. The complaint was made sometime between 2000 and 2006 and the complainant had not proffered any details regarding the alleged perpetrator or the alleged offences. The evidence arose to rebut a defence that the allegations were fabricated because of, *inter alia*, a business dispute between the complainant and the appellant in 2011.

**10.** At hearing, counsel for the appellant indicated that the evidence was properly admitted, and no issue arose in this respect. Therefore, this aspect of the ground as originally filed fell away. Thus, the issues for this Court's consideration are confined to the manner in which the judge directed the jury on this evidence.

**11.** It is specifically contended that the trial judge invited the jury to infer that, the person about whom the complainant made a complaint to Ms. M was in fact the appellant. It is submitted that the judge failed to give a further warning to the jury in respect of the prosecution's invitation to infer that the unnamed abuser referred to in Ms. M's testimony was the appellant.

**12.** The second complaint is that the judge ought to have expanded the corroboration warning and directed the jury that Ms. M's evidence was not capable in law of corroborating the complainant's testimony. It is said that no clear warning against assumption or corroboration was given by the jury in respect of Ms. M's evidence. No further issue is raised regarding the charge and recent fabrication.

**13.** Ground 1 now reads:-

*[A]nd where the trial judge invited the jury to infer from the said evidence that the alleged abuser was the appellant thereby prejudicing the accused in the conduct of his Defence and in the minds of the jury and to the extent that the accused did not receive a fair trial;*

*(b) in addition and for the sake of clarity, whereas the learned judge exercised his discretion to warn the jury by way of a corroboration warning he failed to so direct in a clear manner.*

**14.** The remaining ground relates to the contention that multiple trials on the same charges breached the appellant's right to a fair trial and is as follows:-

*In permitting a fifth trial of the Appellant to proceed on the same charges, the trial Judge failed to prohibit an abuse of process in violation of Articles 38(1) and/or 40 of Bunreacht na hEireann and/or Article 6 of the European Convention on Human Rights ("ECHR"), having regard to the obligations of the Director of Public Prosecutions ("DPP") under s.3 of the European Convention on Human Rights Act 2003 and/or Article 47 of the European*

*Charter on Fundamental Rights. In compelling the Appellant to be subject to a fifth criminal trial, the trial Judge failed to give due regard to the Appellant's right to a fair hearing within a reasonable period of time including but not limited to (i) the passage of time since the date of the allegations and commencement of the fifth retrial (ii) the fact of the discharge of previous juries (iii) the delays caused by the DPP and/or prosecution witnesses (iv) the medically diagnosed stress and anxiety caused to the Appellant as a direct result of the retrial process (v) the general oppression, unfairness and/or unreasonableness in subjecting a defendant to more than three criminal trials.*

## **1. Recent Fabrication**

### **Submissions of the Appellant**

**15.** The appellant takes no issue with the admission of the evidence of the appellant's former girlfriend to rebut an allegation of recent fabrication. His principal argument concerns how the trial judge directed the jury on this issue, specifically regarding the fact that the complainant made by the complainant to his then girlfriend was silent as to the name of the alleged abuser.

**16.** In objecting to the admission of the evidence at trial, counsel then representing the appellant argued, *inter alia*, that the complainant did not identify a perpetrator. The complaint was admitted. Following the charge, the judge was requisitioned on this aspect of the evidence and the fact that the appellant was not named, (nor indeed anybody at all) and asked the judge to instruct the jury that the respondent bore the onus of proving that the person to whom the complainant was referring was the appellant before proceeding to act on the rebuttal evidence.

### **Background**

**17.** The background to his evidence is to be found in a business relationship between the appellant and the complainant where the business failed and, where, in and around 2011, the complainant received a letter ending his employment. The appellant gave evidence that the complainant was very angry and had said to the appellant, "I will ruin you". Moreover, he stated that complainant bore him a grudge because of the loss of the business.

**18.** In response to the appellant's assertion in interview that the complainant's complaint to the gardai in 2015 was as a result of the failure of the business in 2011, the respondent called Ms. M who had been the complainant's partner circa 2000 – 2006. During that period the complainant informed her that he had been abused but gave no further detail.

**19.** The appellant's contention on this aspect of the trial from the ground filed is that; first, the judge invited an inference which was not open on the evidence, second, he ought to have advised the jury that before they could rely on the evidence, they must be satisfied that it was the appellant to whom the complainant was referring when he disclosed abuse to his former girlfriend, and third, (the subject of the new ground 1[b]), the judge ought to have expanded on the corroboration warning and added that Ms. M's testimony did not amount to corroboration.

### **Submissions of the Respondent**

**20.** The respondent argues that the complainant's statements to his previous girlfriend were admissible under the recognised "recent fabrication" exception to the rule against narrative, in circumstances where an unequivocal allegation of recent fabrication had been made by the respondent in Garda interviews. The respondent submits that the trial judge considered the issue and provided a

reasoned decision as to why the evidence was admissible, and gave the jury an adequate and correct charge in respect of this evidence.

### **Discussion**

**21.** In charging the jury, the trial judge set out in some detail the defence put forward and in particular gave a clear account of the second limb of the appellant's defence; being that the complainant's allegations should be rejected as a recent fabrication motivated by the aforementioned grudge. He then proceeded to elaborate on the background to the alleged grudge and placed the evidence of Ms. M in that context. He then stated as follows:-

*Thus, it would be for you to decide whether there is evidence of recent fabrication that prevents you from being satisfied beyond reasonable doubt of the credibility and hence the reliability of [the complainant's] evidence.*

**22.** This is the extract from the transcript which has been relied upon by the appellant. It is readily apparent that the judge did not expressly issue an invitation to the jury to infer that the alleged abuser was the appellant. It is clear that the prosecution did so in closing to the jury. However, the issue appears to be that, while the judge instructed the jury as above, he in effect invited the jury to infer that the person about whom the appellant complained, while unnamed, was in fact the appellant. This was in circumstances where the judge did not accede to the requisition to instruct the jury that, the onus rested with the prosecution to prove beyond reasonable doubt that the person about whom the complainant complained was in fact the appellant before they could act on Ms. M's evidence.

**23.** Following the judge's charge, counsel for the appellant raised several requisitions but particularly in relation to the unidentified nature of the alleged abuser in Ms. M's evidence:-

*Mr O'Higgins: The next matter, Judge, is the question of recent fabrication. Now, you made a ruling in this case –*

*Judge: Yes.*

*Mr O'Higgins: --that permitted the prosecution to adduce this evidence, without it ever being established that it referred to my client.*

*Judge: Yes.*

*Mr O'Higgins: Now, I assumed that this lacuna, which I note Mr. Clarke had readily acknowledged on each occasion, would be the subject of some sort of direction by you, but there is no reference good, bad or indifferent by you in any way as to how there to deal with the fact that my client is not nominated.*

*Judge: What direction do you say that I should have given them?*

*Mr O'Higgins: Well, what I respectfully submit is as follows—*

*Judge: Yes.*

*Mr O'Higgins: --that the burden of proof in this case is on the prosecution.*

*Judge: Yes.*

*Mr O'Higgins: That's the first factor and that if they're to lay this at my client's door, there must be evidence –they must be satisfied on the evidence that it refers to my client.....*

**24.** The requisition continued:-

*Mr O'Higgins: ...Next, in the burden being on the prosecution and they have to be satisfied beyond reasonable doubt that it refers to my client, in my respectful submission, it should be brought to the Court's attention that no effort was made by the investigation or the Director of Public*



*Prosecutions to question [the complainant] to establish whether he had, in fact, been abused by any other person.*

**25.** The judge declined to re-direct the jury and stated, *inter alia*:-

*...and so I believe the jury were left in no doubt that it is for the prosecution to rebut the defence of recent fabrication beyond a reasonable doubt.*

### **Conclusion**

**26.** The appellant confines himself to a limited complaint regarding the charge on recent fabrication; that is the fact that the alleged perpetrator was unnamed in the complaint to Ms. M and so the jury should have been warned in this regard.

**27.** We are satisfied that there is no suggestion that the trial judge expressly issued an invitation to the jury to draw the inference that the complaint made by the complainant in and around 2000-2006 referred to the appellant.

**28.** In written submissions it is said that the prosecution invited the jury to infer that the appellant was the unnamed abuser, and this is indeed so. However, the contention that the trial judge invited the jury to infer from the evidence that the alleged abuser was the appellant, thus prejudicing the jury, stems from the judge's refusal to re-direct the jury following requisition, where the prosecution had invited the jury to draw the inference that it was the appellant.

**29.** In our view the trial judge properly directed the jury in terms of the onus and standard of proof and the presumption of innocence. The requisition related to the fact the complaint did not nominate the appellant and that the jury ought to be advised that this was an issue for the prosecution to prove to the required standard.

**30.** The judge provided a cogent summary of the defence case and made it quite clear to the jury that the impugned evidence did not disclose that a specific individual had been named by the complainant as the alleged abuser by either Ms.

M or the complainant. This followed the directions on the applicable fundamental principles in a criminal trial. It must have been clear to the jury that the onus rested on the prosecution to prove all aspects of its case and this included the evidence of Ms. M. They were fully aware that no perpetrator was nominated. To suggest to the jury that no investigation was made as to whether the complainant had been abused by another person would have been inappropriate and, in effect would have brought the judge into counsel's domain.

**31.** The jury were fully aware of where the onus of proof lay. Moreover, the judge specifically instructed them that the issue of recent fabrication was for them to decide. The jury were made aware by the trial judge that no individual had been named by the complainant when he made his complaint to his then girlfriend and it was argued with this information and knowledge that the jury was instructed to assess the evidence.

**32.** Insofar as it appears that a more nuanced argument is advanced; that the prosecution invited the jury to draw the impugned inference and as the judge did not accede to the requisition, he lent weight in effect to prosecution counsel's contention, it is the position that comments or suggestions made by counsel are just that, and bear no additional weight simply because such comments are made by counsel. The trial judge advised the jury:-

*As Mr Clarke and Mr O'Higgins have already explained, you're free to accept or reject, as you see fit, any comments or observations that they have made on the evidence in this case. In exactly the same way, you're free to accept or reject any, as you see fit, anything that I say to you about the evidence. You must not feel bound, in any way, by any view of the evidence that I may express or appear to express. When it comes to the facts, rather*

*than the law, it's imperative that you should reject any comments of mine, as judge, with which you don't agree.*

**33.** We are not persuaded that there is merit in the argument advanced either in oral or written submission that the judge invited the jury to draw the inference alleged either expressly or by omission.

## **2. Corroboration Warning**

**34.** We now turn to consider the proposed ground 1(b):-

*[I]n addition and for the sake of clarity, whereas the learned judge exercised his discretion to warn the jury by way of a corroboration warning he failed to so direct in a clear manner.*

## **Submissions**

**35.** The Director objects to the substance of the complaint and argues that the appellant does not meet the threshold under *People (DPP) v Cronin* (No.2) [2006] IESC 9; [2006] 4 IR 329. The respondent relies on the case of *R v Makanjola* [1995] 1 WLR 1348 for the proposition that judges are not required to conform to a specific formula in charging a jury. The respondent also places reliance on *DPP v David Curran* [2011] IECCA 95.

**36.** The appellant, for his part, accepts that the point was not raised at trial, however, in essence argues that there is an apprehension that a real injustice has occurred in that the trial judge ought to have directed the jury following the corroboration warning that the evidence of Ms. M was not corroborative of the complainant's testimony. It is also argued that the word "separate" as opposed to "independent" was used by the trial judge, however, we are not at all persuaded that this is of any real significance in the context of the charge and the overall trial.

**37.** That is the only argument put forward by the appellant. To assess the point, it is necessary to look to the terms of the warning given by the trial judge and in doing so to acknowledge that the terms of the warning are, pursuant to statute, entirely within the discretion of a trial judge.

*The second warning I must give you concerns the absence of corroboration in this case. By corroboration, I mean some separate evidence that confirms a material part of [the complainant's] evidence implicating [L.C.] in the commission of any of the offences charged against him. I must solemnly warn you that it is dangerous to convict upon the evidence of a complainant, unless it is corroborated but that having borne that in mind, and having given due weight to the warning, if the evidence is nonetheless so clearly acceptable that you're satisfied beyond reasonable doubt of the guilt of the accused, to the extent that the danger which is generally inherent in acting on the uncorroborated evidence of a complainant is not present in this case, then you may act upon [the complainant's] evidence and convict.*

### **Discussion and Conclusion**

**38.** The first observation we make is that the warning given by the judge is of a strong order, perhaps more so than is usually seen in recent times by this Court. The second and more salient observation is that the judge very clearly points out to the jury that there is an absence of corroboration. Therefore, from the commencement of the warning, the jury were fully aware that there was no corroboration in the case.

**39.** The appellant submits that the judge ought to have then informed the jury that the evidence of Ms. M did not constitute corroboration. However, in our view, where the judge clearly told the jury there was no corroboration, that was sufficient in the circumstances and any further direction would have been

superfluous. This is particularly so, where the judge had already advised the jury of the evidence of recent invention and the rebuttal evidence adduced and instructed them in terms that it concerned the credibility of the complainant.

**40.** We are also cognisant of the fact that the appellant was represented by extremely experienced counsel who did not find fault with the judge's charge in this respect. As we have stated, no requisition was raised, and we are not at all persuaded of the apprehension that a real injustice occurred.

**41.** Therefore, the appellant does not satisfy the principles in *Cronin* and this ground fails.

### **3. Abuse of Process**

#### **Submissions of the Appellant – Abuse of Process**

**42.** In respect of ground 8, counsel for the appellant contends that subjecting the appellant to five trials on the same charges violated his rights under Articles 38 and 40 of the Constitution, as well as Article 6 of the European Convention on Human Rights. The appellant argues the cumulative impact of multiple trials constituted an oppressive procedure, which placed unreasonable strain on the appellant and undermined his right to a fair trial. The appellant places reliance upon *D.S. v. Judges of the Circuit Court & Anor* [2008] 4 IR 379, arguing that when previous trials have been discontinued or dismissed, subjecting an accused to a further trial requires careful judicial scrutiny to protect their constitutional rights. The appellant also relies upon the cases of: *People (DPP) v Nevin* [2003] 3 I.R. 321; *Charles v The State* [2000] 1 W.L.R. 384; *R. v Hanworth* [2001] 2 Cr. App. R. 47; *Hanworth v UK* 515/02 [2004] ECHR 579; *AP v The Director of Public Prosecutions* [2011] 1 IR 729; *Byrne v Judges of the District Circuit Court & Anor* [2015] IESC 105. The appellant also cites the DPP's *Guidelines for Prosecutors* (5<sup>th</sup> Ed. December 2019) (the "DPP Guidelines").

**43.** The appellant, citing *Byrne, D.S.* and the *DPP Guidelines*, submits that the relevant factors in considering whether there has been unfairness to the appellant in conducting multiple trials in this case are: any prosecutorial delay; the seriousness of the offences; the complexity of the case; the results of previous trials; oppression and stress caused to the appellant; the conduct of the complainant; the change in the evidence presented; the need for the court to exercise its discretion to prevent prosecution with caution; and the duty on the court to protect due process.

### **Submissions of the Respondent**

**44.** The respondent submits that in fact only two trials went to the jury for deliberation, one of which was disagreed and the other which produced the conviction the subject of this appeal. The respondent distinguishes this from a case where an accused is exposed to four or five or more trials where there had been jury disagreements in all previous trials. The respondent submits that a trial stopped early in the process is entirely different to a situation where there has been a full trial but a disagreed jury.

**45.** The respondent submits that the appellant did not suffer any oppression or unfairness over and above the usual trial process, nor over and above the usual effects of adjournments of trial matters. The respondent further submits that there was no avoidable delay in the trial process, and that this issue was not raised in the court below and cannot now be raised on appeal.

**46.** The respondent denies any prosecutorial delay. It is submitted that the elapse of 32 months between trial 1 and trial 5 cannot be attributed to any one person. It is submitted first three trials resulted in discharges of the jury at the application of the defence, but did not negatively affect the defence more than anyone else. The respondent further submits the jury were adequately warned by

the trial judge about the delay and the dangers brought by the delay between the offending and the final trial which resulted in convictions. The respondent argues the appellant has not met the test for prohibition, and the mere fact of some prosecutorial delay is not enough to overcome the public interest in having the serious charges the subject of this case proceed to trial. The respondent also denies that there was any requirement on the DPP to make an application to the court for a fifth trial to proceed.

### **Discussion**

**47.** By way of background, the appellant faced trial on five occasions, culminating in this conviction. It is the position that only two trials proceeded to a determination by a jury, one of which resulted in a disagreement and the other in conviction. The juries in the other three trials were discharged on the defence application.

**48.** It is noteworthy from the perspective of *Cronin* that while an application was made pursuant to the *PO'C v DPP* [2008] JIC 0401 line of jurisprudence, and a contention of abuse of process was raised, it was in the context of the passage of time between the dates of the offending and the trial.

**49.** The ground of appeal specifies that "in compelling the appellant to be subject to a fifth criminal trial, the trial judge failed to give due regard to the appellant's right to a fair hearing". It is clear that no application was made before the trial judge to stop the trial on the basis of it being the fifth trial. The criticism is confined to an alleged failure on the part of the trial judge to make any proper enquiry as to the procedural history.

**50.** We do not find any merit in this argument. We are satisfied that the appellant fails to meet the threshold in *Cronin* and that no possible injustice arises.

**51.** There is no obligation on a trial judge to make this enquiry. On the contrary, should there be an issue concerning placing an individual on trial for a fifth time, (and we cannot see it arising here in the circumstances of this case), an individual has other potential remedies available.

**52.** We reject this ground of appeal.

**Decision**

**53.** As we are not persuaded by any ground of appeal, the appeal is dismissed.