



THE COURT OF APPEAL

Record No. 9/2015

Birmingham J.  
Mahon J.  
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

T. O'D

APPELLANT

**JUDGMENT of the Court delivered on the 22nd day of May 2017 by Mr. Justice Mahon**

1. The appellant was convicted by a jury at Cork Circuit Criminal Court on the 27th June 2014 of indecently assaulting N, then a sixteen year old boy, on a date unknown between the 1st March 1979 and the 30th April 1979, contrary to Common Law. He was sentenced on the 18th December 2014 to five years imprisonment (from the 14th November 2014), with the final two years suspended on certain conditions.

2. The indecent assault took place at a boarding school in Co. Cork where the complainant was then a pupil, and the appellant a priest on the staff of the school. The single incident took place at night time while the complainant was sleeping in the school sick bay. He described how he woke up to find himself being masturbated by the appellant. He described how the appellant told him, the complainant, that he was sick and that he would get him some disprin. He returned with a glass of water and disprin, and then left. The complainant made no complaint for thirty three years, before making contact with the gardaí in April 2012, having earlier undergone counselling and having spoken to a solicitor about taking a civil claim for damages against the appellant's Religious Order. The appellant was interviewed by the gardaí on the 18th April 2012 at Cobh garda station. He denied the allegation.

3. The appellant pleaded guilty in 1999, and again in 2014, to incidents of indecently assaulting a number of pupils at the same school. These earlier convictions had been reported in the press, and the appellant had been named, and the fact of these convictions was disclosed in the course of the trial. The appellant had acknowledged indecently assaulting ten named boys at the school, but was adamant that he had not assaulted the complainant.

4. The appellant's notice of appeal as originally filed included two grounds of appeal. He successfully applied to this court for leave to add a third ground of appeal. The three grounds of appeal therefore are:-

(i) The learned trial judge's decision not to give a corroboration warning to the jury was made on an incorrect legal basis and / or was clearly wrong in fact,

and

(ii) the delay warning given by the learned trial judge was impaired by the comment he made in respect of the jury's task of assessing the memory of the complainant's version of events and the appellant's version of events; and that such comments had the effect of creating an onus of proof on the appellant,

and

(iii) in his charge to the jury the learned trial judge said that the appellant's evidence that he had no memory of ever seeing the complainant in the location where he was allegedly abused, demonstrated a failure of memory on his part. The learned trial judge then implied that the appellant could have abused the complainant but had forgotten the incident as he had, on his own admission, abused so many boys. The effect of these unwarranted and erroneous comments was to undermine the delay warning that had been given and to cause irreparable prejudice to the appellant.

**The corroboration warning issue**

5. Section 7 of the Criminal Law (Rape) (Amendment) 1990 removed the hitherto mandatory warning by a trial judge to a jury on the dangers of convicting a person for a sexual offence in the absence of corroborating evidence.

6. Since then, it is a matter for the discretion of the trial judge to decide, having regard to all the evidence given, whether the jury should be given a corroboration warning. If a warning is given, no particular form of words need be used. But, if given, it must be *clear and unambiguous* (*DPP v J.P* [2003] 3 I.R. 550 at p. 567).

7. In advance of his charging the jury, the learned trial judge indicated that he was not minded to give a corroboration warning having heard all of the evidence in the case in circumstances where the facts grounding the allegation were secretive in nature. He expressed his concern that a corroboration warning would only confuse the jury, and that it was impossible to contextualise such a warning in the circumstances. An opportunity was afforded to counsel on both sides to address the court as to how the learned trial judge should exercise that discretion. Mr. Creed S.C, counsel for the appellant argued in favour of a corroboration warning being given, while Mr. Sreenan BL, for the respondent argued to the contrary, expressing a concern that such a warning would only serve to confuse the jury.

8. The learned trial judge in deciding to exercise his discretion not to give a corroboration warning, explained his decision in the

following terms:-

*"Gentlemen, over night I was looking at the evidence in the case and I had mentioned the corroboration warning to you yesterday and it is a discretionary warning. And I am just wondering giving the type of case that it is and the way that the evidence has actually sat, whether or not a corroboration warning is appropriate in this case or not, and I am inclined to the view that it probably isn't. Because the nature of the offence is secretive, surreptitious, what is there by way of corroboration that could possibly be in this particular case? It's admitted that the accused was a priest in the school at the time. It is not challenged that the injured party, the complainant, was in the school at that time. So those two - it's only if there was some element which tended to take one or the other out of the frame at the particular time that it seems to me that corroboration would be relevant. As I am inclined, notwithstanding what I said yesterday, I am inclined not to give the corroboration warning in this instance."*

9. The learned trial judge added:-

*"...this is where I see the difficulty on the corroborative warning, that I am tending to the view that the corroborative warning would not bring anything additional to the charge which would be of benefit to the jury or indeed be of benefit to the accused."*

10. In due course Mr. Creed requisitioned the learned trial judge following the conclusion of his charge to the jury in relation to the corroboration warning issue, but to no avail. The learned trial judge did give the jury a delay warning having regard to the in excess of thirty years which had elapsed between the date of the incident and the complaint to the gardaí. That delay warning was also the subject of a requisition by Mr. Creed, and is the subject of the second (and additional) ground of appeal herein.

11. It is apparent from the exchange of views between the learned trial judge, Mr. Creed and Mr. Sreenan that the learned trial judge's reasons for his decision to exercise his discretion not to give a corroboration warning can be summarised as follows:-

(i) Where a corroboration warning is given it must be contextualised. The judgment of McMenamin J. in *DPP v. D* [2014] IECCA20 was cited as the authority for this requirement. It was not possible to provide such contextualisation in this case.

(ii) Because the nature of the offence was secretive and surreptitious *"what is there by way of corroboration that could possibly be in this particular case?"*

(iii) A corroboration warning would only serve to confuse the jury. It would not be of benefit to the accused.

12. It is appropriate at this juncture to examine closely what was said in *DPP v. D*. That appeal related to the conviction by a jury of six counts of indecent assault and one count of sexual assault of a minor. Features of that case are broadly similar to the instant case; the only witness was the complainant, there was no corroboration of his testimony, and there was a significant gap in time between the period in which the offences were committed and complaints made to the gardaí. Also, the main grounds of appeal concerned the issues of warning the jury in relation to corroboration and delay.

13. Before doing so however, it is useful to briefly refer to the judgment of the Supreme Court in *DPP v. Gentleman* [2003] 4 I.R. 22. In his judgment, Keane C.J., referring to the trial judge's charge to the jury stated:-

*"...(it) does not indicate in any way to the jury why the law considers it dangerous or has in its experience found that it may be dangerous to convict on the uncorroborated evidence of a complaint in relation to a matter of sexual assault. He does not draw the jury's attention to the fact that the reason the law has always exercised caution in this area is because it is so much a case of one person's word against the other and the jury therefore has to exercise special care in deciding whether they believe the complainant or whether they are not satisfied beyond reasonable doubt of the truth of the complainant's allegation, bearing in mind that this was a case in which the accused also gave evidence."*

14. In his judgment in the same case, Keane C.J., referring to the fact that the evidence consisted of the testimony of the complainant with no corroboration, and a very long lapse of time, opined:-

*"...one would not be in the least surprised to find a trial judge would find it necessary to give a warning..."*

15. In *DPP v. D*, the trial judge did address the issue of corroboration in his charge to the jury, in that he expressed the view that there was no evidence capable of amounting to corroboration. He went on to state as follows:-

*"...notwithstanding an absence of corroboration, having carefully considered the warning that there is not any, you would be entitled, if all twelve of you were satisfied of the guilt of the accused to the standard beyond reasonable doubt, to convict, but I am telling you there is nothing capable of amounting to corroboration and you should bear that in mind."*

16. In giving the judgment of the court, McMenamin J. was critical of what had been stated to the jury by the trial judge. He said:-

*"...There was no explanation to the jury of any of the function that corroborating evidence may serve in any given case, or that it might be dangerous to convict in the absence of such evidence. There was no indication that the jury might be slower, or more careful, to convict on the basis of an uncorroborated account given by the complainant, nor was the jury informed that the absence of corroboration was a factor which they should consider in deciding whether or not it was safe to convict the accused. Having mentioned the fact that there was no such evidence, the learned trial judge went straight to the statement that the jury might convict if satisfied of the accused's guilt even though there was nothing capable of amounting to corroboration."*

17. McMenamin J. did not specifically refer to a need to contextualise a corroboration warning, or that such a warning ought not be given where such contextualisation was not possible. He did however state, when dealing with the part of the judgment under the heading *The Delay Warning*, that contextualisation is *highly important*, and went on to discuss in some detail contextualisation in relation to a delay warning.

18. A trial judge has a discretion as to whether or not to warn a jury in relation to corroboration, and this court is slow to interfere with the exercise of such discretion. The basis on which it will interfere was briefly referred to by this court in *DPP v. KC* [2016] IECA

155 when Birmingham J, in giving the judgment of the court, 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."*

19. In *DPP v. Ryan* [2003] 3 I.R. 550 at 566, Geoghegan J. said that:-

*"as in the case of all discretionary orders, an appellate court may interfere if, on the facts of any particular case, a failure to give the warning was manifestly a wrong exercise of the discretion."*

20. As earlier indicated, in the instant case, the learned trial judge's reasons for not giving a corroboration warning were threefold, being that contextualisation was necessary but was impossible to achieve, because the nature of the offence was secretive corroboration could not exist, and a corroboration warning would only serve to confuse the jury, and would be of not benefit to the accused.

21. The court is satisfied that both in respect of the particular circumstances and evidence in this case, and in terms of the applicable legal principles generally, the learned sentencing judge was wrong in his reasoning and therefore did not exercise his discretion based on appropriate criteria.

22. The fact that the nature of the offence was *secretive* and *surreptitious* significantly increased the justification and appropriateness of giving a corroboration warning. It was a case of one person's word against another. It was also a fact that the duration of the assault in question was relatively brief. It occurred at night time when the complainant was initially asleep. The lack of corroborative evidence in itself placed the case into a category of cases in which a trial judge should lean towards exercising his or her discretion in favour of giving a corroboration warning. That view is very much supported by the judgments in *Gentlemen* and *D*.

23. A live issue in the instant case was, obviously, the identity of the priest who indecently assaulted the complainant. In circumstances where it was likely, based on the complainant's evidence, that he had in fact been sexually assaulted in the manner he described, the jury were very much aware of the fact that the appellant emphatically denied his involvement and did so in circumstances where it was pointed out that other priests, besides the appellant, had themselves been involved in the sexual abuse of pupils at the school. In effect, it was maintained by the appellant that if the complainant had been sexually abused as alleged, the abuser was another school staff member.

24. In *DPP v. K.M.* [2005] IECCA 93, and similarly to the instant case, there was no real doubt that the complainant had been assaulted; the only question was the identity of the assailant. In that case the trial judge gave a corroboration warning, and although it was later found to be defective in content, the Court of Criminal Appeal found that he was correct in doing so because the only question of any consequence for the jury was whether the offences were committed by the accused, rather than someone else. In that case, the court believed it appropriate that the jury should direct their minds to the question whether there was any independent evidence connecting the accused with the crime, while at the same time being advised that they could convict even in the absence of such evidence.

25. The learned trial judge's concern that the corroboration warning would only serve to confuse the jury was misplaced. A corroboration warning, when properly given, will not confuse a jury. The concept of corroborative evidence is not a difficult one and is well capable of being absorbed and understood by persons without legal training. It is by its nature simply an admonition to exercise care before finding an accused person guilty, in the absence of corroboration. It is a warning, when properly given, which also makes it clear to the jury that may find the accused guilty in the absence of corroboration.

26. A corroboration warning, properly given, had the potential to have been of considerable benefit to the appellant in the particular circumstances of this case.

27. Even where there is an obvious lack of corroboration evidence, the explanation of the concept can be aided and clarified by reference to hypothetical examples of where corroboration might have arisen in the circumstances of the case. For example, in the instant case, a written record of the complainant having been a patient in the school's sick bay at around the time of the incident, had it been available, might have been considered by the jury as corroborative evidence.

28. The court is satisfied that there was, for these reasons, an error of principle on the part of the learned trial judge in the manner in which he exercised his discretion not to give a corroboration basis, and on this basis this ground of appeal must succeed.

29. In the circumstances, it is unnecessary for the court to consider the grounds of appeal relating to the delay warning. The court will therefore allow the appeal and quash the conviction, and will hear submissions as to whether or not it is appropriate to order a retrial.