THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

227/16

The People at the Suit of the Director of Public Prosecutions

Respondent

V

John Prior

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 24th day of November 2016 by Mr. Justice Birmingham

1. On the 14th July, 2016, the appellant was convicted of two counts of indecent assault following a jury trial which lasted six days followed by two days of jury deliberation. The verdict was a majority one, a majority of 11-1 in the case of the two counts where convictions were recorded and the jury failed to agree on three other counts that were on the indictment. Subsequently on the 27th July, a sentence of eighteen months imprisonment was imposed. The appellant has brought an appeal against conviction and sentence. This judgment deals with the conviction aspect.

Background
2. In summary the background to the case is that in summer 1985, the complainant EC who was then aged ten years going on eleven years and her older sister LC came to Ireland from America for the summer. They were residents of the United States. The complainant's mother was undergoing a surgical procedure in the United States at the time and the plan was for the two girls to spend the summer with various maternal relatives across Ireland. That included a two to three weeks stay approximately in the home of the appellant which was a bed and breakfast establishment in Dublin 4. The appellant and his wife P, who was the sister of the complainant's mother, had four children who at the time were aged 14 (L), 12 (S), 5 (A) and less than one year, baby (C).

3. The complaints that gave rise to the five count indictment all relate to this period and the incidents in question were alleged to have occurred either in the house, that was so in the case of three incidents, or in a car during the course of a shopping trip to collect groceries or in the changing room of a store during the course of a shopping trip to Dublin city centre.

4. The complainant made a statement to gardaí on the 3rd June, 2011. This was therefore a case of alleged historic sex abuse as the alleged incidents went back some 26 years prior to the statement being made and almost 30 years prior to the trial which took place in July, 2016. So far as the background and circumstances of the appellant are concerned he is now 68 years or age, he is a widower, his wife P died in 2011, and his children are all now adults. He has been involved in building or property development for much of his life.

5. The appellant has formulated nine grounds of appeal which are set out in the notice, but these can be netted down into three groups. There is, first of all a complaint that the case should have been withdrawn from the jury and that there should have been a direction on *Galbraith* grounds. Four grounds are formulated on this issue. Secondly, it is said that the judge erred in deciding not to give a corroboration warning, two grounds have been formulated here. It might be noted that there is a degree of overlap between the *Galbraith* grounds and the corroboration warning grounds in that it is said that there were inconsistencies and weaknesses in the prosecution case and that the prosecution evidence was unsatisfactory in respects to the extent that the case should have been withdrawn from the jury. Alternatively it is submitted that if the grounds were not such as to require that the case be withdrawn from the jury that they did require that there should be a corroboration warning. Finally then there are grounds of appeal relating to how the judge dealt with the issue of the burden of proof, that has given rise to three grounds being formulated.

6. It is accepted though that the primary ground of appeal relates to the question of the failure to give a corroboration warning and linked to that is what the judge actually had to say on the issue when he came to charge the jury.

Corroboration
7. In relation to the question of corroboration, this issue arose first on day 5 of the hearing after the evidence in the case closed. The defence had called a number of witnesses though the accused man, as he then was, had not given evidence in his own defence. The judge stated that he would be giving a delay warning, a so-called *Haugh* warning, but went on to say that he did not intend to give a corroboration warning observing that there was nothing in particular in the case that would require one. Counsel for the appellant responded by saying that such a warning was required in the circumstances of the case and said that was so because over and above the normal problems associated with delay, that here there were inconsistencies in the complainant's evidence and in certain respects the evidence of the complainant was unsatisfactory. It was argued that in certain respects the account given by the complainant was inherently improbable. Counsel for the prosecution responded by disputing that there was any inconsistency in the evidence of the complainant, i.e. inconsistency between her statements first made to An Garda Síochána and her evidence at trial.

8. Following the debate between counsel the judge ruled as follows:-

> "I have listened to what Mr. O'Kelly (senior counsel for the defence) has indicated and I see no reason to give the corroboration warning in this case. I did not find – I didn't find anything particularly difficult in the complainant's evidence. Obviously a jury can believe it or not believe it. It is for them. And I always find it a bit difficult to give a warning where you are saying it's unsafe to convict, but you can convict. I have always considered a corroboration warning – I hesitate ever to ask a jury to do anything that is unsafe. So, I am not going to give it in this case. There is, as far as I am

concerned, and it is only a matter of opinion, Ms. C stood up well to cross examination. The jury may not believe that but in exercising my discretion, I see no reason in this case to give a corroboration warning."

He then added:-

"But they will be told by the judge, by me the judge, that there is no corroboration in the case."

9. In the course of his charge the judge did make reference to corroboration in the following terms:-

"Now, there is no corroboration in this trial. There is no independent support in relation to these allegations. But nonetheless if you are satisfied beyond reasonable doubt of the truth of them, you can convict, but I am asking you to look fairly closely at the evidence of Ms. C taking in account what other witnesses said to the Court. I am also asking you in assessing the credibility of Ms. C to take in account what Mr. Clarke (prosecution counsel) said in relation to her evidence and what Mr. O'Kelly (defence counsel) said in relation to her evidence. Obviously, if you agree with the submissions made by either counsel, adopt them. If you disagree with them reject them. They have done their job, both of them really well. They have laid out the case very clearly to you in relation to the facts, but bear in mind despite their eloquence they are not the deciders, you are the deciders. You take into account what was said and you must listen to what they – and I know you will, but in the end it is for you to decide the case. It's for you to decide the guilt or innocence of Mr. Prior and the case largely if not totally depends on the evidence of Ms. C. Now the evidence and I am not going to make any comment really on the evidence in the case, you are going to have to assess it yourselves. You are going to have to look at it yourself and you are going to have to look at all the witnesses, particularly Ms. C and look at the circumstances when these offences occurred, but the only comment and disregard this if you wish, sexual assaults are usually if not always committed secretly. That is so that very few on very few occasions do sexual assaults occur openly before witnesses and the only further comment usually people who assault makes sure of that, but that's a matter for you."

10. Following the conclusion of the judge's charge counsel for the defence by way of requisition reopened the corroboration issue and sought what might be described as a traditional or classic corroboration warning, but that was refused, with the judge indicating that he was not departing from or minded to revisit his earlier ruling.

11. On behalf of the appellant it is submitted that the judge exercised his discretion in an improper manner when he decided not to give a corroboration warning. It is said that the decision and the reasoning behind it did not disclose a decision that was judicially made, that it was not in truth reasoned, nor was it based on legal principle and/or that it was manifestly wrong. There is a particular focus on the comment by the judge that he had a difficulty in telling the jury that the evidence was such that it would be unsafe to convict when he had already ruled that the matter could go to the jury. It is said that that was indicative of an element of pre-judgement or inflexibility on the judge's part. It is submitted that there are here a number of aspects of the complainant's evidence which should have given rise to serious concerns about her reliability/credibility as a witness and which would have required a corroboration warning. There is as has already been indicated an overlap here with arguments that were made in the context of the application for a direction.

12. It is said that the oral evidence of the complainant was inconsistent in material respects with her statement of complaint to An Garda Síochána. It is said that the sequence in which the five alleged incidents are supposed to have occurred changed between her direct evidence, what she had to say in cross examination and what she had said in the course of her garda statement. It is said that there is an amount of embellishing going on in court and that what she had to say in court in her evidence went beyond what she had said to the gardaí.

13. Other areas identified as being of concern included that in her statement to gardaí she did not refer to the presence in the house of the sister of the appellant who was employed as a housekeeper, that her evidence about the location of the TV room, where one incident is alleged to have occurred, is at variance with what other witnesses had to say including defence witness L, the daughter of the appellant.

14. Moreover it said that the evidence was inherently improbable and indeed implausible in that it was being suggested that the abuse had occurred in what was a very busy house and indeed a very busy bed and breakfast and that the evidence failed to overcome the inherent improbability of abuse being possible in such a busy and crowded environment.

15. The Court has read the transcript of the direct examination and the cross examination of the complainant. A transcript has its limitations. This Court has not had the opportunity that the trial judge had and that the jurors had to view the complainant give her evidence and to see her deal with cross examination. It is for this reason that the long established jurisprudence of appellate courts in this jurisdiction is that such a court should not interfere with findings of primary fact. However, with all the limitations of the transcript acknowledged, the fact is that the complainant emerges from the transcript as an impressive witness.

16. In written and oral submissions the point is made that there was a tendency on the part of the complainant to resort to a mantra of "I was only ten" or some variation of that such as "I was only a child". On examination of the transcript that criticism does not really stand up. By way of example, the first such reference is at day 3, p. 11 of the transcript and is in the context of a cross examination that was taking place at that stage in relation to the conversation that took place in the car on the way to the shop on the occasion of the first alleged act of abuse. It is apparent that the witness was not saying that she could not be expected to answer or that she was not in a position to answer because of her age at the time, but that she was saying, and indeed protesting, that the conversation was not an appropriate one.

17. To take another example, at one stage she was being questioned about the height of the loft which featured in one of the alleged incidents and she was indicating that because she was ten at the time, that objects would have appeared bigger to her than they would to an adult.

18. A particular emphasis of the criticism of the complainant's evidence is that she was not consistent when it came to listing or sequencing the alleged incidents of abuse. The Court does not see this as a point of substance. In direct evidence and she returned to this in cross examination, she said that she was in difficulty listing the order. What she was certain about was that each of the incidents had occurred and she was also certain that the first incident was the incident in the car on the way to the supermarket to shop.

19. In the course of argument, the Court made the point to counsel that it is not unusual that somebody looking back on events that occurred a number of years ago would be in a position to describe and perhaps describe in some detail a number of incidents that

occurred but would be in difficulty in indicating the order in which they occurred.

20. In any event the Court is of the view that there was no basis whatever for withdrawing the case from the jury. This was quintessentially a case for the jury to consider whether the truth of the allegations that were made was established to their satisfaction beyond reasonable doubt.

21. So far as the corroboration issue is concerned and this is really at the heart of the appeal and this was identified in both written and oral submissions as the primary ground of appeal. The starting point for consideration of this issue has to be s. 7 of the Criminal Law (Rape) (Amendment) Act 1990. That section it will be recalled abolished the long standing mandatory requirement for the giving of a warning in cases where sexual assaults were charged. In the case of *R. v. Makanjuola* [1995] 1 W.L.R. 1348, the English Court of Appeal in the context of their very similar legislation set out guidelines as to how trial courts should approach this issue in eight numbered paragraphs. The approach taken in England was approved in the case of *DPP v. J.E.M.* [2001] 4 I.R. 385 where the judgment was given by Denham J., subject to one qualification in relation to the reference in the English judgment to the Wednesbury principles.

22. The appellant says that no reason, or certainly no proper reason, was given by the trial judge for the conclusion that he had arrived at not to give a warning. In the Court's view that is not completely correct. When raising the topic and it was the trial judge who first raised the question of a corroboration warning, the judge expressed the view that there was nothing particular by which we think he meant specific present in the case, requiring the giving of a warning. He returned to this topic and indeed elaborated upon it when ruling following the legal argument between counsel. At that stage he commented that he did not find anything particularly difficult in the complainant's evidence referring also to fact that the complainant stood up well in cross examination. He commented that observation was only a matter of opinion, but the Courts' reading of the transcript would indicate that it was perhaps an understandable opinion.

23. The question of corroboration warnings, whether they were required to be given and the adequacy if given, have featured in a number of a recent decisions of this Court and its predecessor, the Court of Criminal Appeal. In the case of *DPP v. Ryan* [2010] IECCA 29, Geoghegan J. giving the judgment in the Court of Criminal Appeal commented that an appellate court would not interfere with the discretion that a trial judge had, but that as in the case of all discretionary orders, that an appellate court may interfere if on the facts of any particular case a failure to give a warning was manifestly a wrong exercise of the discretion. In *DPP v. Mulligan (ex tempore*, Court of Criminal Appeal, 27th March,2009), the Court of Criminal Appeal in a judgment which was delivered by Fennelly J. commented:-

> "The trial judge could have decided to give the corroboration warning in this case, but the question is not whether this Court would have decided to give it, but rather whether the trial judge exercised his discretion wrongly."

24. In *DPP v Ferris* (Unreported, Court of Criminal Appeal, 10th June, 2002) where again the judgment was delivered by Fennelly J., the Court commented that the question of whether a corroboration warning was required was a matter for the discretion of the trial judge and this Court should not intervene unless it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact.

25. In the view of the Court, the judge here was acting within his discretion. It cannot be said that his conclusion was manifestly a wrong exercise of the discretion, to use the language of the *Ryan* judgment, nor can it be said that it was based on an incorrect legal basis. The most that can be said and the high watermark from the point of view of the defence is that it is a case where the judge might have decided to give a warning, but as the case of *DPP v. Mulligan* makes clear that is not the issue, nor indeed is the issue whether this Court would have given the warning had it been the court of trial, but rather whether the trial judge exercised his discretion wrongly.

26. In the view of the Court it cannot be concluded that the exercise of the discretion was an impermissible one. The Court rejects the corroboration point which is the primary ground.

27. There remains the question in relation to what the judge had to say in relation to the burden of proof. It is accepted that what the judge had to say about the burden of proof always being on the prosecution and that the obligation was to prove the case beyond reasonable doubt, was in general terms correct, but it is said that in the circumstances of the case it was deficient because the judge failed to address certain assertions made by prosecution counsel in the course of his closing speech, which it is contended had the effect of inviting the jury to approach the evidence in a manner that was inconsistent with the correct burden of proof.

28. Prosecution counsel in the course of his speech had referred to the burden of proof and had done so in classic terms such as are used by judges in this building day in and day out and used by judges across the country. The criticism though is that counsel invited the jury to ponder why would someone in the position of the complainant make false allegations. Counsel is also criticised because he addressed possible explanations for false allegations which were advanced or canvassed by the appellant in the course of interviews that were conducted with him by An Garda Síochána. Those possible explanations included the fact that the complainant was motivated by money or might be motivated by money. The appellant is apparently a person of means. It is said that there was marital disharmony in the complainant's household and that this might have affected and influenced the complainant. It is said that there might have been an issue of the seeking of revenge on the part of the complainant and her family for the fact that the appellant had separated from his wife P for a period and there was also mention of the fact that the complainant as a child and perhaps also as an adult, had been demanding, complaining and attention seeking.

29. The Court has read the closing address of counsel for the prosecution and sees nothing improper in what counsel had to say. He was doing no more than putting the prosecutions perspective before the jury albeit forcibly, but while forcibly, in the Court's view properly. The situation is to be contrasted with that of *DPP v. P.J.* [2003] 3 I.R. 550 where it appears that counsel's speech was inflammatory and indeed improper. Therefore the criticisms made of the trial judge and by implication of prosecution counsel in relation to what was said in relation to the burden of proof are not sustained. In the circumstances the Court rejects all the grounds of appeal against conviction and the appeal against conviction will be dismissed and the conviction will be affirmed.