THE COURT OF APPEAL

95/2018

Birmingham P.
Edwards J.
McCarthy J.

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT/

PROSECUTOR

- AND -

J. F.

APPELLANT/

DEFENDANT

JUDGMENT of the Court delivered on the 19th day of July 2018 by

Mr. Justice McCarthy

1. On the 7th December 2017 on the fifth day of his trial at Dublin Circuit Criminal Court the appellant was found guilty of sexual assault on one D. M. on the 14th February 2015 and has appealed against conviction on the following grounds:

> (i) that the trial judge erred in law in refusing to give a corroboration warning in respect of the evidence of the complainant.

and,

> (ii) The failure of the prosecution to disclose the notes of certain (alleged) counselling receiving by the complainant until after the verdict, rendered the trial unfair and in breach of the accused's right under Article 38 of the Constitution of Ireland to a trial in accordance with law.

2. At the hearing of this appeal counsel for the appellant – rightly in our view – did not argue the latter ground and accordingly we are here concerned only with the issue of a corroboration warning.

3. The relevant facts are that on the evening of Friday 13th February 2015 the complainant was staying in the home of her friend M. S. on a so-called "sleepover". She was 12. M. S.'s stepfather, the accused (who was 40), lived there with her mother O. and a younger child. When sharing a bed with M. she felt something around her breast area "trying to get in my top", whereupon she sought to cover herself with the duvet – she did not know what was going on and, then, she saw a man's hand "coming back", she put it, and "trying again". She saw the perpetrator pull his arm back. His hand had been placed under her vest top and he was seeking to put it into her sports bra. She could see the outline of the accused's body (whom she identified as the perpetrator) ("the shape"), tartan pyjamas and a bald head when the second attempt was made. She then awoke M., who screamed. The accused was described by her "running and crawling" towards the door, having "gone down low" as she put it and then "magically appears with the light on" opening the door – in the witness's view purporting merely to have entered the room at that stage. She said that M. agreed with her when she said it was the accused who had been present during the incident but when the accused denied it and swore on his parents' grave that it was not he, she said he would not have done that if he had been the individual in question. When M. gave evidence however, she said that she was awakened by the complainant who told her, on enquiry as to what was wrong, that she could see "eyes looking at her on the floor" but that she could not see anything save what she described as a "dark splodge" which could have been her school uniform; she rejected the proposition that she had recognised the accused or said so. She described the complainant as being "fine" and, later, on enquiry of her as she was leaving the house a short time later told her that she was "grand". She was certain that nothing untoward had occurred (but obviously this could not assist as to anything which may have occurred when she was asleep). The accused's evidence was effectively confined to a denial of any wrongdoing and evidence in conformity with that of his stepdaughter to the effect that hearing her screaming or calling he ran upstairs to her room. M.'s mother, similarly, gave evidence to the effect that she went in to her daughter's room when she heard her. The complainant's father collected her within minutes – she and her family lived within five to ten minutes' walking distance – and he described her as looking upset and, later, "like I felt there was something wrong" and further stated that she was crying. He did not dissent from the proposition that he had described her as being "a little bit upset" when he spoke to a Garda that night but told us also that she was "sobbing crying, she was upset" when pressed in cross examination. He was moved in the circumstances to ask her whether or not the accused had "done anything" to her or whether or not "anything" had happened to her, to which her response was in the negative. It appears from the cross examination that there was a degree to which there were discrepancies between what he told the trial court and what he said to the Gardaí or, apparently, thereafter to a social worker but in our view these discrepancies were of no significance.

4. The circumstances in which a corroboration warning should or may be given are well established and the starting point is *R. v. Makanjoula* [1995] 3 All E.R. 730, (broadly applied in this jurisdiction in *The People (DPP) v. J.E.M.* [2001] 4 I.R. 385), where it was said:-

> "The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge

> should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the [1994] Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."

It was pointed out in *The People (DPP) v. Wallace* (unreported, Court of Criminal Appeal, 30 April 2001) that:-

> "The express legislative provision for the abolition of the mandatory warning . . . must not be circumvented by a trial judge's simply adopting a prudent or cautious approach of giving the warning in every case where there is no corroboration where the evidence might not amount in the view of the trial judge, to corroboration. That would be to circumvent the clear policy of the legislature and that, of course, the courts are not entitled to do",

a proposition repeated in *The People (DPP) v. C.* [2001] 3 I.R. 345:-

> "The fact that there is a conflict in evidence between witnesses or between what one witness said on one occasion or another does not mean that a trial judge is required to direct the jury on the dangers of convicting on uncorroborated evidence. This is a matter for his discretion."

and, further, in *The People (DPP) v. Ferris* [2008] 1 I.R. 1 that:-

> "This Court [the former Court of Criminal Appeal] should not intervene unless it appears either that the decision was made upon an incorrect legal basis or was clearly wrong in fact."

5. After extensive discussion as to whether or not evidence capable of amounting to corroboration existed, the trial judge (having held that it did) put the matter as follows:-

> "Now, in relation to whether I give a corroboration warning. Bearing that in mind, [the fact that such a warning could tend to undermine the defence] I refer to the textbook of McGrath on *"Evidence"*, in relation to that it is set out in McGrath at para. 4.139, which relates to the judge's discretion to give a warning; para. 4.142 refers to *R. v. Makanjoula*; and it also refers, at para. 4.144, to *The People (DPP) v. J.E.M.*; and further at para. 4.145 and 4.146. I don't propose to recite them fully. But I am satisfied that based on the circumstances of this case, the issues raised and the content and manner of the witness's evidence that it is not appropriate in this case to give a corroboration warning and I am exercising my discretion not to give the warning, and I think in the circumstances of the case, that's the fairest approach to take."

6. There is no need here to set out *in extenso* the passages referred to from Mr. McGrath's work. Suffice it to say that they are in conformity with the principles of law to which we have referred above and of particular note, of course, is the learned trial judge's reference to *Makanjoula* and *J.E.M.*

7. Evidence of the state or condition of upset or distress of a complainant in a sexual offence case is, as we know, capable of being regarded as corroboration of her evidence – a principle so well-established as to require no further elaboration by us (though it was the subject of some debate at the trial) and to a very limited extent before us.

8. Mr. Clarke, however, submits that an error of law was made by the learned trial judge when he took the view that the evidence of the complainant's condition (in terms of distress and upset) both on her journey from the accused's house to her own and on her arrival there could not constitute corroboration because an alternative view of that evidence favourable to the accused could be taken. Mr. Clarke was pressed by the President of the Court to articulate such alternative view, if it existed, and effectively the height of his proposition was that possibly because earlier that day when the complainant and M. S. were visiting a supermarket some mention was made of ghosts on a Friday the 13th coupled with the fact that the complainant apparently at one stage thought that what transpired to be touching by the accused was M. S.'s foot constituted such an alternative. We think that this is a fanciful proposition and could not reasonably constitute such an alternative view on the evidence.

9. The proposition that if two views exist one favourable to the prosecution and the other favourable to the accused as to whether or not given evidence is capable of amounting to corroboration, it could not in law constitute such is in our view ill-founded: the ordinary rule is that it is a matter for the jury to decide whether or not, as a fact, such evidence is corroborative, depending on the version they accept. Thus, apart from the view we take of the relevant evidence as to supposed alternative views, even if they existed, it would form no basis for the proposition that it could not constitute corroboration, contrary to what might be argued is the reasoning in *The People (DPP) v. Slavotic* (unreported, Court of Criminal Appeal, 18 November 2002).

10. Whilst Mr. Clarke further relied upon the proposition that there was a discrepancy between the evidence of the complainant and M. S. as to what occurred after the latter was awakened, allied to the proposition that the fact alone that a second person was present when the crime was committed (even if asleep) added to the need for a warning, these were matters which plainly were taken into account by the trial judge having regard to the basis of his decision and needless to say, in any event, such a discrepancy need not in any given case give rise to the need for a warning, still less an intervention by this Court.

11. We think therefore that the trial judge made no error of law and that apart from the fact that two views do not exist on the evidence the case is a good example of the circumstances where the learned trial judge, in accordance with the relevant legal principle, was entitled to exercise his discretion in refusing to give a warning and, in any event, it has been stressed in many cases that the discretion of the trial judge is a wide one.

12. We therefore dismiss this appeal.