



## THE COURT OF APPEAL

**Birmingham J.  
Sheehan J.  
Mahon J.**

**7/16**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Ivan Seredych**

**Appellant**

### **JUDGMENT of the Court (ex tempore) delivered on the 3rd day of November 2016 by Mr. Justice Birmingham**

1. On the 18th November, 2015, the appellant was convicted of a single count of sexual assault and he was subsequently sentenced to a term of three years imprisonment which was backdated to the day of conviction when he went into custody. He has now appealed against his conviction.
2. A single ground of appeal has been argued, which is that the judge erred when she declined to give a corroboration warning to the jury when requested to do so. A second somewhat related issue had been referred to in the written submissions which related to a request at the requisition stage by junior counsel for the defence that the judge, notwithstanding that she had said that she was not prepared to give a corroboration warning, should nonetheless have explained the concept of corroboration to the jury and highlighted its absence for them. That point was expressly not argued by senior counsel for the appellant who moved the appeal before us.
3. It is appropriate to refer very briefly to the background to the trial in order to provide context for the corroboration issue which arises today. On the 9th/10th June, 2012, the complainant who was living in Cavan at the time was in Dublin and she was socialising in Dublin. She had travelled in order to attend a 21st birthday party which was taking place in Clontarf Castle. After the events there, a number of those who were at the party made their way to the city centre and in particular to the Temple Bar area. In the early hours of the morning, perhaps around 3.00 a.m. she became separated from her friends. It may be said that she has always acknowledged that she had consumed alcohol on the occasion at a number of different locations. She had said "I wasn't too bad, I wasn't falling around the place like, I can quite remember what happened, I can quite remembered what happened, the events that happened so I wasn't very drunk".
4. Separated from her friends, the injured party decided to walk to McDonalds in O'Connell Street, where she hoped that she might meet up with some of them. She made her way across the Millennium Bridge and walked in the direction of O'Connell Street, she was feeling "vulnerable", that is her word, and was visibly upset and was crying. At one stage at least she was shouting for her friends.
5. On the North Quays a taxi pulled over. The driver told her to stop crying and he offered to take her home. She told him that she was going to Donaghmeade and she got into the car, sitting in the front passenger seat. According to the complainant very shortly into the journey, he put his hand on her thigh. She remonstrated with him in Polish thinking that that was his nationality and that Polish was his language. In fact the taxi driver was Ukrainian. The injured party had some colloquial Polish as a Polish lodger had stayed with her family or with friends at some stage. He asked her had she a boyfriend, while all the time keeping his hands on her thigh. He then proceeded to move his hand further up under her underwear and touched her on the vagina. The injured party at the time was wearing a short gold party dress.
6. According to the complainant, when the taxi reached the seafront road in Clontarf, the driver pulled into a car park and he asked her if she would like to kiss. At this stage the complainant took out her phone and took down his name and badge numbers from the identification documents which were on the dashboard of the taxi while pretending to be engaged in texting a friend. The driver drove out of the car park and she directed him to drop her in Raheny where she knew that there was a garda station.
7. Again according to the complainant on the way there, he kept touching her vagina before exposing his penis taking her hand and placing it on his penis. She pulled her hand away and then when they arrived in the vicinity of Raheny garda station, she got out of the car and the driver did not make a request for payment. She went into the Raheny garda station where she became very upset and she asked to speak to a female garda. She did speak to a member of the gardaí, Garda Haverty, soon afterwards and described to her what had happened which included a description from the complainant and details in relation to the car as well as the details that she had entered on her phone.
8. In terms of the subsequent investigation the position is that a search warrant was obtained in respect of the appellant's home and on the 25th July, 2012, gardaí went there and the taxi badge with photograph and number were located. The badge matched the details that had been provided by the complainant. At a later stage on the 3rd August, 2012, the appellant was arrested detained and questioned.
9. At trial, when the evidence in the case concluded, it was not a case where the defence went into evidence, counsel for the appellant requested the judge to give the jury a corroboration warning. He did so in these terms:-

"Counsel It is because of the intoxicated state of the complainant within terms of the evidence that she had given and the state of apprehension, that's not the word that she used, but it is a word I would seek to utilise within terms of describing her condition on the night and her feelings of abandonment in effect by those with whom she had sought to make arrangements for travel home or to the place of residence of her friend where she was due to stay the night. For those reasons I would ask that there be a corroboration warning given."

10. Counsel for the prosecution responded and urged the judge to exercise the discretion that she had under s. 7 of the Criminal Law (Rape) Amendment Act 1990, by declining to give a warning. Prosecution counsel made submissions on the law in the area, referring to the English case of *R. v. Makanjuola* [1995] 1 WLR 1348 and the Court of Criminal Appeal decision in *DPP v. J.E.M.* [2001] 4 I.R. 385, quoting extensively from the judgment of Ms. Justice Denham in that case and also referring the Court to cases such as *DPP v. Wallace* (Unreported, Court of Criminal Appeal, 30 April, 2001) and *DPP v. Ferris* [2008] 1 IR 1. Counsel then submitted that if the principles that emerged from those cases were to be applied that a warning would be appropriate only if there was an evidential basis for concluding that the complainant was unreliable.

11. She then went on to review the evidence referring to the fact that the injured party had not at any stage hidden the fact that she had been drinking, mentioning an encounter that had occurred with a member of the Garda Reserve who was known to the injured party, who had said that the injured party had drunk taken but was not staggering, referring to the presence of mind of the injured party when a passenger in the car in taking details of the taxi badge number and so on and entering those details into her phone.

12. Counsel said that the suggestion that was put to the injured party that she was hallucinating did not provide any basis for a warning, but rather the evidence was clear. The judge indicated that she wanted to take time to consider the matter and she said that she would send the jury away for an early and extended lunch and that she would sit again at about 2.30 or 3.00, explaining that she wanted time to read the *J.E.M* decision and to consider it in the light of the evidence.

13. The judge then sat that afternoon and delivered a reasoned decision. She began by setting out the background to the ruling that she was giving and did so in these terms:-

"Defence counsel (Mr. Sammon) had applied to the Court for a corroboration warning to be included in my charge to the jury due to the intoxicated state as he, I think described it, of the complainant on the night in question. Counsel for the prosecution (Ms. Rowland) has resisted the application on the grounds that in the light of the evidence there is no basis upon which the Court should exercise its discretion to do so."

14. Counsel for the appellant says that this introduction indicates that the judge adverted to only one of the two limbs on which the request had been made. What was described as the intoxication limb and not to what counsel has described as the state of apprehension limb.

15. The judge then having reviewed the law in the area, quoting from some of the authorities commented as follows:-

"In this matter I have carefully reviewed all of the evidence and in particular the evidence of Ms. LD the complainant. It is my view that Ms. D gave her evidence in a very clear and truthful manner, although of course it will be a matter for the jury to assess and decide on that, she declined to answer several questions on the ground that she was under oath and would not give any evidence on any point, but she did not or was not able to recall. She was very forthright in particular in relation to the amount of alcohol she had consumed on the night in question. One or perhaps two glasses of champagne in her friend's home, one and half bottles of wine over a four and a half hour period in Clontarf Castle and finally a bottle of cider in the Temple Bar nightclub, again over a period of a couple of hours. She described herself as drunk, but not excessively so. She was able to recognise and speak to ex Reserve Garda [named] when she encountered her near the Millennium Bridge and the ex Reserve Garda observed that she had had drink taken but that she was not staggering. Ms. D was clearly able to note the name and badge number of the taxi driver and to commit such details into her mobile phone. She was able to ask the taxi driver to drop her near to where she knew Raheny garda station to be, although she was also lucid enough not to tell him that this was her destination. She told him that she lived in a house nearby. She was able to give the details of the name and badge number of the taxi driver to Garda Thighe, who described her as being upset and distressed. He did not describe her as being drunk. Garda Haverty who saw her shortly afterwards said that she had consumed alcohol and that that was why Garda Haverty did not take a statement from her there and then. Garda Haverty also described Ms. D as being upset, distressed and crying but did not describe her as being drunk. I do not see any relevance to what transpired on the night in question to Ms. D having been briefly hospitalised several years before for a panic attack. Having considered the application and having regard to the evidence, I am satisfied that this is not a trial in which I should deliver a corroboration warning."

16. It is true that the judge in the course of her ruling did not rehearse the language of counsel when he was seeking the giving of a warning. However, the judge stated expressly that she had carefully reviewed all the evidence and in particular the evidence of the complainant. She referred to the fact that Garda Thighe at Raheny garda station had described her as upset and distressed and referred to what Garda Haverty's evidence in that regard was.

17. In the course of argument, counsel was critical of the nature of the garda investigation and in particular critical of the fact that no effort was made to explore the possibility of obtaining forensic evidence. The adequacy or inadequacy of the investigation was not raised as a ground of appeal as such, but it appears counsel was relating his criticism to the corroboration issue by saying that because the investigation was a limited one, that the case was therefore a particularly difficult one, heavily dependent on the complainant's evidence and that this made the giving of a warning appropriate and indeed necessary.

18. He stresses that the defence case was that nothing untoward happened in the taxi that the allegations were the product of the injured party's imagination and he says that one has to operate on the basis fear feeds imagination.

19. The starting point for consideration of this issue is that this is by statute a matter for the trial judge's discretion. Very properly the issue of a warning was canvassed with the trial judge before closing speeches and the judge heard and considered submissions on the issue from both sides. The judge then took time to consider the matter and delivered a detailed reasoned ruling. In the Court's view that ruling fully engaged with the issue and the judge exercised her discretion in a way that was open to her.

20. In the case of *DPP v Ryan* [2010] IECCA 29, the Court of Criminal Appeal decision, Geoghegan J. observed that an appellate court would not interfere with that discretion, but 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 the case of *DPP v. Mulligan* (ex tempore, Court of Criminal Appeal, 27 March, 2009), also a Court of Criminal Appeal decision, the judgment was given by Fennelly J. where he commented:-

"It may well be that the trial judge could have decided to give the corroboration warning in this case, but the question is not whether this court would decide to give it, but rather whether the judge exercised his discretion wrongly. The court is quite satisfied that the judge very carefully considered all of these matters and decided in the exercise of his discretion not to give the corroboration warning."

21. In this case the Court is quite unable to conclude that the decision not to give the warning was manifestly a wrong exercise of the discretion nor indeed to conclude that the discretion was wrongly exercised at all. The judge in deciding to, as she did, acted within her discretion and in those circumstances the Court must dismiss the appeal.