THE COURT OF APPEAL

Birmingham J.
Sheehan J
Mahon J.

176/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V
R.A.

Appellant

Judgment of the Court (ex tempore) delivered on the 4th day of March 2016, by Mr. Justice Birmingham

1. On the 2nd May 2014, the appellant was convicted in the Central Criminal Court of a count of attempted rape, a number of counts of sexual assault and one count relating to the restriction of the personal liberty of a child for the purposes of sexual exploitation contrary to s. 3(2) of the Child Trafficking and Pornography Act 1998. Subsequently on the 18th June, 2014, he was sentenced to eleven years imprisonment on the attempted rape count and to four years imprisonment on the other counts with the final two years of the sentence suspended.

2. The appeal against conviction relates to the decision of the trial judge not to give a corroboration warning.

3. The background to this case is that in 2007, the complainant JC and the appellant RA both lived at an address in Togher in Cork. At the time Mr. A was in a relationship with the mother of JC and indeed, during the period that the incidents in with which the case is concerned, are alleged to have occurred, they got married. They married in 2008. In 2007 when the incidents that are the subject matter of the charges, are alleged to have commenced, JC was aged twelve years. In the course of her evidence Ms. JC described a number of specific incidents.

4. She told the jury that in 2007 she was sharing a room with bunk beds with her sister NC who was approximately a year and a half older than her. On one occasion RA entered the bedroom went to the bunk where she was, she was on the bottom bunk and whispered to her to be a good girl and then handed her a €10 note. He placed his hand inside her pyjamas and knickers and rubbed her vagina and then rubbed her breasts. She describes another incident which she dates as occurring in May 2008, when she was watching an episode of CSI Miami in the downstairs of the house. Her evidence was that RA asked her "give us a rub" and that he then pulled down his trousers and took her hand and placed it on his penis and caused her to masturbate him.

5. A further incident was said to have occurred over the Christmas holidays. On this occasion there was a sleep over. Her elder sister NC had a friend staying and she herself had a friend CD. NC and her friend went to bed and the complainant and CD stayed on the couch downstairs in a room where RA was. Ms. JC's evidence was that RA asked her friend CD for a kiss and that CD said no and that he then came over to her, that is to say the complainant and kissed her and attempted to put his tongue into her mouth, but that she kept her mouth closed.

6. She describes a further incident as occurring in the following October. On that occasion she went downstairs to have a shower when RA said to her "give us a ride" and she said no. Having showered she went upstairs and was engaged in drying herself off when he entered her room and said "I am going to ride you". He then attempted to rape her on the bed.

7. A further incident in April 2010 was described. On this occasion she was upstairs working on a French project and also doing her nails. RA entered the room, took a belt off a hanger that was on the back of the door and tied her wrists together with the belt, put them over her head and the proceeded to pull up her top and down her pants and sat there looking at her for some five or ten minutes.

8. At trial the main prosecution evidence came from the complainant. There was, though evidence in the nature of recent complaint evidence from a young man who is the same age as JC about what she had told him on one occasion.

9. As part of the prosecution case, the statement of evidence of CD was read to the jury. That statement was brief and was in these terms:-

> "My name is CD, when I was younger, my friend JC was having a sleepover it was the end of December 2008 or the start of January 2009 and we were on school holidays. I remember the sleepover, but I don't remember anything strange happening or anything between JC and her step-dad."

10. The evidence in relation to this sleepover is central to the arguments that are advanced about the requirement for a corroboration warning. Just to return to the evidence at trial, the position is that Mr. A gave evidence in his own defence and denied the allegations.

11. Following the conclusion of the evidence, it was a brief trial, the jury was addressed by prosecution counsel and then by defence counsel and then the trial judge delivered his charge. There was no discussion between counsel and the judge before speeches or before the charge in relation to the issue of corroboration. This Court has on a number of occasions indicated its view that it is desirable that such discussions should take place. One reason why that is so, is that if the discussions take place in advance of the speeches and charge, the judge may be more disposed to provide a warning whereas if the issue is raised only after the judge has concluded his charge it is possible that he may feel that to address the issue at that stage would be to do so in an unbalanced manner.

12. The judge did not give a corroboration warning during the course of his charge in response to the request and indeed the only mention of the corroboration issue was when he was dealing with the recent complaint evidence and made the point to the jury that the complaint evidence was not independent corroborative evidence and gave as an example by way of contrast of evidence of bruising or of injuries in the immediate aftermath of an alleged sexual assault or rape which would be independent corroborative

evidence. In the course of that section of charge the judge said that there was not evidence of that type, that is to say corroborative evidence in this case.

13. When the judge completed his charge, junior counsel for the defence requisitioned and requested a corroboration warning. He said that he had two points that he wanted to raise and that this was the primary one. He said that obviously the question of a corroboration warning was a matter for the judge's discretion, but that he was urging that the discretion would be exercised to give a corroboration warning because of the run of the case, but in particular because he said that there were inconsistencies in the prosecution case referring in that regard to the fact that CD had said that she did not remember anything happening on the occasion of the sleepover. The judge responded as follows:-

> "Thank you I won't do any of those Mr. Munroe [defence counsel] I think In relation to the corroboration warning, there is nothing exceptional really about this case. Cases time and again may have some inconsistencies between, say, one witness and another. The fact that there is nothing which would bring it within the authorities taking it out of what we call the - making it the exception rather the rule and so I am against you on that."

14. Since the enactment of the Criminal Law Rape Amendment Act 1990, judges have a discretion as to whether to give a corroboration warning and it is also the case that if a judge decides in the exercise of his or her discretion to give such a warning that it is not necessary for him or her to use any particular form of words to do so. The mandatory corroboration warning was also abolished in England and Wales. In the case of *R. v. Makanjoula* the court of appeal in a passage which has been quoted with approval in Ireland on a number of occasions observed as follows, Lord Taylor, L.C.J. said:-

> "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 issue 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. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what responses they should make at the level in their direction to the jury. We also stress that judges are not required to conform to any formula and that this Court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its contents."

15. The courts in Ireland have made the point on a number of occasions that judges should not circumvent legislative policy by routinely giving the warning where, for instance it is a case without corroboration. See in that regard *DPP v. Wallace*, 30th April, 2001, *DPP v. Ferris,* [2008] 1 I.R. and *People v. Dolan* [2007], IECCA 30.

16. In the case of *Wallace*, Keane C.J. commented as follows:-

> "The express legislative provision for the abolition of the mandatory warning must not be circumvented by trial judges simply adopting a prudent or cautious approach of giving the warning in every case where there is no corroboration or 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."

17. There was an observation to the same effect in *Ferris*, where Fennelly J. delivering the judgment of the Court of Criminal Appeal commented:-

> "The question of whether the jury should be warned about the danger of convicting on the uncorroborated evidence of a complainant being, as already stated, a matter for the exercise of discretion by the trial judge, this Court should not intervene unless it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact."

18. Likewise in the case of *DPP v. C.* [2001] 3 I.R. 345, Murray J. (as he then was) observed

> "The fact that there is a conflict of evidence between witnesses or between what one witness said on one occasion or on another occasion 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."

19. The defence in this case really make two points. They say that this was a case where a corroboration warning is required and that contention is put primarily in the context of the conflict between the evidence of JC and the statement of CD that was read into evidence in relation to the sleepover occasion.

20. In the view of the court there was no basis for saying the case was such that the discretion that a judge had could be exercised only one way which is in effect what the defence is contending. If this Court was to conclude that the circumstances of the case mandated a warning, then the cases where a warning was not required would be few and the legislative policy would be set at nought.

21. Secondly, however, the defence says that the judge when deciding not to give a warning applied the wrong test that he seems to have felt that the case had to be exceptional before a warning would be given. If that was so he applied the wrong test and in a sense wrongly fettered his own discretion.

22. The defence says that this was a case where there should have been a warning and as a fall back position they say that as a minimum it is a case where the appellant was entitled to have the application for a warning carefully considered by reference to the correct test.

23. The exchange that occurred between junior counsel for the defence and the trial judge has to be seen in the context in which it occurred at the requisition stage, after the judge had completed his charge and the jury had been sent away to begin their deliberation. The court has already commented on the fact that there was no discussion between counsel and judge after evidence had concluded and before speeches in charge. Had there been, no doubt the discussions would have addressed the circumstances in which a warning is appropriate or is required and it is very possible that the judge would have elaborated on how he approaches that issue.

24. In the nature of things, exchanges at requisition stage are likely to be more terse and to be less discursive. While it is true that the judge spoke of "nothing exceptional" the court is of the view that in all likelihood he was simply saying in a very brief way that warnings were not given as a matter of routine, not given in the ordinary way as it were, and that before he would give a warning that there would have to be factors taking the case out of the ordinary.

25. The issue was by statute a matter for the trial judge's discretion. The authorities indicate that this Court should be slow to intervene interfering only when the decision was made on an incorrect legal basis or was clearly wrong in fact. That has not been established in this case. The matter remained one for the trial judge's discretion and in the circumstances the court must dismiss the appeal.