THE COURT OF APPEAL

[108/18]

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

GARBHAN O'CINNEIDE

APPELLANT

JUDGMENT of the Court delivered on the 4th day of April 2019 by Ms. Justice Kennedy

Introduction
1. The appellant appeals against his conviction on the 5th of February 2018. He was convicted of rape contrary to section 2 of the Criminal Law (Rape) Act, 1981, as amended, and was sentenced to five years' imprisonment with the final eighteen months suspended.

Background
2. The events giving rise to the offence occurred on the 23rd November 2014. By way of background, the injured party met the appellant about two weeks prior to the offence and they began dating. She gave evidence that on the night in question, she and the appellant were in the midst of becoming physically intimate when she told him she was not willing to engage in sexual intercourse without the use of a condom. The appellant made attempts to have sexual intercourse with the injured party without a condom and was rebuffed by her in clear terms. He ultimately succeeded in doing so, and was prosecuted and convicted of the offence of rape.

Grounds of Appeal
3. The appellant puts forward two grounds of appeal in that: -

a) The trial judge erred in law by refusing to discharge the jury when the complainant repeatedly referred to "information that she was not permitted to talk about"; and

b) The trial judge erred in his direction to the jury on corroboration.

Submissions

Failure to discharge the jury
4. On the conclusion of the complainant's evidence, counsel for the appellant made an application to discharge the jury on the basis that, during cross-examination, the complainant made several references to evidence which had not been before the jury. Moreover, it was contended that in the course of her direct examination the complainant consistently enquired as to whether she could or could not give certain evidence. The application was refused.

5. The evidence in question concerned a conversation outlined in the complainant's statement that is alleged to have occurred between the appellant and the complainant in the direct aftermath of the offence. The first reference to this conversation was made during the direct examination of the complainant when the following exchange occurred: -

"A. The next bit was he put his clothes on and he came back out into that hall and this was the bit actually that terrified me and it was terrifying and it's

Q. All right.

A . I'm not allowed say that, no?

Q. Well, if you can just tell us what you saw him doing or where he went?

A. Okay. So, he came in, he came in so, this is my bedroom, this is the hall, this is the sitting room, so I was sitting on my bed and I could clearly see around the corner and he came around the corner here and he gave out to me, asking me do you know how long you get for something like this.

Q. Yes.

A. And then I replied to him

MR WHITE: Judge, I'd object to this evidence.

MR GILLANE: Well, if it's words that the accused said I don't know what the objection could be but I'm not

JUDGE: Are we going to need to argue it in the absence of the jury?

MR GILLANE: I mean I'm happy to move on but

MR WHITE: Well, I would ask that the prosecution move on from it, Judge.

JUDGE: Okay. Well, you're moving on."

6. The appellant refers to two subsequent occasions during cross-examination where it is contended that the complainant referred to this conversation, while being cross-examined on the content of text messages between the complainant and her friend discussing the event. She was asked about the following series of text messages: -

"Q. And then E… came back to you further, "well, he's a bit thick and obviously not sexually mature if he thinks that sex without a condom is okay first thing"?

A. Too right.

Q. And you clearly said, "No." "He doesn't sound at all like he cares for your feelings and then to blame you by saying you over reacted is a total dick move"?

A. Yes, and again he did say that, but that was cut off earlier as not relevant when the jury had to leave. This is all stuff that I have said already and I've confirmed numerous times.

Q. And E… got back to you again, "It's not okay, …", and goes on, "He didn't say I over reacted, he said I am not a rapist and then he put on his clothes and said, I'm going, I think better in the car"?

A. And again in text message you don't give a blow by blow account, especially there was a conversation that happened there between him getting up and saying he's not a rapist and him going. There was a conversation that happened in my hall."

The cross-examination continued with a further reference as follows: –

"Q. Yes, your call to the police station seems to have been just after 11 o'clock, these text messages are all going on, and there's a message I think that's coming in from E…?

A. Yes.

Q. "Fence yes, fence what if this is routine for him, no freak incident equal ruin his life"?

A. Again, conversation that we weren't allowed speak about would explain why I said that, it's a very reasonable statement and again, I'm a responsible person, I know I probably shouldn't, but anyway, I'm someone who takes my actions very seriously in regard to that, I'm not going to go and go through all of this and there's also the emotional impact, I'm not an idiot, it's hard doing this, it's very hard."

7. The appellant submits that the above passages highlight an impermissible reference to evidence that had been deemed inadmissible and gave the jury the impression that evidence was being withheld from them. Moreover, it is contended that the complainant's answers in cross-examination caused the appellant prejudice.

8. The appellant further contends in written submissions that the complainant's answers were calculated to draw attention to evidence which the witness knew had been ruled inadmissible. Before dealing with the substance of this ground; it is clear that the answers arose in the course of questions asked in cross-examination and it is difficult to conceive how, therefore, the argument can be advanced that the replies on the part of the complainant were deliberately designed to prejudice the appellant.

9. The appellant submits that to inform the jury that there was evidence to which they were not privy would lead them to speculate on the nature of such evidence and in doing so, it would be natural for them to conclude that such evidence was not advantageous to the accused.

10. The respondent submits that discharging a jury during the course of a trial is a last resort and refers to *DPP v. Cleary* [2009] IECCA 142, where the Court of Criminal Appeal adopted the Supreme Court's comments in *Dawson v. Irish Brokers Association* [1998] IESC 39 and held that: -

"The decision on whether or not to discharge a jury is a matter within the discretion of the trial judge. The exercise of the discretion will be interfered with on appeal only where there is a real and substantial risk of an unfair trial. On appeal regard will be had to all the facts and circumstances of the trial. Relevant in this case is the circumstance that the learned trial judge at the time of the application to discharge the jury had before him the entire prosecution case including the video evidence. He had also heard the evidence of Mr Roels, the first of two witnesses called by the defence. The learned trial judge was thus in an excellent position to evaluate the significance of what had occurred in the context of the trial as a whole."

11. The respondent says that the context of the cross-examination is of importance in considering the complainant's answers. Cross-examination was extensive and concerned messages that were taken out of sequence and the complainant was at all times cautious in her answers.

12. The respondent argues that the impugned conversation was never the subject of any application or ruling on admissibility. On this submission, we note that before the evidence could be given, objection was raised on behalf of the appellant and the evidence was not led by the prosecution.

13. Finally, the respondent submits that the trial judge directed the jury not to engage in speculation in the course of their deliberations.

Discussion and Conclusion: Ground 1

14. We observe, firstly, that the impugned answers given by the injured party came about as a direct result of cross-examination. It is the position that the appellant's legal team were served with the book of evidence and that the text messages upon which the injured party was cross-examined were disclosed in advance of the trial and consequently all parties were fully cognisant of the content thereof.

15. Secondly, it is clear from a perusal of the transcript that this witness was a careful and prudent witness. This is neatly illustrated by the fact that during the course of her direct testimony, the witness enquired whether she was permitted to use a photograph in order to assist her in answering a question. This photograph had quite clearly, already been proven in evidence by the prosecution. Again, at a later stage in her direct examination, she enquired whether she is allowed to give certain evidence which leads to the evidence to which objection was raised on behalf of the appellant. The following took place:-

> *"Q. And what's the next thing you noted Mr O'Cinneide doing?*
>
> *A. The next bit was he put his clothes on and he came back out into the hall and this was a bit actually that terrified me and it was terrifying and its---*
>
> *Q. All right.*
>
> *A. I'm not allowed to say that, no?*
>
> *Q. Well, if you can just tell us what you saw him doing or where he went?*
>
> *A. Okay. So, he came in, he came in--- so, this is my bedroom, this is all, this is the sitting room, so I was sitting on my bed and I could clearly see around the corner and he came around the corner here and he gave out to me, asking me do you know how long you get for something like this.*
>
> *Q. Yes.*
>
> *A. And then I replied to him---*
>
> *Mr White: Judge, I'd object to this evidence.*
>
> *Mr Gillane: well, if it's words I think you said I don't know what the objection could be but I'm not---*
>
> *Judge: are we going to need to argues in the absence of the jury?*
>
> *Mr Gillane: I mean I'm happy to move on but-"*

From the above passage, two matters occur. Firstly, it is clear that this indeed was a careful witness and secondly it is also apparent that there was no ruling on admissibility by the trial judge.

16. There are further examples of the injured party's prudent approach to the evidence in the course of cross-examination, when again she enquired as to whether she was permitted to give certain evidence when the following exchange took place: –

> *"Q. And you say, "granted I probably flirt loads too"?*
>
> *A. Yes.*
>
> *Q. Which suggests---?*
>
> *A. That's a joke.*
>
> *Q. ---That it's only a joke?*
>
> *A. When you say it suggests, I don't know am I allowed to--- am I allowed discuss like this, I don't know--- I don't know the limits, am I allowed reply like this."*

17. We reject the appellant's contention that the replies to questions asked on behalf of the appellant gave rise to an impression in the presence of the jury that information and conversations were being withheld from them. On the contrary, we do not see any prejudice arising to the appellant in circumstances where the evidence was being given by a witness from whom evidence was given in direct evidence and in cross-examination in a careful fashion. We therefore reject this ground of appeal.

The Corroboration Warning

18. The trial judge gave a corroboration warning to the jury in the following terms: –

> *"Now, there's one very important warning that I feel I should give you and that's on a warning of lack of corroboration. In this case, the complainant is saying one thing, although there's overlaps between the two. But she is saying one thing and the accused is saying something else and through nobody's fault, there is no independent evidence whatsoever as to what occurred, nobody else saw this. This is very common in such cases. But corroboration is evidence which is independent of the evidence to be corroborated. In other words, the evidence in this case of the complainant that tends to implicate the accused in the commission of the offence and it is simply not there. And in those circumstances, you must be particularly careful in if you choose to convict somebody because miscarriages of justice do occur. But having said that, if you were not entitled to convict or acquit, I wouldn't have allowed this case to go to you. So, it has gone to you, it is going to you for decision, but you must take on what I say about the law and what I say about that warning."*

19. The appellant submits that the terms of the corroboration warning were inadequate in a number of respects. It is contended that the trial judge did not sufficiently explain the meaning of corroboration, that he failed to provide examples of the type of evidence which might be capable of providing corroboration, that he failed to explain to the jury the function such evidence serves in any given case and the dangers of convicting in the absence of corroborating evidence. Finally, the judge failed to refer to the reasons for the warning and failed to contextualise the warning in any way.

20. The appellant refers to the decision in *DPP v. P.J* [2003] 3 I.R 550, where it was held that once a trial judge determined to give a corroboration warning, such a warning must be given clear and unmistakable terms.

21. The respondent submits, relying on *DPP v. Cronin* (No. 2) [2006] 4 IR 329, that the appellant should not be permitted to raise the issue of the adequacy of the corroboration warning as no requisition was raised on this issue. The respondent says that no reason has been offered as to why this was not raised at the trial, particularly in circumstances where the appellant was clearly alive to the issue of corroboration. In this regard, the respondent points to the exchange between the trial judge and counsel for the appellant when the following requisition was raised: -

> *"MR WHITE: And then the other matters, Judge, are two factual matters. Again, you have told the jury that there is no corroboration in this case. But I would ask you to remind the jury that what might have been said to E… could not constitute corroboration.*
>
> *JUDGE: But I said there's no corroboration.*
>
> *MR WHITE: You have, Judge.*
>
> *JUDGE: I mean*
>
> *MR WHITE: Perhaps it's perhaps it's an abundance of caution on my part.*
>
> *JUDGE: I think it's yes, no, you're right, no, sorry. But I'll be treating them as brain dead, but I do well, I'll come but I do believe to emphasise that, perhaps I could have put it better, but to emphasise that I think is pushing it too far, that's my view on that."*

From the above, the respondent submits that there can be no suggestion that the failure to requisition the trial judge on the terms of the warning was due to an error or oversight. Moreover, there can be no suggestion that the warning given gave rise to a fundamental injustice.

22. The respondent rejects the assertion that the warning given to the jury was deficient in any respect. Having just charged the jury on the presumption of innocence and the burden and standard of proof, the trial judge addressed the requisite elements of the offence alleged and immediately gave a corroboration warning in clear and unmistakeable terms.

Discussion and Conclusion: Ground 2

23. In the first instance, whilst requisitions were raised on behalf of the appellant concerning other issues, no requisition was raised concerning the terms of the corroboration warning. In accordance with the principles stated in *DPP v Cronin (No. 2)*, as no such complaint was made, notwithstanding the fact that counsel for the appellant referred to corroboration in the context of asking the judge to reaffirm to the jury the absence of corroboration, there can be no question of inadvertence. We are satisfied that the appellant is precluded from arguing this ground as it was not the subject of a requisition and no question of fundamental injustice arises. This ground therefore fails.

24. We have however, scrutinised the direction given by the trial judge and we observe that when a trial judge determines to give a corroboration warning, the terms of any such warning are entirely within the discretion of the trial judge having regard to the circumstances of the case. Section 7(2) of the Criminal Law Rape (Amendment) Act, 1990, clearly provides that it is not necessary to use any particular form of words when a judge decides to give a warning. We are of the opinion that an insistence on any particular form of words is to be depreciated. The nature of the warning is determined by the facts of the particular case. Therefore, the terms of the warning will vary from case to case. The purpose of the warning is to provide comprehensible guidance to the jury in the context of the facts of the case and so will involve the trial judge tailoring the directions to meet the requirements of the particular case. The trial judge, therefore, enjoys a considerable margin of discretion concerning the terms of the warning.

25. We are satisfied in the instant case that the trial judge gave a clear explanation of the concept of corroboration, he informed the jury on three occasions that there was no corroboration of the complainant's testimony and that this was not uncommon in such cases. He then advised the jury in circumstances where there was no corroboration that they should be particularly careful if they choose to convict the appellant, as miscarriages of justice do occur.

26. The fact that no requisition was raised on the terms of the warning is pertinent in assessing whether the language used by the trial judge was appropriate. It is logical to conclude that should there have been any concerns on the part of those present, such concern would immediately have been made known to the trial judge. The absence of reaction by those present at trial is a very relevant factor is assessing the adequacy of the instruction given by the judge. We can see no error in the direction given by the trial judge. This ground, therefore, also fails.

27. The appeal is dismissed.