THE COURT OF APPEAL

The President
Birmingham J.
Sheehan J.

No. 260/12

The People at the Suit of the Director of Public Prosecutions

V

P.K.

Appellant

Judgment of the Court delivered on the 10th day of March 2015, by Mr. Justice Birmingham

1. On the 11th July, 2012, a unanimous jury convicted the appellant on two counts of sexual assault committed in January/February 2007. The allegations related to sexual assaults on a fifteen year old girl who was the niece of the appellant's wife. On each count the accused was sentenced to a term of eighteen months imprisonment, both sentences to run concurrently. He was in custody from the 13th July, 2012, to the 16th May, 2013, when he was admitted to bail.

2. Three grounds of appeal are advanced:

> (i) the learned trial judge allowed a psychiatrist to say that the complainant was admitted to acute care because of the effects of sexual assault. This ground, it might be noted, was the basis on which the appellant was admitted to bail. The judge indicated that he was allowing this evidence to be given because of questions asked by the defence as to why the complainant was admitted to psychiatrist care. The defence contends that no such questions were asked.
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> (ii) the learned trial judge refused to give a corroboration warning to the jury, despite a requisition by counsel for the defence and despite the fact that the allegations were uncorroborated, made years after the alleged events and while the complainant was in psychiatric care.
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> (iii) the learned trial judge referred to the accused as "the bold Freddie."

3. To put these grounds of appeal in context, it is necessary to say something about the evidence that was before the jury. The evidence at trial focused on two alleged incidents in early 2007. The first in time occurred when the complainant was babysitting when the appellant and his wife returned home. The complainant's evidence was that she was helping the accused look for his mobile phone when he came around her, kissed her, put his hand in her underwear and performed an act of digital penetration. The second incident which is alleged to have occurred some weeks later was said to have involved the appellant coming home when the complainant was babysitting once more. The suggestion is that on this occasion the complainant was asked to go into a sitting room to get a TV remote control and that the appellant came in after her, grabbed her and put his hand inside her underwear and once more digitally penetrated her vagina. At trial there was evidence of recent complaint admitted in relation to contact between the complainant and an aunt of hers.

4. When the complainant was giving evidence, she was questioned about her interaction with the psychiatric services, including an acute admission. It was suggested to her, but denied by her, that there was a pattern of self harming which preceded these alleged incidents. The prosecution sought to re-examine the complainant on this issue, but were not permitted to do so, but it was indicated that the calling of psychiatric evidence would be permitted. There was a psychiatrist on the book of evidence, and she was called. It appears that until this issue arose in the way that it did, no decision had been taken by the prosecution on whether or not to call the psychiatrist. Her evidence was that the injured party was admitted to an acute psychiatric unit on the 25th May, 2009, at which stage she was acutely suicidal, and that the reasons that she came into the unit were because of the allegations of child sexual abuse allegations at the age of fifteen years and the sequelae. It is this evidence that gives rise to the first ground of the notice of appeal.

5. The only evidence at trial was called by the prosecution.

6. When the appellant was arrested and questioned in relation to these matters he strongly denied the allegations.

Ground 1 – The involvement with the psychiatric service and the evidence at trial by the psychiatrist

7. In cross-examination, the defence raised the question of when the injured party first had an involvement with the psychiatric services and when she first began to self harm. This necessarily involved the question why she needed such treatment. The line of inquiry could have been pursued to bolster the suggestion that she was making up the allegations against the appellant or to lay the basis for suggesting that, because of her adolescent psychiatric history, the complainant was an unreliable witness, whether this was going to be done explicitly or by implication. Whatever the reason for exploring the topic, when the issue had been raised, it was reasonable that the prosecution be permitted to establish the date of her first contact with the adolescent psychiatric services. Insofar as the defence were suggesting a history pre January, 2007 in relation to self harming, it was also reasonable to allow the psychiatrist to refer to the ostensible or recorded reason for her admission to acute psychiatric care. Not to do so would have been unfair to the prosecution. It would have left open the suggestion that her interaction with the service was because she was a troubled, and by extension, unreliable individual. It must be noted that the psychiatrist did not say, and nor was an attempt made to have her say, that the complainant had as a matter of fact been sexually abused at a particular time or that the allegations made by the complainant were reliable and accurate in the view of the witness. Her evidence was more restricted than that, being evidence

that the patient was admitted, because of the allegations and the sequelae arising.

Ground 2 – The corroboration warning

8. The question of a corroboration warning arose for the first time when defence counsel requisitioned the trial judge following the conclusion of the judge's charge. At the outset we would observe, as the Court of Criminal Appeal has done in the past, that if one side or the other, and obviously normally one would be talking about the defence, believes that a corroboration warning is required or would be appropriate, then this is something that should be canvassed with the trial judge before he charges the jury and indeed before closing speeches of counsel so that they have an opportunity to tailor their remarks to what the judge is going to say.

9. The starting point for consideration of this issue has to be that the question of whether to give a corroboration warning is by statute a matter for the discretion of the trial judge. Guidance to trial judges on how to exercise this discretion is to be found in the case of *DPP v J.E.M.* [2001] 4 I.R. 385 and in the English case of *R. v. Makanjuola* [1995] 1 WLR 1348. There, the Court had been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought, in summing up to a jury, to urge caution with regard to the particular witness. Lord Taylor of Gosforth C.J. stated as follows:-

> "1. Section 32(1) [of the Criminal Justice and Public Order Act 1994 – the English equivalent to s. 7(1) of the Criminal Law (Rape) (amendment) Act 1990] abrogated the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence simply because a witness into one of those categories.
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> 2. It is a matter for the judges discretion what, if any, warning he considers appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
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> 3. In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so, simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross examining counsel.
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> 4. If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussions with counsel in the absence of the jury before final speeches.
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> 5. Where the judge does decide to give some warning in respect of a witness, it would be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set piece legal direction.
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> 6. Where some warning is required, it will be for the judge to decide the strengths and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
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> 7. Attempts to re-impose the strait jacket of the old corroboration rules are strongly to be deprecated.
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> 8. Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense (see *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 233)."

10. The approach suggested by Lord Taylor, with the exception of what he had to say at paragraph eight, was endorsed by the Court of Criminal Appeal in the case of *DPP v J.E.M*.

11. At p. 1352, Taylor LCJ. had commented:-

> "Given that the requirement of a corroboration direction is abrogated by the terms of s. 32(1) we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. 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 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 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 judge's may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this Court will 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 content."

12. Counsel for the appellant, who had not appeared in the court below, was pressed to identify the evidential basis for the giving of a warning in this case. His initial response was to refer to the fact that it had been put to the complainant in cross-examination that the incidents complained of had not happened. However, at paragraph three of Lord Taylor's summary, and in particular the last sentence thereof, it was said very clearly that this could not provide an evidential basis. Counsel then said that an evidential basis was provided by the fact that in evidence the complainant had said that there was kissing involved, when she had not referred to this in her statement of evidence. Again, the Court is of the view that this would not provide an evidential basis. In contending that this was a case which required a warning, counsel has referred to the fact that there was a delay of some three years between the alleged incidents and the matter coming to light and to the fact that the complainant's behaviour during this period was not what would have been expected of a victim of abuse. While counsel advanced this suggestion on the hearing of this appeal, in the view of the Court there was nothing established in relation to the complainant's behaviour during the period that elapsed after the alleged incidents which mandated a corroboration warning. Counsel has also said that the complainant had given evidence that she had not self harmed prior to the incidents complained of, but there was a note referred to in the disclosed documentation which appeared to suggest that at one stage she had given a history to a psychologist which referred to three earlier incidents of self harm. The only

evidence on this point came from the complainant and her evidence does not provide an evidential basis for a corroboration warning.

13. At the requisition stage, an exchange took place between defence counsel and the judge. The exchange was as follows:-

> "Counsel: The second issue then judge, is whether you propose, I'd anticipated that you would perhaps, it being a sexual case, insofar as give special warning to the jury on acting in a situation, where there is uncorroborated evidence.
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> Judge: Well why should I do that."

14. Counsel then responded by quoting s. 7 of the Criminal Law (Rape) (Amendment) Act 1990 and then began to comment "at one stage, judge, as you will know, there is a requirement". At this stage the judge intervened and said "I know all that, there is no requirement on a judge to give a mandatory warning. I have absolutely no reason - I have no idea why I should give a corroboration warning in this case". Counsel responded by saying "so be it" and the judge continued "absolutely none" to which defence counsel again said "so be it judge". At that stage the judge observed that a corroboration warning would only be applicable if there had been some suggestion about veracity or reliability attaching to a witness. The judge added that there is no such suggestion in this case and that he could not conceive why he should give a corroboration warning to which counsel once more responded "so be it judge". The reference by the judge to the fact that a corroboration warning would only be applicable if there had been some suggestion about veracity or reliability attaching to a witness seems to have been a paraphrase in abbreviated form of the views expressed by Lord Taylor which were endorsed in the Court of Criminal Appeal by Denham J., as she then was, in *DPP v JEM.*

15. In *DPP v Ferris* (Unreported, Court of Criminal Appeal, 10th June, 2002) Fennelly J. commented that the question of whether a jury should be warned about the danger of convicting on the uncorroborated evidence of a complainant was a matter for the exercise of discretion by the trial judge and that the 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.

16. In this case, the discussion between counsel and judge about the need for a corroboration warning was more curtailed than might have been the case had the issue been raised at the appropriate time before closing speeches. However, this Court cannot conclude that the ruling was made upon an incorrect legal basis. As already indicated, the Court takes the view that remarks made by the trial judge are indicative of the fact that he had in mind the *J.E.M./Makanjuola* jurisprudence. Neither is there any basis whatsoever for suggesting that he was clearly wrong in fact in declining to give a corroboration warning. On the contrary, no evidential basis for a warning had been established or indeed even suggested.

17. In the case of *DPP v Roger Ryan* [2010] IECCA 29, in the Court of Criminal Appeal, Geoghegan J. commented:-

> "If counsel for the defence, however, has not pressed for the warning then its absence should not be entertained as a ground of appeal apart, as always, from exceptional circumstances."

18. In this case counsel for the appellant did not press for a warning at trial.

19. Counsel on the appeal has indicated that the failure to press for a corroboration warning or to set out a basis why a warning was required or would have been appropriate may have been because it was felt that the judge's first response to the topic being raised amounted to a ruling on the issue.

20. This Court would not want to be seen to be encouraging counsel to argue with a judge who has made a final ruling on a topic. However, if counsel was of the view that a warning was required, then it was surely appropriate that he would explain to the judge, even in short form, why that view was being taken. Counsel indicated that he had anticipated a warning. Why a warning would be anticipated is not clear as, ordinarily, if counsel believes that a warning is about to be given, the topic will be addressed in the closing speech. In this case, had the question of a corroboration warning been raised, and had the judge decided to give a warning, he would have been required to discuss with the jury whether there was evidence in the case which was capable of amounting to corroboration. Arguably there was such evidence in terms of the complainant's distressed state when she spoke to her aunt and her condition when admitted to the psychiatric unit which was capable for amounting to corroboration. In these circumstances the introduction of this issue might not have served to advantage the defence. In summary, so far as this ground of appeal is concerned, the Court is not of the view that the failure to give a corroboration warning was an error rendering the verdict unsafe or unsatisfactory. In this case there are no factors present which would justify this Court interfering with the judge's decision not to give such a warning.

Ground 3 – The "bold Freddie " comment

21. The Court begins its consideration of this ground by stating that it would deprecate strongly any use of language by a trial judge when referring to an accused person which was disrespectful or disparaging of him or her.

22. The ground of appeal now advanced arises out of a comment made during the course of the judge's charge. It should be explained that while the appellant's name is P, he was generally known as Freddie. To put the remark made in context, it is necessary to set out in full this section of the charge:

> "Now, in cross-examination, it was put to her that in the first instance she was saying in the witness box that Freddie had kissed her, whereas there is no mention of that in her statement to the guards. She said she was very upset when she was making the statement. She babysat, she confirmed from about when she was twelve to fifteen, certainly for three years regularly and there were only two incidents that she complained of and these were the two that you have heard of. Mr. Connolly [defence counsel] said to her: "look, isn't this surprising that in all the time there is two incidents and they are both the same and they both happen when the wife is in the next room?" Mr. Connolly put it to her that they never happened, that she is making it up and how can she explain all the other times, the times she was all alone with Freddie and nothing had happened. She did her Leaving Cert, she went to hospital, and as you have heard she then suffered a breakdown, and she was in hospital. When did she start self harming? She says it was after those incidents in 2007. It was put to her that it had happened much earlier, happened in school with a needle and thread and in sewing herself. And that, in fact, she told this to a psychologist that she had started much earlier, that she started at fourteen and a half, she said she started at fifteen and a half and that there was nothing significant before that. Why, if these events are true, did she return to the babysitting? After the second incident, Mr. Connolly, says "you often met the bold Freddie at Christenings, confirmations. In fact, you stood for C who apparently is Freddie's child. "C was like a sister to me" she said, "C never did anything to me". Then she (sic) says Ce, this woman that you said complained to, she made, after all this, she made Freddie the godfather. She made the complaint in 2010."

23. The reference to "the bold Freddie" was certainly an unusual one. Indeed, this rather strange remark at one level caused a degree of disquiet on the part of both the prosecution counsel and the defence counsel. The ground of appeal states that the learned trial judge appeared to disparage the applicant by referring to him as the "bold Freddie". However, when the remark is seen in context, it is clear that it is used in a situation where the trial judge is summarising or paraphrasing a point that was made by the defence which was, "if Freddie really did these terrible things/bad things/bold things, isn't it very strange that you would have continued to have contact which would have involved baby sitting and attending various family events including acting as sponsor for Freddie's daughter at her confirmation." Then, the judge moved on to the second limb of the defence argument, which was that if these terrible things/bad things/bold things had really happened or had really been believed to have happened by C. O'D., that she would not have honoured him by inviting him to be godfather of her child. In the view of the Court, seen in this context, the remark is not in reality objectionable.

24. The Court would conclude its consideration of this ground of appeal by observing that excessive informality in a charge by way of shorthand of this nature is to be avoided and its deployment on this occasion was a cause of some concern to both prosecution and defence. However, this Court cannot believe that the remark could have impacted on how the jury viewed the accused. The choice of language, while strange, did not taint the trial process so as to cause the outcome to be unsafe and unsatisfactory. Accordingly, this ground also fails and so the Court will dismiss the appeal and uphold the conviction.

25. There is one further matter to which reference should be made: there is an application to add a ground of appeal and adduce additional evidence. The appellant, by notice of motion, sought to admit fresh evidence. The evidence sought to be admitted relates to an incident involving the appellant's wife S.K., and the complainant's aunt, C. O'D. The evidence at trial was that it was to C.O'D. that the complainant turned to in the aftermath of the incidents and her evidence, in the nature of recent complaint evidence, was admitted. The appellant claims that on the 1st October, 2014, C.O'D said to S.K. on an occasion when they encountered each other , "you dirty rotten bitch, you stay away from my kids or I will put you in jail like I did your husband, and you will be in there together. You know I can you tramp." The appellant says that the inference to be drawn from this remark is that C.O'D. was prepared to give false evidence against S.K. so as to cause her to be imprisoned as she had done previously in the case of the appellant.

26. The Court was of the view that what was said or not said during the course of a confrontation more than two years after the trial took place was too remote to be admitted in evidence. Even at trial it was obvious that the allegations which had been made had proved very divisive within the extended family. That tensions and difficulties would persist is not at all surprising. However, the inference which the appellant says should be drawn is simply a step too far. The occasions when evidence relating to events that occurred years after a trial and conviction will be admitted are likely to be few and far between. The court was clear that this was certainly not such a case.