**THE COURT OF APPEAL**

**Birmingham J.**
**Mahon J.**
**Hedigan J.**

**[137/17]**

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

**Respondent**

**V**

**H.B.**

**Appellant**

**JUDGMENT of the Court delivered on the 6th day of March 2018 by**

**Mr. Justice Birmingham**

1. On 7th April 2017, on the fifth day of a trial which had taken place in the Central Criminal Court the appellant was convicted of two counts of rape and three counts of sexual assault. Subsequently, he was sentenced to terms of seven years imprisonment on each of the rape counts and to lesser concurrent terms of imprisonment in respect of the sexual assault counts. The effective sentence therefore was one of seven years imprisonment. The appellant has appealed against his conviction.

2. By way of background, the complainant in the case was the grandniece of the appellant. The counts of rape relate to the summer of 1994 and are alleged to have occurred at the home of the appellant in Dublin when the complainant visited there from her home in Donegal.

3. So far as the counts of sexual assault are concerned, the first of these, which involved kissing on the mouth was alleged to have occurred between 1st June, 1991 and 30th September, 1994 and the second, which involved digital penetration of the complainant's vagina, was alleged to have occurred between 1st November, 1992 and 1st November, 1993. These offences are said to have occurred at the home of the complainant in County Donegal. The final sexual assault count is alleged to have occurred between 3rd September, 1994 and 5th September, 1994 in Dublin. The complainant says that she can date this by reference to the fact that she had visited Dublin for a Take That concert, for which she had been given a ticket as a birthday present.

4. It is probably helpful to say a little more about the details of the allegations. The injured party's home was in Co. Donegal. She lived with her family in a small cottage. Although the cottage was small, from time to time the extended family would gather there with relatives returning from England and crossing the border from Derry. One of the two sexual assaults is stated to have occurred in Donegal on just such an occasion. The complainant says that at a time when she was approximately nine years old there were numerous relatives staying in the house at the time, including the appellant. She says that she was told by her mother that she, along with her sister K.C. and her cousin K.G. were to share a mattress with the appellant. She went to sleep in a back bedroom of the house along with the two other girls and was awoken in the middle of the night to find the accused with his hands down by her pyjama bottoms and with his fingers penetrating her vagina. She dates this incident by reference to the fact that her sister was experiencing her first period around this time. The second Donegal incident occurred at the same location and again on an occasion when the appellant was staying in the house. On this occasion, she says that she and her two sisters were sleeping in a front bedroom of the cottage. The appellant had been out socialising in the pub with her grandfather and her uncle and she gave evidence that when they returned the appellant came into the room where she was sleeping and woke her up. She described him as asking her if she wanted to play a game and directed her to stick her tongue out, whereupon he began to kiss her.

5. In relation to the Dublin offences, the complainant gave evidence that during the summer between primary school and secondary school that she spent a period of time at the appellant's home in Dublin. She would have been approximately 11 or 12 years old at this stage. This extended visit came about because her cousin M.B., son of the appellant, with whom she was friendly, he was more or less the same age as she was, suggested that she should holiday in Dublin. She gave evidence of an incident while she was staying in the house in Dublin and was having a shower in the bathroom which was opposite the boys' bedroom. She described the appellant opening the door of the bathroom and walking in while she was in the shower area before leaving again. She says that after she got out of the shower she went into the bedroom where she was staying and was followed by the appellant who pushed her onto D.'s bed (the younger brother of M.B., the cousin with whom she was friendly) and raped her.

6. She describes a second incident of rape occurring when she was in a bedroom of the house in Dublin, sorting out items of clothing in her suitcase when the appellant entered the room and asked her what she was doing, and then pushed her onto M.'s bed and removed her clothing before vaginally raping her.

7. The third incident in Dublin is described as happening on an occasion when with her mother, her friend and cousin N., and her cousin Z. had stayed with the appellant while attending a Take That concert at the Point Depot. They had slept on the night of the concert in a caravan which the appellant kept parked in the front garden of his house. On the morning after the concert her mother and her two cousins had gone into the main house to have breakfast. She had remained behind in the caravan for a period. While she was there, the appellant entered the caravan, pushed her onto a fold-out bed where he proceeded to unzip her trousers and digitally penetrate her.

8. The grounds relied on in the notice of appeal and the written submissions are:

> (i) That the verdict of the jury was against the weight of the evidence and/or was perverse.
>
> (ii) That the charge to the jury was unsatisfactory. More specifically, it is said that a delay warning, or a so-called Haugh warning, which was given by the trial judge was later inappropriately diluted in response to a prosecution requisition arising from the charge. It is said that the corroboration warning which was given was not adequately contextualised and that the judge's approach to summarising the evidence, which involved summarising the evidence of individual witnesses in sequence was not appropriate or adequate, and that the trial judge should have sought to marshal the evidence in the

case by reference to themes or issues.

9. At the appeal hearing the appellant argued only ground 1, the complaint that the verdict was against the evidence and/or perverse.

10. Moving the principal ground of appeal, counsel on behalf of the appellant acknowledges that the task facing him is a formidable one and that the occasions when a verdict of the jury would be set aside as contrary to the weight of the evidence or perverse are likely to be quite exceptional. Nonetheless, he says that this was a case where the weight of the evidence was the other way, and that there were numerous inconsistencies and difficulties within the account of the complainant when viewed in the context of the evidence as a whole. Counsel for the appellant analyses the evidence in the case, with particular reference to the evidence of the complainant and identified 11 issues which he says are amongst those which give rise to a considerable level of concern. Counsel for the Director says that there was ample evidence to be considered by the jury and that the verdict reached by the jury was one that was entirely open to it. He points out that the very experienced legal team who represented the appellant at trial, a different team to those that now appear on the appeal, never applied for a direction at the close of the prosecution case nor did they apply to the trial judge to withdraw the case from the jury after all the evidence in the case had been heard. The Court regards this as very significant. It amounts to an acceptance by those who had participated in the case that there were matters to be considered by the jury. The Court is reluctant to lay down hard and fast rules which would apply in all circumstances but finds it hard to imagine the circumstances in which an appellate court, if a matter had been properly left to the jury, could intervene because it disagreed with the verdict reached. While not purporting to lay down any absolute rules, the Court is quite satisfied that this is not a case for setting aside the verdict of the jury. Reviewing the evidence in the case, and the Court does so of course only by reference to the transcript with all the limitations that that gives rise to, the sense one has is that the complainant was quite an impressive witness, who engaged with counsel for the appellant and never resiled from the allegations that she was making. Yes, there were certain difficulties in the case, as there are in all or virtually all such cases, but those that were in issue here were quintessentially matters for the jury. The case was defended with considerable finesse and real skill, as one would expect of a legal team of such experience and reputation. The assessment which seemed to have been made that there was nothing to be achieved by seeking a direction at the close of the prosecution case, or by seeking the withdrawal of the case when all the evidence had been given was entirely understandable in a situation where the outcome of any such application would have seemed obvious. The Court is of the view that there is no basis for setting aside the verdict of the jury as being contrary to the weight of the evidence or as being perverse and this, the main ground of appeal, must fail.

11. The Court will therefore turn to the subsidiary issues that have been canvassed in the course of the written submissions but which were not the subject of oral argument. The first relating to the suggestion that the delay or *Haugh* warning was diluted arises in circumstances where the judge gave a very full direction on the issue of delay in terms that had been suggested by Haugh J. and endorsed by this Court in *Director of Public Prosecutions v R.B.* (Unreported, Court of Criminal Appeal, 12th February 2003). Counsel for the prosecution requisitioned on the basis that the judge had not told the jury that if, having taken on board the warning they had been given, they remained satisfied beyond reasonable doubt of the guilt of the accused, they could convict. In fact, counsel for the prosecution was wrong in this regard, and indeed it must be said that the judge's charge on the issue of delay was really a model charge in all respects. In response to the requisition, the trial judge recharged the jury. There is no suggestion that anything she said in the course of the recharge was incorrect. However, the appellant says that the mere fact that there was a recharge served to dilute the impact of the warning and that it might be that a jury would take the view that the judge having thought about the matter further had come to the view that the dangers arising from the delay were not particularly serious. The requisition made by the prosecution was unnecessary and to that extent it would have been preferable if there had been no such requisition. However, the situation was perfectly adequately dealt with in the course of the recharge, as indeed it had been during the original charge and the Court has not been persuaded that the fact of a requisition and recharge unbalanced the charge as a whole.

12. A further complaint is made that the judge did not contextualise the corroboration warning. The judge dealt with the issue of corroboration as follows:

> "Now, I know counsel mentioned this to you in the course of their closing speeches and the word corroboration was mentioned and I'm going to give you a definition of corroboration. Corroboration is independent testimony or evidence which affects the defendant by connecting or tending to connect him to the crimes alleged. So, it's evidence which implicates an accused person, which confirms in some material particular, not only the evidence that the crime has been committed, but that it was also the accused that committed the crime. Now, there's a former President of the High Court who said, and I want to paraphrase on what he said, he said there can be no doubt that the entire purpose of corroboration is to reassure a jury that potentially questionable evidence is both credible and reliable. Now, in this case, and I want to be clear, I do not say to you that the evidence of M. [the complainant] is potentially questionable or unreliable evidence, I do not say that to you, because it is for you, ladies and gentlemen of the jury, as I have said to you many times already, to make up your own minds in relation to the credibility and reliability of the evidence in the case. Now, you have heard the account given by M. [the complainant] and of what she says happened to her at the hands of H.B. So, that's her individual story but she cannot corroborate her own evidence obviously because it comes out of her own mouth. It's not independent evidence. And there is no independent evidence in this case that is capable of corroborating her account of these five alleged offences.
>
> So, in the circumstances I have decided to give you a warning in relation to the absence of corroboration in this case. And the rule as to the presence or absence of corroboration has evolved over many years in sexual cases like this because experience has shown that complainants in sexual cases sometimes tell an entirely false story which might be very easy to fabricate but extremely difficult to refute and such stories can be fabricated for all sorts of reasons and then perhaps sometimes for no reason at all and an allegation of a sexual assault could be fabricated for a hidden motive, which is not obvious to us, and when there is no corroboration particular care has to be taken in assessing the issue of the guilt of the accused and you have to scrutinise the evidence with particular care to assess, as I have said, whether it's credible and reliable in your view. Because by definition these offences occur in private or at least in circumstances of some furtiveness and there have been occasions where evidence apparently plausible has subsequently been shown to be untrue but the law does not say that corroboration is something that's a prerequisite before you can convict and the law does not say that in the absence of corroboration that you cannot convict, and I must emphasise it doesn't mean that, but the absence of corroboration does mean that you have to scrutinise the evidence of the complainant with particular care. Now, be conscious of the fact that there have been cases in the past where the allegations have been fabricated and there is always a danger, particularly where there is no corroboration, that the same may happen in any other case, including this case. So, it's not saying, as I have already said to you, that you cannot convict the accused but it is saying to you that you have to be particularly careful about it and be aware of the dangers of a fabricated story. But if however all 12 of you are in agreement as to the guilt of the accused on any or all of the five counts that you have to consider to that standard of beyond reasonable doubt, if the prosecution have so satisfied you, then you must convict

> the accused on all or any of the counts in the absence of corroboration but if the prosecution has failed to satisfy you as to the guilt of the accused on all or any of the counts to the standard of beyond reasonable doubt then, as I have said previously, if they have failed to reach that standard in relation to any of the five counts that you have to consider, then you must acquit the accused man on that count or counts."

13. Counsel on behalf of the appellant did not raise any requisition about a failure to contextualise the warning. He did however raise what he said was a failure to lay out the actual terms of the classic warning which he says was required by statute once a warning was being given which is that it is dangerous to convict on the uncorroborated evidence of the complainant. Counsel referred to the fact that the Court had spoken about special care but that in his submission there was

> ". . . a great lucidity in the very simple and well-worn phrase "it's dangerous to convict on the uncorroborated testimony" and I quibble not at all with anything else that the Court has said in that . . ."

The judge agreed to recharge in response to various requisitions and in the course of that recharge she said:

> "I omitted to say to you that the law considers it is dangerous to convict in the absence of corroboration and you take that into account, ladies and gentlemen, in your deliberations."

14. Despite invitations from the judge for further requisitions there were none such.

15. The position here is that the judge gave a corroboration warning and upon a request by counsel who had heard the charge delivered added an additional element, a specific statement that it was dangerous to convict in the absence of corroboration. Counsel who had sat through the charge being delivered commented that apart from the request that the judge should say specifically that it was dangerous to convict in the absence of corroboration, that he did not quibble with what was said. In those circumstances the Court is not convinced that the issue of contextualisation raised by those who had not heard the charge amounts to a point of substance.

16. The final criticism is that the judge summarised the evidence in the case by referring to the evidence of individual witnesses in sequence rather than by marshalling the evidence by reference to themes in the case or issues in the case. Different trial judges have different approaches when it comes to charging a jury and this Court would be very reluctant to be prescriptive. Indeed, from a review of transcripts and from its own knowledge the Court is aware that some judges adopt different approaches on a case-by-case basis. Where the case involves the prosecution, through its witnesses providing a narrative, and the defence challenging that narrative through cross examination it may be that referring to what individual witnesses had to say in turn when giving evidence is a convenient and appropriate way to deal with the provision of a summary. On the other hand, if there are discrete issues in the case such as duress or a claim of right made in good faith, to mention some examples that come to mind, a judge may find it convenient to gather together what was said on that topic. This Court is happy to leave this to the good judgment of trial judges. More particularly that is so in the present case, where no criticism was, for very understandable reasons, made of the trial judge.

17. In summary then, the Court is not persuaded by any of the criticisms made of the trial judge's charge and having already expressed its view on the major issue in the case whether the verdict was contrary to the weight of the evidence or perverse, it must dismiss the appeal.