THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

145/2017

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

D N

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2018 by Mr. Justice Hedigan

The Appeal
1. On the 9th of March 2017, the appellant was convicted by a Jury in the Central Criminal Court on two counts of oral rape and on four counts of sexual assault contrary to s.4 and s.2 of the Criminal Law (Rape) (Amendment) Act 1990 respectively. On the 15th of May 2017, the appellant was sentenced to eight years' imprisonment in respect of each s.4 count, and to four years for each s.2 count, both sentences to run concurrently. The sentences were to commence on the lawful termination of a sentence the appellant was then serving for a separate offence. He now appeals against conviction and sentence. This judgment deals only with conviction.

Background
2. The appellant was convicted for offences of rape and sexual assault that took place between approximately March 2005 and September 2006. The complainant was a boy aged twelve when the offending behaviour began, which included oral rape and sexual assault.

3. The complainant was still in primary school education at this time, where the appellant was involved in the Board of Management. He was known to the appellant. He often helped him with gardening, as this was a keen interest of his. The complainant was allowed and invited into the appellant's parochial home. Occasionally, the appellant would bring the complainant to another house of his. Offending behaviour took place at both locations. The appellant would ask the complainant sexually motivated questions and get him to engage in sexual acts including oral sex and digital penetration of the anus. The complainant gave evidence that the first instance of the offending began in the appellant's bedroom, where the appellant exposed his penis to the complainant and asked him to put it in his mouth, which he did. The complainant gave evidence to the effect that he did not understand what he was doing.

4. The offences came to light after the complainant went to his GP in late 2013/2014 due to pain arising from the injuries caused by the digital penetration to which he was subjected. The complainant revealed to his mother that the appellant had "groomed" him and this was brought to the attention of the school. The appellant was questioned in relation to the offences in 2014. He denied the claims and subsequently pleaded not guilty when the offences were brought to trial.

Personal Circumstances
5. The appellant was born on the 30th of May 1952. He is originally from Dublin and served different areas of Dublin as a priest for a number of years, before moving to another county where the offences took place. He was the parish priest in the area in which the complainant lived and was involved in the management of the local school. He was regarded as being of good character before the offences emerged and was a respected member of his local community in his role as a priest.

Sentence
6. The appellant was sentenced to eight years' imprisonment in respect of each s.4 rape count and to four years' imprisonment for each s.2 sexual assault count, both sentences to run concurrently. The sentences were to be consecutive to a sentence he was currently serving also in respect of sexual offences against a minor. The appellant was placed on the sex offenders register and four years of post-release supervision was also imposed.

Submissions of the Appellant

Conviction
7. Mr Bowman Senior Counsel for the appellant informed the court that the appeal against conviction was now based on one issue only. This was that the trial judge erred in refusing an application made by counsel for the appellant to give a corroboration warning to the jury. While it is accepted that under s.7 of the Criminal Law (Rape) (Amendment) Act, 1990, discretion is generally given to a trial judge in determining whether a corroboration warning is warranted in a case, there clearly are circumstances whereby such a warning should be given. The appellant referred the court to *DPP v. J.E.M.* [2001] 4 IR 385, where the Court of Criminal Appeal endorsed the principles set out in the well-known cases of *R. v. Makanjuola* [1995] 1 WLR 1348 *DPP v. P.J.* [2003] 3 IR 550, and *DPP v. Gentleman* [2003] 4 IR 22 at p. 25. These cases establish that where there are certain inconsistencies and vagueness going beyond what is normal, there may be grounds for the judge to give an appropriate warning. There will have to be an evidential basis for suggesting that the witness may be unreliable. The court is also referred to the judgement of Geoghegan J in *The People (DPP) v Ryan* [2010] IECCA 29 where it was stated (at. p 7 of the report):

> *"an appellate court would not interfere with that discretion but, as in the case of all discretionary orders, 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."*

This principle was reiterated by Birmingham J (as he then was) in DPP v KC [2016] IECA 278, where it was held (at para 25) that:

> *"The starting point for consideration of this issue is that the decision to issue a warning or not is a matter for the trial judge's discretion. The Court will be slow to intervene with the exercise of that discretion by a trial judge and a court will intervene only if it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact."*

These principles apply equally in this case. Counsel for the appellant requested the warning on the following basis:

> *"I would ask the court to consider giving it, and I know it must be rooted in the evidence as opposed to anything else and I do say there are inconsistencies, not least of all the presentation of the confirmation documentation confirming the date upon which the confirmation took place and clarification that we are still dealing with March 2006 to June 2006 allied to the fact that in the civil proceedings we had reference to four distinct oral circumstances and that was expressly put to the complainant and he indicated that he thought he may have been confusing kissing for oral sex in circumstances where evidence has been offered that the first party he discussed this with was Doctor C...., where in reality we know it was his solicitor and there was a third or a fourth matter of concern just in terms of the evidence. The suggestion that the injured party didn't understand what was taking place, didn't effectively know what was wrong and he indicated in his statement and his direct evidence that it was only later when he got old he understood what was wrong. His mother has confirmed in terms that he knew right from wrong and that he explained to her about matters which made him feel uncomfortable as a consequence of the engagement of Father N..... So, I do say that there's a sufficient basis for the court to give the corroboration warning."*

It is submitted that there was a sufficient basis for the court to give a corroboration warning and the proper exercise of the trial judge's discretion required that he do so.

Submissions of the Respondent
8. It is worth noting that the trial court provided a delay warning due to the lapse of time between the offences and the trial. The court determined in its discretion however that a corroboration warning was not required in the circumstances. The court is referred to the case of DPP v Ferris [2008] 1 IR 1, where Fennelly J (at 13) in the Court of Criminal Appeal stated as follows:

> *"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"*

The court's discretion in relation to corroboration warnings was again upheld by the Court of Appeal in DPP v R.A [2016] IECA 110, which stated that a judge's discretion in the matter should only be interfered with where the decision not to give a warning was made on an "incorrect legal basis" or was "clearly wrong in fact". Neither instance has occurred in this case and therefore the matter should remain within the trial judge's discretion.

Decision
9. As set out in the authorities cited above, it is a matter for the discretion of the trial judge whether a corroboration warning should be given. There must be an evidential basis upon which the reliability of the witness's evidence is questionable. The matter was comprehensively dealt with in the judgment of the court delivered by Birmingham J.(as he then was) in *DPP v. R.A.* [2016] IECA 110. He stated as follows:-

> *"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:-*
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> > *'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.'*
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> *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.*
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> *16. In the case of Wallace, Keane C.J. commented as follows:-*
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> > *'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.'*
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> *17. There was an observation to the same effect in Ferris, where Fennelly J. delivering the judgment of the Court of Criminal Appeal commented:-*
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> > *'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. '

10. In ruling on the request for a corroboration warning the learned trial judge stated as follows:-

'… I am of the view it was not appropriate or necessary in this case. Obviously the delay it is. It is largely – well, it is in substance, I think I could say, the same as virtually all of these cases and that doesn't mean that it shouldn't be given in this case or perhaps it shouldn't be given in all of the cases of the class alleging wrongful sexual conduct involving children, but nonetheless I think the law certainly is that one must have regard to the nature of the offences alleged and one must be cautious of putting classes of offence, so to speak, into a particular box whereby in reality one is – one almost, as it were, is in the old-fashioned sense when one had no real discretion required to give the warning in question. I think there isn't any peculiar or special factor in this case which goes beyond what might be regarded undoubtedly as elements of inconsistency and matters perfectly legitimately to be highlighted and pursued by the defence, so those are the grounds…"

11. The inconsistencies argued in support of the application were in relation to:

(i) The complainant anchoring the dates of assault around his confirmation date. The former being 2006 whilst the latter was in 2005 around the same time of year.

(ii) In civil proceedings the complainant had referred to four separate incidents of oral sex offences but in his evidence referred to just three. He said he may have been confused about oral sex and kissing.

(iii) The fact that he stated that he did not understand what was happening and that he said in his statement and direct evidence that it was only later he understood it was wrong. His mother had confirmed he knew right from wrong and that he had explained to her about feeling uncomfortable about his engagement with Father N.

12. In remembering events of eight years previous, it is hardly surprising that there might quite innocently occur certain inconsistencies in establishing a time line and linking dates. This certainly is the case in relation to children whose grasp of dates will often be confused. The inconsistencies between the complaints in the civil proceedings and these criminal ones is also something that can quite innocently and frequently arise. The complainant's explanation in this regard of his confusion between oral sex and kissing is also understandable. The question of when he knew that what was happening was wrong, reflects the tragedy of the sexual abuse of innocent young children who may have neither the understanding nor the vocabulary to correctly assess the nature of the abuse being inflicted upon them.

13. It seems to the court that there was nothing particularly striking about the inconsistencies and slight vagueness that occurred in the complainant's evidence to take it out of the normal. Confusion over the number of instances of oral sex is not central to the complaint made. The core complaint is that he was sexually abused by the appellant and he graphically described those instances. The learned trial judge had the opportunity of observing the witness and coming to a judgment as to his reliability. He did not in our view create a new hurdle of "peculiar" or "special" factors that misled him as to the appropriate criteria to apply. As we read his comments he found that the inconsistencies and other matters relied upon to base the application did not go beyond normal elements of inconsistency to be found in cases of this nature. We must bear in mind the constraints upon a court of appeal in intervening in an area of judicial discretion. We are not satisfied that there exists in the learned trial judge's ruling any incorrect legal basis for not giving a corroboration warning, nor could it be said to be clearly wrong in fact. In our view, the learned trial judge remained within his discretion to refuse the application for a corroboration warning and we must therefore dismiss the appeal against conviction.