



## THE COURT OF APPEAL

**Birmingham J.  
Sheehan J.  
Mahon J.**

**No. 212/16**

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

**Respondent**

**V**

**Jack Kirwan**

**Appellant**

**JUDGMENT of the Court delivered on the 10<sup>th</sup> day of February 2017 by**

**Mr. Justice Birmingham**

1. On the 15th February, 2016, the appellant was convicted at Wexford Circuit Court of counts of sexual assault and burglary. The conviction was by a 10 - 2 majority jury verdict. Subsequently on the 5th July, 2016, he was sentenced to a term of two years imprisonment. He has appealed against conviction and sentence and this judgment deals with the conviction aspect only.
2. By way of background it should be explained that the trial was concerned with events that occurred in the early hours of the morning of the 11th October, 2008 in the Ferrycarrig Hotel in Wexford. The prosecution case was that the appellant entered, without permission, the hotel bedroom of the complainant Ms. MB and proceeded to sexually assault her by touching her breasts and penetrating her vagina digitally. To put the main issue that arises in the appeal in context, it is necessary to appreciate that the trial which concluded with a conviction on the 15th February, 2016, was not the first occasion on which the appellant stood trial for these alleged offences. On the 26th January, 2016, a trial of the appellant had commenced. However, on the third day of the trial, the trial judge (His Honour Judge Barry Hickson) discharged the jury. The retrial commenced on the 2nd February, 2016. The circumstances in which the first jury came to be discharged were central to the present appeal. At the first trial evidence was heard from the complainant and from a sister of the complainant, Ms. AMB [the sister], who had accompanied her to the hotel.
3. During the course of the sister's evidence it emerged that prior to the trial starting she had discussed the forthcoming trial and the evidence that would be given with the complainant. She then dealt with an issue in the course of her testimony at trial, which was not dealt with in the statement of evidence which was provided to gardaí and which was then included in the book of evidence.
4. The complainant gave evidence of travelling to Wexford on the night of the 10th October, 2008, of booking into the hotel, having dinner and then going to a nightclub with her sister. Alcohol was consumed with the dinner and later in the nightclub. They returned to the hotel and she went to the bedroom while her sister remained in the downstairs area of the hotel. The complainant gave evidence of falling asleep on the bed and coming awake to feel that her top was being lifted and that she was being digitally penetrated. She awoke, felt pain and then saw a male who was unknown to her, standing in the room without trousers on. The man appeared to initially move to leave the room, but then attempted to get into the bed. The complainant shouted at the man to leave and he eventually did.
5. She contacted her sister by phone. While waiting in the room for her sister to come up, she heard a knock at the door, thinking it was her sister she opened it to find the man there with no trousers on. The complainant's sister came up and the complainant told her sister what had happened and Ms. AMB then contacted the hotel manager.
6. The complainant was cross examined on the basis that aspects of her evidence had not featured in her original statement to the gardaí and that these aspects had been added in following on from pre-trial discussions with her sister. In addition it was suggested to her that what had happened was that she had consumed an amount of alcohol, had returned to her room, had fallen asleep face down on the bed leaving the bedroom door open. It was further put that what had actually happened was that the appellant looked into the room occupied by the complainant while on the way to his own room which was close by and became concerned for her well being. He entered the room and tried to shake her awake. However, he did not succeed and returned to his room where he took off his trousers. Still concerned for her well being, he decided to return to her room and shake her again. On this occasion she awoke, she got a fright and believed that the appellant had been molesting her when in fact nothing of the sort had happened.
7. The evidence of Ms. AMB was that she was in the downstairs section of the hotel when she received a phone call from her sister M, saying that there was a man in the room. She went to the room and encountered a man standing further down the corridor with no trousers on. She went into the bedroom that she was sharing with her sister, and her sister told her what had happened. Again she was cross examined on the basis that she had discussed the evidence that she would be giving at trial with her sister and had made changes arising from the discussion.
8. Following the conclusion of the sister's evidence, the defence sought a directed acquittal on the basis that there was evidence of collusion between the two sisters. The application for a directed acquittal was refused, but the judge did agree to discharge the jury on the basis that the divergence from the statements contained in the book of evidence meant that the defence were not on notice of the case that it had to meet.
9. It is an unusual aspect of the present appeal that while the appeal is of course brought from the conviction on the 15th February, 2016, much of the focus of attention on the hearing of the appeal has centred on events that occurred and matters that emerged during the course of the first trial. First it is said that the evidence about the extent of communications between the two sisters and their willingness to adopt and modify their evidence meant that their evidence was so unreliable that it was not fit to be considered

by a jury and the proper course of action was that the trial would be halted and there would be a directed acquittal. Alternatively, it is said that if contrary to what the defence say is the situation that it was a case which could be allowed to go to the jury, that it was essential that there would be strong and comprehensive warnings from the trial judge. It is contended that the jury needed to be told in clear terms that it was dangerous to rely on the testimony of the complainant and her sister. Then, secondly it is said that the circumstances of the case called for a particularly strong corroboration warning.

10. The appeal is slightly unusual in that while of course the appeal is from the conviction that was the outcome of the second trial, really much of the focus of attention has been on what occurred during the first abortive trial.

11. The information about what happened during the first trial comes from what was said about the abortive trial during the course of the second trial and also from extracts from the first trial quoted in the course of the written submissions. It appears that during the course of the first trial, the complainant gave evidence that the man in her room "picked up his trousers that were on the spare bed and walked out of the room" and then gave evidence that when she opened her bedroom door later, a man was standing outside and was "carrying his trousers" but they "weren't on him".

12. The complainant's sister when giving evidence stated that the complainant had told her that the man in her room "tried to get in on the other side of the bed" and that he then "picked up something off the bed and left".

13. In order to make sense of the discussions that took place during the course of the second trial, which were of course conducted by parties all of whom had access to the statements contained in the book of evidence, the Court has requested to be provided with copies of the statements made to gardaí by both sisters.

14. The relevant sections of the statement of Ms. MB are as follows:-

"I went to sleep on my left hand side. I always go to sleep on that side. I can't recall hearing anybody entering the room. I then remember my top being lifted, my right breast being touched. I remember being pulled back onto my back as if a person was at the opposite side of the bed. I then remember the covers being pulled off. I fully came around to what was going on when I felt at least two or three fingers inside me. It was rough. At that stage the person was kneeling on the bed on my left hand side. At this stage I saw a male roughly in his 20's. He had fair hair, it was straight but short. I saw he was wearing a stripy top which was vertical, the lines that were going down red and white at the top. I then shouted at him to 'get out'. I stayed in the bed. I remember pulling the covers over me and sitting up on the bed. I thought he had gone. I put my head on my knees and I lifted my head again and he was there trying to get into the right hand side of the bed. I screamed at him several times to get out and he left. I rang my sister A on ..... I asked A to come up, there is a man in the room. In the meantime a knock came to the door. I thought it was A. I opened it and he was standing here (sic) in his shirt and he was wearing no trousers. I would like to say that when I got out on the bed to ring A I noticed the legs of my pyjamas were off me and were at the end of the bed. I received a call from A at 5.09 am to say she was outside. A came in and I told her what happened. A contacted reception to speak to a manager and he came up a short time after. I informed him what had happened. He asked 'will I ring the gardaí?' and I said yes. The gardaí arrived a short time after."

15. Ms. MB's statement was taken on the 11th October, 20018 at Ferrycarrig Hotel.

16. The relevant portion of the statement of her sister, which was taken in March 2009 at Howth garda station, is as follows:-

"At approximately 4.50 a.m. I rang M's phone to see if she was ok, but I got no answer. At this stage we were still in the reception area. Roughly about fifteen minutes later M rang me. She sounded very agitated and distressed on the phone. She told me that there was a man in the room with her. I immediately jumped up and ran over to the lift. I went straight up to the room, when I came to our floor I could see a person standing with his back to me either one or two doors up from M's. The man was wearing no pants and had a striped shirt on. When I got to our room where M was, it was shut and I could not open it with my card probably because I was in such a panic. I called her name out and knocked on the door and rang her mobile to let her know that it was me outside and that it was ok to open the door. She opened the door to me. I could see that she was shaking and crying. She told me again that a man had been in the room. I checked the toilet and the room to make sure there was no one there. I then sat her down on the bed and put the blanket around her. She told me that she felt like there was someone behind her and that she woke to a man kneeling on the bed and to the pain of his fingers inside her. She said that her top had been pulled up and she had no pyjama bottoms on. She said that he had no trousers on and that his trousers were at the bottom of the other bed. She shouted at him to get out and then she said that she sat up in the bed with her knees up. Then she tried to ring me, but when she looked up the man was there again. She shouted at him again and he left. She said she heard a knock and thought it was me, but when she answered it, it was the same man again. She shut the door straightaway that's why she was afraid to answer the door. After hearing what happened she then told me to ring the manager, so I rang reception and asked for the manager to come up to the room. He came up shortly after and M explained to him what happened and he asked her should he call the gardaí and M said yes. The gardaí then arrived. I did not see the man's face who was standing in the hallway as his back was turned to me so I couldn't recognise him from any stage in the night, but the gardaí showed M a shirt and asked her did she recognise it. I am certain that this was the same shirt that the man in the hall was wearing. It had a red stripe going through it."

17. By reference to what the sisters said in the course of their evidence at the first trial and the statements provided by them to the gardaí it is evident that the defence concern centred on what they had to say in relation to the trousers worn or not worn by the man. In the statement furnished by Ms. MB to the gardaí while still in the Ferrycarrig Hotel she does not make any reference as to whether trousers were being worn by the man while he was in the room with her. She does say that when she opened the door believing that she was opening it to her sister, the man was there in his shirt, she had referred to the shirt earlier and that he was wearing no trousers. Her sister Ms. AMB refers to seeing a man on the corridor with no pants and a striped shirt on. When Ms. AMB is recording what she was told by her sister, she says that her sister had said that the man had no trousers on and that the trousers were at the bottom of the other bed.

18. In the Court's view the fact that two sisters who were going to be significant witnesses in a forthcoming trial would discuss the fact that the trial was coming up was not at all surprising and the Court sees nothing disturbing or sinister in that. The fact that the sisters would seemed to have adverted to each others statement and indeed in a sense to have refreshed their memory and checked the completeness of their own statement against the other's is certainly not ideal. It has the potential to block the effectiveness of cross examination. However, it is necessary to maintain a sense of perspective about the significance of what had occurred. The statement from the complainant was taken in the hotel and there was evidence from her sister, from hotel manager Cosgrave and a

Garda Whitty, who was one of the gardaí who came to the scene, that Ms. MB was distraught, upset and traumatised.

19. Ms. AMB had not witnessed anything of what had occurred, but her evidence was confined to recording what had been said to her by her sister. In those circumstances that the direct account of the complainant given in the immediate aftermath to strangers and the recollection of her sister about what she was told would diverge somewhat was only to be expected. Had the two statements been subjected to analysis at the time it is possible that the gardaí would have returned to the two women to see what if anything they had to say in relation to trousers, but that did not happen. In the Court's view the circumstances of this case, the fact that the witnesses, two sisters, discussed the events of the night in question and the evidence they would be giving could not possibly have provided a basis for directing an acquittal. The Court has no difficulty disposing of that ground of appeal.

### **Warnings to the Jury**

20. When the Court convened on the 12th February, 2016, day 8 of the trial, in order to hear the closing speeches of counsel and the charge from the judge, the trial judge raised the topic of corroboration, asking whether either side wanted to say anything about corroboration, and whether both sides acknowledged that there was no corroboration.

21. Defence counsel responded that he wanted a corroboration warning. Prosecution counsel, however, urged the judge not to give a corroboration warning or certainly not to give, as she put it, a strong one. She referred to the fact of an immediate complaint and to the fact that there had been evidence from several witnesses that the complainant was extremely distressed. She referred also to the evidence of Dr. Hooper of the Sexual Assault Treatment Unit at Waterford Regional Hospital that blood was found on two lower vaginal swabs and that the doctor had said that was consistent with the account that was given to her by the complainant. She made clear that on behalf of the prosecution she was contending that there was corroboration in the case. There followed some debate between counsel about the significance of the evidence of Dr. Hooper, which was cut short by the trial judge who intervened to observe that he did not feel that the evidence of Dr. Hooper could be regarded as corroborative evidence.

22. Counsel for the defence continued to press for a corroboration warning, referring to the fact that there was no forensic evidence, and to what he described as clear evidence of weakness in the evidence of the complainant, and clear evidence of weakness in the recent complaint evidence. This would seem to have been a reference by him to the fact that the complainant and her sister had discussed their evidence in advance of the trial and that in the aftermath of those discussions that their evidence was modified. Counsel submitted that this was specifically the type of case which the Superior Courts had in mind as being appropriate for a corroboration warning. As defence counsel continued his submissions, pointing to other factors in the case such as the evidence of the complainant consuming alcohol and to areas in the case where he identified inconsistencies between the evidence of the complainant and her sister, the judge intervened to say that, without requiring further submissions from either side, he had decided to give a warning and was going to incorporate into that warning the issue about the evidence "being prepared or colluded" and the defence, it should be noted, spoke throughout the trial of "collusion" and of the witnesses colluding.

23. The judge indicated that he would incorporate into the warning, the amount of alcohol that had been consumed. He added that in all cases there were inconsistencies and that in this case he would be going through the evidence of the complainant and her sister in some detail and that this would serve to refresh matters for the jury.

24. The judge addressed the question of corroboration in the course of his charge in these terms:-

"Now you must be satisfied that all of the facts in this case have been proven. You should look therefore carefully at the entirety of the evidence. In this case, there is no corroboration present in the case and I will speak to you about that now. Corroboration is some piece of independent evidence, independent of the evidence given by the complainant Ms. MB, which points to the guilt of the accused. This evidence must be credible evidence and such that you can rely on it beyond reasonable doubt. Very often – Mr. Peart [defence counsel] gave an example of a fingerprint on the window. In this case, there is no independent corroborative evidence and I must tell you that the reason corroboration is often times required by courts is to ensure that when it resolves to a question of what the complainant says as against what the accused man says, it makes it safer to convict if there is independent corroborative evidence."

25. This was the subject of a requisition and defence counsel reminded the judge that he had said that he would be giving an omnibus warning. The judge immediately responded by saying :-

"Yes I didn't give a corroborative warning in fact which I will give."

The judge then proceeded to recharge the jury as follows:

"Now ladies and gentlemen, there is just one thing I wanted to say to you and I omitted to say it to you in my charge and I will recall it now. That there is an absence of corroboration in this case. In sexual cases it is not always required but it is at the discretion of the judge and I have decided that I will give you what is known as a corroboration warning in this case. Corroboration is independent evidence of a material particular tending to implicate the accused in the commission of a crime. In other words it is independent and must have three ingredients. It must come from an independent source. It must implicate the accused in the offence charged and it must be credible. So those three ingredients make up corroboration. And judges in the past always gave warnings about corroboration when in effect it is one witness's word. In this it is Ms. B's word against the accused man's word and the courts always in the past looked for corroboration, independent evidence. Credible independent evidence. It may be supporting evidence. It could be for instance scratches on the accused man or something like that. Or if there were other pieces of independent evidence which supports the evidence given by the complainant in this case and it is dangerous to convict without corroboration. If corroboration is required, if it is to fulfil its purpose it is to make it safe for a jury to convict, but that does not mean you can't convict, but it is to make it safe to convict. That is why we look for corroboration. Evidence will be treated as implicating the accused if it makes it more probable that the accused committed the offence. So, you have no corroboration here, so you must take great care. You must be aware that there is no corroboration in this case. The evidence of the sister is not corroboration and I have said that to you before. So there is no other independent evidence, so bear that in mind. That there is no corroboration here. Take that into account and it can be dangerous to convict without corroboration. But having regard to all of that you are still entitled to convict. Very good."

26. On behalf of the appellant it is said that this warning was defective, that it was not pitched to a sufficiently high standard and that it was not applied to the specific facts of the case. Moreover, it is said that there was a failure to contextualise it.

27. The starting point for consideration of this issue has to be s. 7 of the Criminal Law (Rape)(Amendment) Act 1990 which abolished the mandatory requirement for a warning and provided that if a judge in the exercise of his or her discretion decided to give a warning

then it was for the judge to decide on its terms. However, while it is for the judge to decide on whether there should be a warning and if there is to be a warning in what terms it should be given, it is beyond dispute, and indeed a matter of common sense, that if a decision is taken to give a warning then the warning must be adequate and appropriate. Was the warning adequate? In this case, on two separate occasions, the judge informed the jury that there was no corroboration and in the course of his recharge twice told the jury that to convict in the absence of corroboration was dangerous. In truth, the defence were fortunate to have the benefit of a warning in such terms. There was evidence in the case which arguably was capable of amounting to corroboration, such as the evidence of Dr. Hooper and the evidence of the complainant's distressed state which might have been regarded as being capable of amounting to corroboration.

28. Moreover, in considering the adequacy of the corroboration warning, that warning does not stand alone. There were other aspects of the charge that were relevant to this issue. Elsewhere in the charge the judge dealt with the question of alcohol that was consumed by the complainant and more relevantly, and as we will shortly see, dealt in some detail with the issues that arose from the fact that the complainant and her sister had discussed their evidence in advance of the trial. The Court is not persuaded that the corroboration warning was defective. Therefore this ground of appeal must fail.

### **"Collusion"**

29. During the course of his charge, the judge dealt with the cross examination of the complainant and her sister in relation to their meeting to discuss the evidence in considerable detail. Having gone through the cross examinations, the judge then made the following comments to the jury:-

"Now, before I move on to the rest of the evidence I will deal with what is a major topic in the case and that is the suggestion by the defence that there was collusion between the sisters. And Mr. Peart [defence counsel] in a question said to AMB and it holds good for both witnesses of course 'I'm not saying that you did anything wrong in the sense that I am not saying that you are criminally wrong, but what I am saying is that you both decided to meet and read each other statements to form an alliance about what you would say?' AMB said: 'I wouldn't say form an alliance. I would say we did speak about what has happened' and Mr. Peart said 'I put it to you that it's reflected in the anomalies that we find in evidence and in particular it is in your statement. And there is a reference to the trousers being at the bottom of your bed and that's why your sister decided to say while it is not in her statement that the man who was in the room took the trousers out and I put it to you first? Well ----- if you are not answering me it's also while it is not in your statement that you said in the other case that the man went to the other side of the bed?' and I intervened and asked the witness and she agreed that there is some evidence in relation to the trousers that she inserted into her evidence that was not in her statement and vice versa with her sister and about some other matters including the unidentified man.

And the defence says there is collusion by the witnesses and I am reading from a definition of collusion from Murdoch's Dictionary of Irish Law which defines collusion 'as an agreement usually secret for some deceitful or unlawful purpose. It may amount to crime or tort, the tort of conspiracy' in other words the parties agree usually secretly for some deceitful or unlawful purpose.

Now the sisters have both given evidence under oath and have been cross examined about that and their explanation is 'we wanted to get it right in our heads'. You are in a privileged position because you have seen them and heard them being cross examined and you are able to assess them. And you bear in mind that it's eight years after the alleged incident occurred and they hadn't had - its just sworn evidence, they hadn't had a discussion about this, but they wanted there statement. Ms. AMB said she wanted to see her statement and two of them spoke together. Did they intend to be deceitful to mislead you? If they did and it is your view of them doing that then you cannot accept their evidence. So you must ask yourself was there collusion? Was there an intention to deceive you in doing what they did or is there an innocent and honest explanation that they were trying to get it straightened out in their head. So you must consider that part first before you move on. If they don't pass that test, if in your view there was collusion and you are intended to be deceived, you go no further. That is the end of the matter because it would be unsafe to bring in any other verdict save acquittal after that. If on the other hand, you accept the explanation they gave that they were trying to get it right in their heads, then you consider the balance of the evidence then. So that's a matter that has been specifically raised by the defence in this case and you must deal with it. And I am suggesting to you that you should deal with this at the beginning. And if you wish I will read that description of collusion again, but I am sure you follow it and understand it. You don't wish to me to read that to you again? No you are shaking your heads. Very good and that is why I have gone into some great length in the cross examination with my notes of the cross examination and the evidence in chief of both witnesses because it's an issue in the case that you have to deal with. Now, I am not going to delay as long on the rest of the evidence. You heard all the evidence yourself, but I regarded that as rather important that - its been an issue that the defence have raised and they were entitled to raise it and I suggest you deal with in that manner."

30. The following exchange took place between defence counsel and the judge after the charge was completed:

DC: Now you indicated to the jury that it was only if there was intent to deceive that it was the end of the matter and they should go no further. And if there was no intent to deceive then they would assess the weight to give to the evidence. And I am saying to the Court, respectfully saying, that collusion is not just a black and white issue. That you have to consider what happened and you have then - the jury have to consider knowing that (a) there was an agreed insertion and (b) knowing that both of them gave evidence separately in the manner I have described as to what weight they can now give to the rest of the evidence. And you are indicating to the jury that they can go on to consider the evidence and I am saying that serious aspect -

J: Well I didn't say that Mr. Peart.

DC: Did I not? Sorry

J: I said if they found collusion that's the end of the matter.

DC: Yes that's the end of the matter.

J: That they shouldn't go on to consider anything any further.

DC: An intention to deceive. And I am saying that even if they don't establish in their own minds an intention to deceive that's not the end of the matter at all. I am saying that where they find that there has been cross pollination and where there has been evidence given as a result of speaking to each other and I use the word "fixed up" because that is what I

believed it to be in respect of the trousers, then it is up to them to consider if they regard the evidence as reliable and see if they regard it as unreliable and I am saying that you would find the whole lot is unreliable because you don't know what bit you can rely on and I use the example of the cured egg.

J: Yes.

DC: In addressing and I respectfully – that's the correct law.

J: But surely there is the other side which is their sworn evidence that they were preparing for the case that yes that they admitted that they imported a bit or cross pollinated as to use your own expression.

DC: Yes

J: But they did so honestly.

DC: It may be sworn but it is unreliable.

J: It's what?

DC: It may be sworn. They may have – they took the oath and they swore the evidence but I respectfully say it is unreliable. I mean I am not accusing them of a mortal wrong. I am saying that this did happen and as a result the evidence is unreliable, good, bad or indifferent.

J: So what you are saying then Mr. Peart to put it in a fashion that the jury can understand that if they don't find the intent under the definition of collusion, the intent to deceive, then there is another stage that they must be warned that there is admitted to cross pollination and they must approach the rest of the evidence with a view to assessing whether it is reliable in the light of the cross pollination as it is heard.

DC: I agree yes.

J: Is that –

DC: Yes and they may find that they can't make up their minds and the whole thing is unreliable and therefore they can't rely on it at all.

J: Very good, so there is a second limb to the definition of collusion?

DC: Yes.

31. The judge however then refused to give further direction to the jury on the issue. He did so in these terms:

"Very good, well the purpose of me taking such a long time to charge the jury was to be accurate so that the jury would fully understand what happened when the complainant Ms. B was being cross examined by you Mr. Peart, very ably. Ms. AMB so I have taken a considerable amount of time in going through their evidence and the cross examination. And the purpose was what had happened really in relation to whether or not there was going to be, to use your word Mr. Peart, a "fix up" of evidence. And to allow the jury to hear again your succinct cross examination of both witnesses on that point and to provide them with the answers that the accused person or the complainant and her sister gave. And I did that. That was a deliberate choice by me so that I would not be using my words but rather your words and their words. So, I went to great length and great detail to do that. So the jury will be clear as to what you are putting to them was collusion and that what their reply was in relation to that and that is why is said to the jury that not only have you heard what they have said, but you are in a position to assess their demeanour which is equally important for juries. I think I would be, if I were to add a tail to what I said in relation to collusion, I think I would be confusing the issue. So I don't intend to recharge them."

32. For completeness sake it should be noted that the jury during the course of their deliberations asked for a typed definition of the word "collusion". In response the judge read again from Murdoch's Dictionary of Irish Law and did so at a pace that enabled people to take down what he was saying.

33. In the course of written and oral submissions there has been reference to the relevance of collusion between complainants in the context of system evidence. However, that is not what is in issue here. What is in issue here is that two sisters who are to give evidence in a trial discussed their evidence in advance of the forthcoming trial and that the evidence they then gave at the first abortive trial was influenced by the discussions that had taken place.

34. The fact that the sisters had discussed the events of the night in question in the run up to the trial was the focus of considerable attention throughout the trial. Understandably and very properly it was an issue that was dealt with in considerable detail by the judge in the course of his charge. The Court is satisfied that his treatment of the issue was adequate in all the circumstances.

35. The Court is not persuaded that the trial was unfair or unsatisfactory or that the verdict was other than safe and the Court must therefore dismiss the appeal.