THE COURT OF APPEAL

Birmingham J
Mahon J
Hedigan J

Appeal No. 96/2017

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

HENRY WOOLDRIDGE

APPELLANT

JUDGMENT of the Court delivered on the 12th day of April 2018 by

Mr. Justice Hedigan

1. The appellant appeals against his conviction on 10th February, 2017 following a nine day trial before Coffey J. and a jury. The appellant was convicted on 14 counts;

(i) Count 1 – Rape of A.F. between the 1st July 2010 and the 31st August 2010,

(ii) Count 2 – Not guilty of s. 4 rape but guilty of the sexual assault of A.F. between the 1st July 2010 and the 31st August 2010,

(iii) Counts 3 – 6 – Sexual assault of A.F. between the 1st May 2010 and the 31st August 2010,

(iv) Counts 8 – 13 – Sexual assaults of N.F. between the 1st January 2009 and the 31st August 2010,

(v) Counts 16 and 18 – Sexual assaults of B.F. between the 1st November 2009 and the 25th August 2010.

2. The appellant was found not guilty by a direction of the Court in respect of Counts 7 (sexual assault of A.F.) and 17 (sexual assault of B.F.). The jury disagreed in respect of counts 14 and 15 (rapes in respect of B.F.) and a *nolle prosequi* was entered in relation to these two counts. The most serious of these offences of which the appellant was convicted was a vaginal rape. All three of the victims were sisters and were minors at the time of the offences. The charges covered a period of time between the 1st January 2009 and the 24th August 2011.

3. A sentence of ten years was imposed on the appellant in respect of the rape offence, with concurrent sentences on count 2 of seven years, on each of counts 5, 6, 9, 10, 11, 12, 13, 16 and 18 of six years and 18 months on each of counts 3, 4 and 8. All sentences were to be served concurrently and were to date from the 10th February 2017.

4. During the periods encompassed within the allegations, the appellant was in a relationship with S.F. who was the mother of the three victims. Her husband B.F. who was the father of the three complainants had passed away in September, 2005. The appellant moved into the family home in November, 2008.

5. During the time of these offences, the three complainants were aged between 11, 12 and 16. They were adults at the time of the trial herein. The sole conviction for rape of A.F. was committed at a time when she was just short of her 15th birthday.

6. There was a certain level of similarity in the nature of most of the offences. This involved the appellant inappropriately applying medicated cream for the treatment of skin problems in or around the breast or vaginal region and progressed to more sexually intrusive assaults. All bar one of the offences involved incidents within the complainant's home.

7. The allegations were first raised on or about the 5th August 2010. In an argument between two of the sisters a reference was made to the appellant having "done things" to A.F. This resulted in a family gathering later that evening at which the allegations were put to the appellant in the company of his father. He vehemently denied these allegations and left the house with S.F. saying that they were going to go to the local garda station. S.F. took sheets from A.F.'s bed and some of her clothing. No complaint was actually made to the Gardaí.

8. On the following day S.F. brought A.F. to the family GP expressing a concern that A.F. had been engaged in sexual intercourse. She told the doctor that this was apparently with a younger man whom she described as A.F.'s boyfriend. The evidence was that during this consultation A.F. did not speak. Following this incident, some days later S.F. and A.F. met the appellant and he was asked to leave the family home. He did this for a few days. No further action occurred until October, 2010 when A.F. made a complaint to a friend in school which resulted in the HSE and eventually the Gardaí becoming involved. Statements were taken from A.F. and B.F. in November, 2010 and from N.F. in February, 2011.

The grounds of appeal

9. The grounds of appeal are:

(i) The learned trial judge erred in failing to give the jury a warning in relation to corroboration.

(ii) The learned trial judge erred in failing to grant directions on a number of the counts on the indictment.

(iii) The verdicts returned by the jury were perverse, inconsistent and unsupported by the evidence.

(iv) The appeal against severity of sentence was withdrawn.

10. At the appeal hearing, counsel for the appellant, Bernard Condon Senior Counsel focused primarily on the first of these grounds. It was submitted that the learned trial judge erred in failing to give an appropriate warning in relation to the evidence of B.F. and A.F. in relation to the rape and s. 4 rape counts. The warning that he did give was an abbreviated ruling although it was accepted that some of his reasons may also have been apparent from the dialogue between judge and counsel which had been carried out up to that point. Counsel noted that the offences at issue were all uncorroborated. The offences were witnessed by nobody. There was no physical evidence and there was no admissions of wrongdoing. The proof of the offences rested solely on the evidence of each of the complainants. It was noted that the earliest report in relation to A.F. was prompted by her sister N.F. in the course of an argument. N.F. and B.F. made their allegations after they had become aware that their sister had made a formal allegation to the authorities and after they had been interviewed by social workers. In the case of B.F., in her first statement in November 2010 she did not include a reference to the two allegations of rape ultimately reported to the Gardaí five years later, on the 24th May 2016. It was further submitted that A.F.'s allegations were complicated by the fact that she had later denied to her sister N. that the assault had occurred. It was further noted that A.F. had expressed the wish to retract her statement. The fact that the three complainants had resented the appellant was also a factor that needed to be considered.

11. The *gravamen* of the appellant's case in relation to corroboration however was that the warning was given in relation to the evidence of B.F. only. This gave rise to the fear that the single warning suggested that the offences in relation to the other two complainants needed less care. It was argued that the fact that there was a warning given in relation to B.F.'s evidence but not A.F.'s was something that could be considered an "additional" feature. In short, whilst a jury might of their own motion harbour doubts about convicting on the word of one witness on his or her own, in the instant of this case there was a danger that the selective warning may have encouraged them to quell such doubts in relation to those witnesses not covered by the warning actually given.

Submissions of the respondent
12. The learned trial judge had a discretion whether or not to administer a corroboration warning. Section 7 of the Criminal Law (Rape) (amendment) Act 1990 provides;

> *—(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.*
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> *(2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."*

13. Senior counsel for the respondent Pauline Walley submitted to the Court that the learned trial judge's warning was impeccable. She emphasised the discretion that the judge had. She referred the Court to the judgment of this Court in *DPP v. K.C.* delivered on 30th May 2016 by Birmingham. Ms Walley urged the Court to consider the summary of the authorities contained in that judgment. Counsel also noted that A.F. did not want to make a complaint because she was warned by her mother that she would be put into care is she did. She observed that this is exactly what happened. In relation to B.F. and the delay in her complaint, she noted that B.F.'s evidence was to the effect that she was very angry. Ms Walley noted that the witnesses gave compelling evidence. She submitted that had the learned trial judge given a warning in relation to the evidence of A.F. simply because he had given one in relation to B.F. would have been to thwart the wishes of the Oireachtas as clearly expressed in the section cited and in the authorities. She submitted that the learned trial judge's reasons for refusing to give the warning in relation to A.F. were clear to all the parties given the extensive discussions and exchanges that had occurred between counsel and judge. The learned trial judge gave a very comprehensive and concise explanation in relation to corroboration. He explained what it was and he told the jury that there was no evidence whatsoever to corroborate the evidence given by the complainants. All that was before them was a bare assertion by the complainants. He warned the jury in relation to the evidence of B.F. given the delay between her initial allegations of sexual assault made to the Gardaí in November 2010 and the allegations of rape that she made on 24th May, 2016. That warning was a clear, concise and easily understood one. The warning was not the subject matter of any requisitions by defence counsel.

Decision of the Court
14. As was submitted by counsel for the respondent, the principles in relation to the giving of a corroboration warning are helpfully set out in the case of *DPP v. Casey* cited above. They may be summarised as follows:

> (a.) 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. To do that would be to circumvent the clear policy of the legislature and that the courts are not entitled to do.
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> (b.) The question of whether the jury should be warned about the danger of convicting on the uncorroborated evidence of a complainant is a matter for the exercise of discretion by the trial judge. The appeal court should not intervene unless it appears that the decision was made upon an incorrect legal basis or was clearly wrong on fact.
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> (c.) 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 was required to direct the jury on the dangers of convicting on uncorroborated evidence. This remains a matter for the judge's discretion.
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> (d.) It is not a requirement that the trial judge must always give a reasoned ruling where a corroboration warning is requested. In most instances, the arguments for and against a warning will be obvious to all concerned. There is no requirement that where the judge exercises the discretion by refusing to give a warning it must be by reference to detailed, specific and analytical reasons mentioning the evidence in the case.
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> (e.) It is appropriate that it should be left to the unfettered judgement of the jury to decide where the truth lay. There must be something special or peculiar in the evidence which could give rise to the danger of convicting the person on the uncorroborated evidence of that other person before a warning is required.

15. The judge's charge in this case was delivered on 8th February 2017 being day 7 of the trial. The learned trial judge did in our view deliver an impeccable charge to the jury. He outlined their role, and emphasised the presumption of innocence. He emphasised the onus of proof that lay upon the prosecution and never shifted to the accused. He dealt with the standard of proof and the meaning of a reasonable doubt in some detail. He came to the issue of corroboration at p. 9 of the transcript and stated as follows:-

> *"Now, I want to come to what's known as corroboration, first of all to explain to you what corroboration is. Corroboration is essentially independent evidence which confirms a material part of the prosecution case and implicates the accused in the commission of the offence or offences charged. The legal definition is that it is independent evidence which affects the accused by connecting or tending to connect him to the crime or crimes alleged. It is evidence which implicates him, which confirms in a material particular, not only that the crime has been committed but also that the accused committed it.*
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> *So in this particular case, it would be corroboration if it existed, would be evidence independent of the complainants, which supports in a material way the prosecution case that is alleged in respect of each of the offences on the indictment. In this case, there is no evidence, no evidence whatsoever to corroborate the evidence given by the complainants. All you have is bare assertion by the complainants. You have heard in the course of the evidence given to you that whereas B.F. made her initial statement to the gardaí on the 10th of November 2010, it was not until the 24th of May 2016 that she first made the two allegations of rape that are the subject matter of counts 14 and 15 in the indictment. In the light of that, I am minded in this case to give you what is known as a corroboration warning in respect of those two rape charges. And I am warning you that it is dangerous to convict Mr W on those charges upon the uncorroborated evidence of B.F.*
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> *This of course, does not mean that you would exercise care only because I have given you this warning. In the ordinary way, you must of course exercise care to ensure that you approach the case on the basis of the presumption of innocence, applying the relevant standard of proof. But this is an extra protection that I'm putting in place and it arises from the evidence that I have referred to. So accordingly, over and above the degree of care and caution that you would normally expect to exercise in coming to any verdict, any verdict on the indictment beyond all reasonable doubt, you should recognise that it is the law's experience that it is dangerous to convict on the uncorroborated evidence of this particular complainant in respect of those particular charges.*
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> *However, having considered this warning, having borne it in mind and weighed it, you nevertheless feel that there is a very high degree of assurance that the evidence is true. You are entitled to act on that evidence and to convict. However, you are only entitled to do so if you have borne the warning in mind and have given it due weight, and are convinced beyond all reasonable doubt that the evidence of B.F. in relation to those charges is true and can be relied upon."*

16. It is to be noted that the above outlined to the jury in the clearest possible terms that the reason why a corroboration warning was given in respect of B.F. was because of the delay involved in making the two allegations of rape. No such delay was present in the case of any of the other charges brought against the appellant by either B.F. or her sisters. This was a completely logical approach to take and was clearly explained. The judge had already indicated to the jury the importance of the care it was necessary to take and the level of proof required in order to come to a conviction. The proposition contended for by the appellant in relation to the giving of the warning in the case of B.F. but refusing it in the case of A.F. cannot, as a general proposition, be regarded as correct. It may well be that in the most exceptional of circumstances a warning in respect of one might require a warning in respect of the other. This ground of appeal thus fails. As pointed out para. 22 of the appellant's submissions, grounds of appeal numbers 2 and 3 were subsumed under ground 1 and that is the manner in which the appeal was conducted by senior counsel for the appellant at the hearing of the appeal. Thus the Court rejects the appellant's appeal against his conviction in this matter.