THE COURT OF APPEAL

[163/21]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GMCD

APPELLANT

JUDGMENT of the Court delivered on the 11th day of November 2022 by Birmingham P.

1. Following a trial in the Dublin Circuit Criminal Court, the appellant was convicted of five counts of sexual assault on his niece, committed between 1981 and 1989, when his niece was aged between three and eleven years. Subsequently, he was sentenced to a term of seven years and two months imprisonment, with the final year and eight months of the sentence suspended on conditions. He has now appealed his conviction. A number of grounds of appeal have been advanced. These include:

    (i) That the judge erred in refusing to stop the trial by reason of delay, the unavailability of certain evidence and the unfairness that gave rise to, in effect, a so-called "PO'C" application.

    (ii) An issue in relation to the admissibility of recent complaint evidence.

    (iii) An issue in relation to whether a particular telephone call between the father of the complainant and the appellant was capable of amounting to corroboration.

    (iv) Criticism of the trial judge's charge in relation to the defence case.

    Further, the point was made that even if some of these grounds on their own might not be sufficient to overturn the conviction, the cumulative effect was that the trial was unfair and the verdict unsafe.

Background

2. Before turning to considering specifics of the grounds of appeal, it may be helpful to provide some background to the trial. The first three counts on the indictment were alleged to have occurred on dates unknown between January 1981 and July 1982, at a caravan park where the complainant and her family were sharing a mobile home with the appellant's family. The complainant is the eldest of five children. Her childhood was spent with her parents in various locations in Leinster and Munster. Count one concerned an incident of touching over underwear in a bedroom. Count two concerned an incident in which the complainant alleged that while she was sitting on the appellant's lap in the sitting room/kitchen area, he put his hand inside under her pyjamas. While he was touching her bottom, it was alleged that he had pressed hard with his penis through her clothes against her vagina. Count three involved an allegation of placing his hand between her legs and touching her vagina over her clothes while she was sitting on a swing in the park. Count four related to an alleged incident at the home of the appellant which was said to have occurred on an unknown date between July 1987 and July 1988 and is said to have involved the appellant rubbing the complainant's bottom outside her clothes. Count five was distinguished from the other counts, in that it related to an identifiable date being the day on which the complainant's sister made her first communion which was in April 1989. Complaint was made to Gardaí in November 2014. Gardaí made contact with the appellant who attended at a Garda station by appointment and made a cautioned statement in which he denied all allegations.

3. Following the close of the prosecution case, the defence made what might be described as a hybrid DPP v. PO'C [2006] IESC 54/R v. Galbraith [1981] 1 WLR 1039 application, though it was expressly stated that the real focus was on the PO'C application made by reference to the delay which had occurred, 40 years in the case of the earliest allegations and more than 30 years in the case of the latter allegations, and that various items of evidence were unavailable. In broad terms, the Galbraith application focused on suggested inconsistencies in relation to the count that dealt with events said to have occurred on the occasion of the first communion of the sister of the complainant, in particular, inconsistencies in relation to sleeping arrangements and as to the point during the incident at which the complainant was awake or asleep. It is said that these inconsistencies in relation to the first communion incident would infect and permeate the other counts in relation to alleged incidents in the mobile home and in the home of the accused.

4. The focus of the hybrid PO'C/Galbraith application was on the fact that records or documentation from contact the complainant had with the Rape Crisis Centre in her hometown in Munster while in her mid-teens was unavailable, as were records/documentation about contact that the complainant had with another women's refuge, a body known as Cuan Saor, while in her twenties. The third area of particular interest was the non-availability of records or documentation related to an incident at the complainant's Dublin school when she was in her second year when she had stated she was sexually assaulted by a fellow pupil. According to the complainant, the matter was

reported to Gardaí and the pupil was expelled, but neither Garda records nor school records were available. To put these issues in context, it is necessary to look in greater detail at the evidence of the complainant.

5. The complainant's evidence was that she had been born in mid-1977 and was 43 years of age at the time she came to give evidence at trial. She was the eldest of five children. The accused, to whom she referred to throughout as her uncle, was married to her aunt. The accused and his wife had two children, the elder of the two, a girl, was around the same age as the complainant's sister who was closest in age. The complainant's sister and her cousin were close, and at one stage had been in the same class in school. At one point, which it was suggested was shortly before the complainant started school, she and her family stayed for a week or two with the appellant and his wife in a caravan park or a mobile home. The complainant's narrative involved descriptions of being a witness to sexual activity by the accused with his wife while she (the complainant) was present. One such incident she described is said to have occurred in the mobile home and she described the accused as staring at her. Another incident described is said to have occurred on the occasion of an early evening visit to the Phoenix Park to view the deer herd. The significance of this in the context of the PO'C application is that a counsellor, whose first name only was known, with whom the complainant had dealings and who was attached to both the Rape Crisis Centre and Cuan Saor, referred to this activity as "grooming". Contact had not been established with the social worker and any notes or records she had made were unavailable. The absence of these records and the fact that the counsellor was unavailable for cross-examination formed one limb of the PO'C application.

6. The complainant commented that her family situation was not great, that after her Junior Certificate, she ran away from home. Upon her return to Munster, she met a counsellor, referred to by her first name. The complainant says that this counsellor was very nice and tried to encourage her to do something about it, to actually say something. However, at one point, the counsellor gave up counselling and returned to her previous career in nursing. In the course of her evidence, the complainant referred to difficult periods in her life. She had her first child when she was 17 years old, arising from a relationship with an older man, which broke up quickly. Some years later, she met her husband. There were initial difficulties, his home background was a particularly difficult one. He was violent and they had "a very, very terrible couple of years". They separated and the complainant engaged with Cuan Saor, an organisation which supports victims of domestic violence. Post-separation, her husband took steps to get his life together and undertook anger management courses and counselling, and as a result, the couple got back together again. The unavailability of the counsellor and any records or documentation created by her, either by the Rape Crisis Centre or Cuan Saor, provided a further limb of the application.

7. The next limb related to the schoolyard incident. This involved a named pupil, who, according to the complainant, had been bullying her. On one occasion, she stated that he sexually assaulted her, an assault which involved putting his hands between her legs. The

complainant told her father and he brought her to the local Garda station. According to the complainant, the pupil was expelled, though, as we have indicated, there are no Garda or school records available.

8. However, while the focus of the PO'C application was on the records that were not available, there were a number of records that were. These include certain records generated by Tusla, including some created by an identified social worker, with some records as dated from 1994. There were also records from Sherrard House, the place to which the complainant went after she ran away from home, and records from the A&E Department of the Mater Hospital where the complainant presented on foot of certain self-inflicted injuries, these notes are dated 7th February 1994. None of these records that were actually available went any way towards exonerating the accused. All refer to the fact that the complainant had been the subject to abuse at the hands of an uncle. It is true that the notes created by the social worker opened up a line in cross-examination.

9. The issue explored in cross-examination arose from the fact that the Tusla notes contained a reference to sexual abuse – but at the hands of the complainant's father. However, when the complainant was asked by defence counsel in cross-examination whether she had ever said to a social worker that her father had sexually abused her, she responded "[n]o, I didn't." She then proceeded to elaborate as follows:

> "What I said was that I had lost faith and trust in my own Dad, that we didn't have a good relationship and that one night when I was sitting on the couch and we were watching wrestling and I got a crick in my neck and Dad said 'I'll rub it for you', and all he did was rub down the side of my back. But because his hands were around here, I was, like, oh this is going to start again. This is going to be something else. And I didn't trust or love anybody anymore and that was it."

Defence counsel continued to press the complainant and she continued to state that what she had done was describe a specific incident on the occasion of the crick in her neck. She said she felt it was a little bit inappropriate, that she felt where his hands were was a little inappropriate. Defence counsel continued to press the complainant for a yes or no answer, with the trial judge at one stage intervening in order to tell the witness that it was a yes or no question. For our part, and we are dependent on the transcript, we do not believe it was a situation where the complainant could or should have been confined to a yes or no answer. It seems to us that her position was a consistent one, that she had significant issues in relation to her father, that he was, as she put it, a cross man, but not a child abuser; although there was at least one occasion when she felt his behaviour was inappropriate and that inappropriate behaviour made her uncomfortable.

10. Further information on this aspect emerged during the course of the PO'C application. Responding to the application, counsel on behalf of the prosecution drew attention to certain matters that were in the notes. It appears he had felt constrained from doing so earlier, by way of re-examination or otherwise, because at that stage, only part but not all of the notes had been attributed to the named social worker. However, it appears that during the course of the trial, the social worker was in a position to confirm that further

notes were his creation. At the PO'C application stage, counsel pointed out that while earlier the defence had quoted from page six of the notes and put matters from there to the complainant, they also had pages seven and eight, and page eight had recorded:

> "[Allegations of sexual misconduct] were nothing along the nature of what the boy in [named area] and my uncle did to me."

Counsel indicated that a letter from the social worker summarising the situation referred to this as "kind of [a sexual way]". It appears everybody was working from poor quality handwritten notes because defence counsel interjected to say that what was recorded was not the terminology of "not of the same nature", but rather "[n]ot as severe". Counsel also drew attention to the fact that the disclosed notes from Sherrard House, unredacted in part, indicated that the reference was to "physical abuse" of the complainant's father, and the "sexual abuse" of her uncle.

11. The second limb has its origin in contact between the complainant and her sister who was next in age to her, which led to the complainant being brought to the Rape Crisis Centre in her hometown and engaging with the centre there. It may be noted that the issue of recent complaint-type evidence was the subject of extensive debate before evidence started in the trial. Initially, three elements of recent complaint evidence were in issue, and they concerned the following: a statement by the complainant to a school friend, her interaction with her sister, and arising therefrom, her interaction with her mother. In fact, as the debate proceeded, the prosecution indicated that they would not be pushing the position in relation to the school friend. The judge was then left to rule in relation to the sister and the mother and permitted the evidence of the sister to be given. However, in relation to the mother, the judge noted that the mother's statement contained less detail than did the sister's and appeared to relate to a different time, and that in those circumstances, out of an abundance of caution and in fairness to the accused, she did not think it was desirable to have a multiplicity of complaints admitted, and so she was not going to allow the mother's statement to be admitted. We will return to the question of recent complaint evidence, but the relevance of the contact with the sister is that it had provided the gateway to the first contact with the Rape Crisis Centre.

12. After the complainant had given her evidence, but before the sister was called, counsel on behalf of the defence sought, unsuccessfully, to reopen the issue. It appears the younger sister expressed an intention to go and stay for a period during the summer months with the accused and his wife. It appears that the complainant reacted in an extreme way to this proposal, starting to shout and telling her that she was not going. She then disclosed to her sister what had been happening. Her sister told their mother and her parents made arrangements, having spoken to the vice principal in school, for her to attend the Rape Crisis Centre in the town. The complainant says that she attended the Rape Crisis Centre about six times, at lunchtimes on Thursday from school, but after she was seen going into the centre in her school uniform by some people from the school, she stopped attending. Again, there are no records, and this provides a limb of the PO'C application.

13. Having heard argument on the hybrid application, the judge took time to consider the matter, putting the case back overnight. Having summarised the contentions of the parties, she then ruled as follows:

> "Firstly, the case law has established that the impact of missing evidence must be considered in the context of all of the evidence put forward at the trial and the applicant must engage with the facts of the case in the context of the application. I have considered carefully all of the submissions made by counsel and read the -- and noted and taken an assessment of the evidence in the case, and it appears to me, that in light of the evidence in respect of the records concerned, such records may or may not have assisted the defence. The issue is whether the absence renders the trial unfair. In assessing all of the evidence in the case as it now stands, it is fair to say that central to the strength of the prosecution case is the view the jury takes as to the reliability and credibility of the complainant. There is also evidence of her immediate and aggressive reaction to her sister, [named], suggesting that she, [named], was going to stay with the accused and his wife, which precipitated the first disclosure to her family. The prosecution also rely on certain utterances that they alleged were made by the accused in a phone call after the complainant had made disclosures to her parents.
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> This is not a case where the prosecution has possession of information in respect of which the accused has been deprived, and it's fair to say that such records and notes as still exist have been given to them and were of some assistance, and I lay emphasis on this. It is clear that the prosecution has taken all reasonable steps to procure all relevant documents and information. Fifthly, the issue is whether the defence has been deprived of the right to challenge the primary witness, [named], as to consistency and reliability of her account with other accounts and, thereby, to cast doubt upon her reliability and consistency such as it renders the trial unfair.
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> The test laid down by [DPP v. CCe [2019] IESC 94] emphasised the robustness of the trial process to handle the absence of witnesses or real evidence where it occurs without fault, unless the cumulative impact is such as to render the trial either impossible or unfair. While the Court accepts as a general proposition that in respect of a right to a fair trial, cross-examination of a complainant on the basis of past records or notes is an important tool for the defence in circumstances where the defence has been afforded all that is available and have made headway in that regard, it is difficult to see how the absence of other records, through no culpability on the part of the State, is fundamentally unfair to the defence. In particular, having evaluated all of the evidence in this trial, and in the course of this voir dire, the evidence in relation to the notes to hand is that they mention uncle's abuse and they in no way actually exculpate the accused. They also mention a schoolboy's abuse and indeed sexual and physical abuse by her father in respect of which the complainant was cross-examined and in respect of which the jury may evaluate her answers. The Court must balance the rights of both parties. The Court is not satisfied that a threshold has been reached, such that the cumulative effect of the

missing records is such that it renders the trial unfair. Having regard to the entirety of the evidence, any potential unfairness can be dealt with by way of appropriate charge to the jury, and in this regard, I will say of particular relevance in the Court's view is that the evidence actually available discloses that the complainant describes sexual abuse by an uncle when she was 15 or 16 in the aftermath of a traumatic time for the complainant. It's not a case where her first disclosure was in her twenties to [named counsellor]. Insofar as the defence has raised [DPP v. Nora Wall [2005] IECCA 140], this is not a case where the allegations only came about as a result of counselling. General allegations of abuse against an uncle are contained in both sets of notes that have been disclosed, and this suggests consistency and not inconsistency in that regard.

I just want to mention as well the issue of reliability. The complainant was challenged by reference to the description in her notes of her father sexually abusing her. Had the prosecution been in a position to re-examine, it's clear from the notes that within them, she differentiated this type of abuse alleged against her uncle -- from the abuse alleged against her uncle and the schoolboy; she said it wasn't of the same type. While this again is not before the jury, it is relevant to the Court's assessment of the fairness or otherwise of the trial, and I want to say that had those available notes post-dated the notes of [named] are missing, I may have taken a different view, it's because of the timeframe. Thank you."

14. The approach to be taken to applications such as these to halt a trial was considered by the Supreme Court in CCe. It is of some interest to note that while the members of the Supreme Court appeared to be in agreement on how such applications should be approached, they split 3:2 on whether the appellant's trial should have been halted. So, while the approach at this stage may be clear, there will be cases where applying the appropriate principles may still give rise to difficulty. It is clear that what is required is that the trial judge assesses the prosecution case and assesses the evidence said to be missing. The issue to be determined then, is whether the accused has lost the real possibility of an obviously useful line of defence. The distinction is as between what is "no more than a lost opportunity" and the "real possibility of an obviously useful line of defence".

15. In our view, the issues raised by the defence in this case did not come anywhere close to meeting the threshold for seeing the trial halted. This is a case where certain records did exist. In general, those records supported the consistency of the complainant. That is not to ignore the fact that they opened up lines of cross-examination, such as the issue as to whether the complainant had said that her father had sexually abused her, but there is nothing to suggest that she was in any way inconsistent about the central allegation, which was that she was sexually abused as a child by her uncle. While, precisely because they are missing, one cannot say with absolute certainty what the missing records from the HSE and counselling notes would have contained, it seems to us to be a remote or fanciful possibility to suggest that they would have provided the real possibility of an obviously useful line of defence. That is not to say that it might not have been material

that would have been deployed in cross-examination, but one has to take an overview. Her first contact with the Rape Crisis Centre in the Munster town where she was living came about when her parents became aware of her allegations. Following their discussions with the school vice principal, they brought her to the centre in the aftermath of the disclosures made to her sister. What reason is there to believe that her involvement at that stage would have provided an obviously useful line of defence? A similar point can be made in relation to her later re-engagement with the Rape Crisis Centre and interaction with the named counsellor. Such records as have remained and are available have shown her to be consistent rather than inconsistent. The defence have placed reliance on the case of Vattekaden v. DPP [2016] IECA 205. They point to what Hogan J. had to say about the fact that there was "considerable evidence to suggest that the collateral questions rule has been relaxed in sexual cases where the only issue is either consent or fabrication, precisely because in such cases issues of credibility are critical." It is said that this should lead to a conclusion that the missing material would have been, or certainly might have been, very significant. However, that is to ignore the circumstances in which the records now missing came into existence, to ignore what was contained in the records that survived.

16. The position is even clearer in relation to the schoolboy incident. The relevance of this incident is marginal in the extreme, though it is of some note that the surviving records do contain reference, distinguishing between it and the uncle's activities, on the one hand, and those of her father, and thus offering a degree of support to the complainant's consistency. If the issue was really seen to have been of significance, it was possible that further information could have been obtained. The suggestion is that the complainant was brought to the Garda station by her father; he was a witness at trial, and nobody asked him about it. The schoolboy was identified by first name, and it might well have proved possible to trace him if anybody regarded that as worthwhile. Nobody felt it necessary to do so and that is scarcely surprising.

17. Overall, we are quite satisfied that the trial judge was entirely correct to refuse the PO'C-type application. The application on Galbraith grounds was not really pressed. We are satisfied that such inconsistencies as there were in the case, principally issues about the sleeping arrangements in the house on the night of the first communion, were matters to be addressed by the jury and would not have justified withdrawing the case from the jury.

Recent Complaint Evidence

18. Following the conclusion of preliminary discussion in relation to the recent complaint evidence, the issue was confined to the evidence of the complainant's sister. The defence posed questions as to the admissibility of her evidence on a number of grounds, including that the complaint was not recent, that it was not voluntary, and that the prosecution had failed to identify with which counts on the indictment it was consistent. Defence counsel returned to the issue after the complainant had given evidence and sought to persuade the judge to reconsider her ruling, but without success. The judge ruled on the matter as follows:

"I found, in particular, the paragraphs of Mr McGrath's book provide a useful synopsis in terms of the test for admissibility and what may be admitted. There are four tests essentially; first of all, that the complaints may only be proved in criminal prosecution for sexual offences, that's not an issue; secondly, that the complaint must have been made as speedily as could reasonably be expected and in a voluntary fashion and not made as a result of inducements or exhortations and this forms the basis of part of the objection raised by the defence; thirdly then, it should be made clear to the jury that such evidence is not evidence of facts. Well, then that's not in issue. It may only be in issue insofar as any warning I give the jury in terms of the evidence, if it's admitted, and fourthly then, the fourth aspect doesn't arise.

Now, [senior counsel for the defence] has indicated that in terms of the first reasonable opportunity that this, in light of the historic nature of the case -- well, there are two aspects to it, the making of the complaint itself, but then there's a second aspect which isn't covered by these tests in terms of the delay between when the complaint was actually made and the delay then in prosecuting the case since that time. That's another aspect in terms of the general fairness or otherwise of the admissibility of the evidence. [Senior counsel for the defence] has pointed to the fact that there is no medical or psychological evidence in relation to what -- in relation to the delay and as to why the complainant delayed in making the statement.

I have considered the statement made by [named], the complainant, and it's quite clear from that evidence that there were a number of bases upon which she felt under psychological pressure. First of all, she alleged that the accused himself made remarks to her in respect of the effect of her making a complaint and what would happen in that event. She, in quite a level of detail, goes into a number of reasons. In terms of the second limb of her statement, I believe it was an additional statement made to the gardaí, which is contained at page 11 of the book of evidence, and in that she gives a number of reasons, in the context of what happened to her. She says after she told [named sister], and this is after making the disclosure that is now -- the defence now seeks to not have admitted, she says that: 'I remember him …' -- she remembers ripping up the diary, this was the subject of [named sister's] statement and she just remembers thinking that if anyone would see these things: '… that they would think I was disgusting.' She said: 'I was afraid Dad would kill him, end up in prison and I was afraid my Mam wouldn't cope.' Now, I think clearly the Court has to look at the context as referred to in the statement -- in the decision -- in the [DPP v. AC [2020] IECA 227] decision, regarding the general context in which the complaint is made here. The Court is dealing with a child complainant, in the first instance.

Often in these types of cases, complaints are not made for a very long time. Here, the defence has pointed out that before the disclosure was made in this case, where the complaint was made to her sister, the complainant, while she was still living in Dublin, had already -- had gone to gardaí in respect of somebody in her class in school in relation to an assault of a sexual nature. But I'm satisfied from reading the statement of the complainant and the reasons she sets out there it's a relative or a near relative within a family can be distinguished from somebody else because there's all sorts of interfamilial issues that arise in that context, the effect on the family as a unit and it's clear from the complainant's statements that these matters were weighing on her mind at the time and I think she describes how she was gradually beginning to speak about those issues as she came towards her mid-teens.

And the disclosure that she made to her sister came within that context. So, I am satisfied that for the purpose of the test of the first reasonable opportunity that this has been met by the complainant in these particular circumstances, notwithstanding that the complainant did feel able to speak about an allegation against a schoolmate. This was dealing with somebody, an uncle, who was an integral part of the family for her entire life. So, I'm satisfied in that context that there was no undue delay in terms of the making of the complaint, that the issue has to be read in the context and the entire circumstances of the case, as has been set out by the case law.

The next issue then is whether the complaint was voluntary and again, [senior counsel for the defence] pointed out that essentially her sister asked questions but this was in the context of the complainant having shown her sister a diary that she kept, which is not before the court but which, according to the complainant herself, contained details of the abuse. While the complainant, in her statement, does not set out what exactly she said to her sister, the issue for admissibly goes to consistency with the allegation -- the allegations themselves and not to do what was said in the statement regarding what was said and, for that reason, I don't think that that point is -- flies as a matter of law.

In relation to the -- what was said to the sister, again, it's been – [named sister], it's been indicated that what she told [named sister] is not consistent with the allegation she herself makes and that's the further ground upon which objection is made. However, I have considered the statement and, in general terms, the occasion -- the detail regarding the particular occasion of the sister, [named sister's] communion, the fact that the [accused] and his wife were staying in their house in [named town in Leinster] and the touching of the complainant under the -- under the underwear in the bedroom, I consider that is sufficiently consistent and certainly not inconsistent with the complainant's own complaint in respect of the allegation at count 5 on the indictment and for those reasons I consider that the case has met the test set out, in particular, by the AC case, that it is not necessary that the entirety of the complainant's version of events be retold but rather that

anything said is not positively inconsistent there with. I'm satisfied that in terms of the material aspects of the allegation there is a consistency. There might be such minor -- may be minor inconsistencies in it but they can be pointed out to the jury in the context of what weight they give to the -- give to the evidence. It's not such as to render it admissible."

19. It is clear from the ruling quoted that the judge considered this matter carefully and sought to apply established legal principles. In our view, her conclusion that the complaint was at a first reasonable opportunity is unimpeachable. Experience has shown that young children frequently find it difficult to disclose abuse within the family. In this case, the disclosure to her younger sister was not a pre-planned one but would appear to have been precipitated by alarm and concern at the fact that the sister was contemplating an extended visit to the accused, and would thus be putting herself in harm's way. We also agree with the judge's conclusions in relation to voluntariness and consistency. The judge pointed out it appears questions were asked, in the context of the complainant providing a diary to read. We might say in passing that the judge's decision to exclude reference to the diary is illustrative of her anxiety to strike an appropriate balance. While the defence has focused on some inconsistencies in relation to the first communion incident, the real significance of the disclosure was not in relation to what was said in respect of any one incident, but the fact that the complainant was disclosing that she had been abused by her uncle. Accordingly, we are not prepared to uphold the ground of appeal relating to the admissibility of the recent complaint evidence of the complainant's sister.

Corroboration

20. This issue relates to evidence about a phone call between the accused and the complainant's father in the aftermath of the occasion when the complainant made a disclosure to her sister. He explained that after contact with his wife's parents to discuss what was emerging, they contacted the accused. He stated that the accused then rang (the call was on speaker phone) and said "[w]e could have sorted this out [named father]. If you'd have come to me I'd have taken the digs off you". The witness said that he replied to that, "[y]ou'll get more than the fucking digs when I catch up with you." In the course of cross-examination, the witness responded to a question "[a]nd you were shouting at him I think?", by saying "[o]h I was shouting at him of course. When he turned around and admitted it to me." Later in the cross-examination, there was the following exchange:

"Q. Well, did he not indicate to you that maybe it would have been a good idea if you'd come to him with the allegation?

A. Probably.

Q. Yes?

A. Maybe that's what he was implying.

Q. Yes?

A. But, to me he was implying his guilt."

21. In resisting the suggestion that the evidence was capable of being corroboration, the defence pointed to the fact that the accused, when interviewed, gave a different account of this telephone conversation. The defence argued that even on the prosecution version of the telephone call, it was ambiguous and could not be said to amount to an admission. In ruling on the matter, the judge observed:

> "I do think it is open to an inference of guilt which supports a guilty mind in respect of what happened, and I'll give appropriate warnings in that regard. But I will go on to say to the jury that if there are two views on it, they must apply the benefit of the doubt to the accused, and then if they reject it as corroboration, well then there is no corroboration. I'll go on then to give the corroboration warning."

22. It is the case that two somewhat different versions of the conversation were on offer. If the jury were satisfied beyond reasonable doubt to accept the prosecution version, then the words spoken potentially supported the prosecution case. What was said was not what someone who was innocent of the allegations would be expected to say. In those circumstances, it seems to us that the judge was entitled to take the view that the evidence of the complainant's father was evidence that was capable of amounting to corroboration. Therefore, we reject this ground of appeal.

Cumulative Effect

23. As we have not upheld any of the grounds of appeal, the question of cumulative effect does not arise. However, it is the case that we have not been caused to doubt the safety of the verdict or the fairness of the trial.

24. The appeal is dismissed.