



THE COURT OF APPEAL

[245/18]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MG

APPELLANT

JUDGMENT of the Court delivered on the 29th day of July 2019 by Birmingham P.

1. On 18th May 2018, the appellant was convicted following a trial, on two counts of having anally raped his wife on the night/early morning of 18th/19th December 2015. Subsequently, on 20th July 2018, he was sentenced to a term of nine years imprisonment. He has now appealed against both his conviction and sentence; this judgment deals with the conviction aspect only.
2. The appellant had originally stood trial on an indictment which contained eight counts of rape, anal rape, and oral rape. The evidence at trial was that in the aftermath of the events that occurred in the early hours of 19th December 2015, the complainant made her way to a friend's house, and from there to her local Garda station where, with the assistance of that friend, she made a complaint that she had been anally raped by her husband. The trial court heard evidence from friends who encountered the complainant, from the Garda with whom she dealt, and from a doctor from the local Sexual Assault Treatment Unit to which she was brought. The indictment also contained rape charges relating to events alleged to have occurred on 29th August 2015, the day after the birthday of the complainant, and events that occurred on a date in October 2015, being the date of the wedding anniversary of the complainant and appellant. The final count, a count of oral rape, was laid as having occurred between 1st November 2015 and 17th December 2015.

3. The complainant's evidence in relation to the events of 18th/19th December 2015, was that the accused returned home in a drunken condition, that she told him that she would not be sleeping with him that night and that she made up a bed in the living room. At a later stage, the appellant came downstairs to the living room and the complainant thought that he "would want to make love". She did not want to do so because she was having her period and she told him this. However, he tore off her underwear and engaged in digital penetration of her anus and then put his penis inside her anus. In addition to shouting, she defended herself and at one stage bit him on the hand. She referred to the appellant strangling her. He then told her to go to the bedroom and he was counting. She gave evidence that he told her if he counted to three and she did not go upstairs, "it would be very bad". There was no counting to two on this occasion: she went upstairs because "I didn't want to risk [it]". Having made her way upstairs as ordered, she was again anally penetrated. The appellant wanted her to put his penis into her mouth, but she told him to go and take a shower to give her "a little bit of time, I was waiting for [my son: P] to come home and I wanted to get out of the house". P, who had been at a youth disco, came back home and, after he had awoken his sister: A, the complainant, P, and A left the house after the complainant had initially phoned a friend: BP. Various witnesses gave evidence in relation to the distressed condition of the complainant; they were BP, IS, and Garda Anne Hogan; who also took photographs of injuries on the body of the complainant which were pointed out to her.
4. When interviewed by Gardai while giving direct evidence and undergoing cross-examination, the appellant maintained that all his sexual relations with the complainant were at all times consensual.
5. The Notice of Appeal initially raised a number of grounds, including a complaint that the appellant was improperly restricted when he applied to cross-examine the complainant on her prior sexual history, however, this aspect has not been pursued. The live issues on this appeal relate to the question of corroboration. There are also a number of sub-issues canvassed. It is said that the Judge was wrong in declining to accede to a request to give a corroboration warning. It is said that a corroboration warning was not only desirable, but necessary, having regard to identified frailties in the evidence of the complainant and the unusual circumstances of their ongoing relationship. The Judge is further criticised for referring to aspects of the evidence as potentially corroborative, while refusing to direct the jury as to the apparent limitation of such evidence at trial.
6. As indicated at trial, the defence requested a corroboration warning. The request was advanced on a number of grounds. It was said that there was no corroboration of any of the offences. The response of the Trial Judge was to point out that there would appear to him to have been evidence capable of amounting to corroboration in respect of the offences alleged to have occurred on 18th/19th December. This Court is in no doubt that the Trial Judge was quite correct in that regard and that, indeed, there was quite an amount of evidence in relation to that incident which was capable of amounting to corroboration.

7. In support of the application for a warning, it is said that there were aspects of the complainant's evidence which gave rise to concern. Reference was made to the fact that her first statement in relation to the 18th December incident had not made any mention of strangulation. It is said that there were inconsistencies on the part of the complainant on certain aspects, including as to whether there were single incidents of anal/vaginal penetration or multiple incidents. Particular emphasis was placed on what it is said was an unusual feature of the case, in that the relationship between the parties continued after the first incidents appearing on the indictment, and indeed, that the relationship between the parties resumed after the events of 18th/19th December. It was pointed out that the complainant had at one stage wanted to withdraw her statement of complaint.
8. The issues raised at first instance have again been relied upon and canvassed in this Court. It is said that the combination of factors that were present meant that there was only one way that the Judge's discretion could be exercised which was in favour of giving the warning. The starting point for consideration of this issue is that by statute, the question of whether to give a corroboration warning is a matter for the Trial Judge's discretion. It is now well-established by the authorities that this Court should be slow to intervene in the exercise of that discretion and should do so only when the decision was made on an incorrect legal basis or was clearly wrong in fact.
9. The Court accepts that there were factors present which meant that it was understandable that the question of the giving of a warning would be canvassed. However, in the Court's view, it remained firmly within the discretion of the Trial Judge whether to accede to the application or to decline to give the warning. In the view of the Court, the circumstances in this case were very different indeed to those that prevailed in the case of the DPP v. Hanley [2018] IECA 173. There, this Court felt that points raised about the tailoring or modifying of evidence to accord with the forensic evidence in the case were of such substance that a corroboration warning was not merely warranted, but was positively required. However, in the present case, the Court is in no doubt that the Trial Judge's discretion was not ousted. He retained a discretion and the manner in which he exercised that discretion was not an impermissible one.
10. In this particular case, there is a further argument for rejecting the ground of complaint focused on the absence of a corroboration warning. If there had there been a warning, the Judge would have told the jury, in language of his choice, that they should be slow to convict on the uncorroborated evidence of the complainant, but they were nonetheless still entitled to do so and would have gone on to identify those aspects of the evidence which were capable of amounting to corroboration. In the context of the present case, that would have involved telling the jury that in relation to the earlier incidents in time, that there was no corroboration and then referring to the aspects of the evidence in relation to the 18th/19th December incidents which potentially amounted to corroboration. In fact, in this case, the Judge did just that. It is true that the Judge did not, in the exercise of his discretion, tell the jury that it was unsafe to convict in the absence of corroboration, but in fact, the jury acquitted on those counts where there was no corroboration and convicted only on those counts where there was potential

corroboration. Thus, it cannot be said that the accused, now appellant, was in any way disadvantaged by the Judge's decision. When that point was put to counsel for the appellant, he responded that this did amount to a disadvantage because had there been a corroboration warning, that warning would, on the authorities, have had to be contextualised. The Court does not see any real substance in that response. To the extent that the appellant implies that contextualising the decision to give a warning would advantage the defence or undermine the prosecution, then the Court would disagree with the suggestion that there was any obligation whatsoever to do anything of the sort.

11. The appellant has an alternative argument to advance, if his primary argument that the Judge erred in failing to provide a corroboration warning does not carry the day. In that situation, he focuses his attention on how the Judge dealt with the issue of corroboration. He is implicitly critical of the fact that the Judge addressed the question of corroboration at all in a situation where he was not giving a corroboration warning. Both at trial and on the hearing of the appeal, counsel on behalf of the appellant disavowed any suggestion that he was going so far as to say that the Judge was precluded from referring to the issue of corroboration, but it is clear that counsel would have preferred if the issue had been left out entirely. In the Court's view, save in the context of a corroboration warning where it is necessary for the Judge to identify the evidence in the case that is potentially corroborative, there is no need for the Judge to address the question of corroboration, but neither is there anything to stop him doing so. As the standard directions in relation to corroboration point out, routinely, people, when faced with important decisions in their ordinary lives, look to see whether the decision that they are considering, or the proposition the veracity of which they are testing, is independently supported. The Court sees nothing inappropriate about a Judge referring to the concept of corroboration and proceeding to identify evidence capable of amounting to corroboration. Save in the situation where the issue has to be addressed because it has been decided that it is an appropriate case for a corroboration warning, the choice of whether to do so is a matter for the discretion of the Judge.
12. Having referred to the concept of corroboration, the Judge then pointed out to the jury aspects of the evidence which were capable of amounting to corroboration, while stressing that it was for the jury to decide whether the evidence was in fact corroborative. In this case, the Judge is criticised for failing to tell the jury that the distressed state of the complainant, if it could constitute corroboration, provided only weak corroboration. Somewhat surprisingly, at trial, counsel on behalf of the then accused had argued that there was no corroboration in respect of any of the counts on the indictment. Confronted with the alternative view that the evidence in relation to the situation that emerged post-the events of the early hours of 19th December potentially provided corroboration, counsel says that if such a view was taken then the jury should be told that it amounted only to weak corroboration. Counsel says that the approach of telling a jury that a distressed state offered only weak corroboration was approved by this Court in the case of DPP v. TE [2015] IECA 218. In the Court's view, there is no absolute requirement on a Judge to tell a jury, as a matter of course, that the distressed state of a complainant, if capable of amounting to corroboration, offers only weak corroboration. Whether to do so

is a matter for the judgment of the Trial Judge and it is a judgment that will be exercised against the background of the particular facts of the case. There may be cases where it would be regarded as appropriate to do so. Examples that come to mind would be situations where a credible alternative explanation for the distressed state is advanced, or where those giving evidence of having witnessed the distressed state might seem other than independent, and indeed, as having an axe to grind. In this case, the Court does not see the need for such a warning or categorisation emerging from the evidence. On the contrary, there is a degree of coherence to the evidence, beginning with the complainant's son referring to his mother crying and speaking in a low voice on the phone, leaving the house, running and telling them to hurry, the evidence of the two female friends who, it should be recalled had their differences with the complainant and were reluctant witnesses at trial as a result, and then the evidence of the Garda who also took photographs.

13. At trial, and again on the hearing of the appeal, the defence was critical of the Judge for drawing together the potentially corroborative evidence, and in particular, doing so at a late stage of the charge, which it is said gave it an undue prominence and amounted to a ringing endorsement of the prosecution's case. It is said that, as a result, the charge became quite unbalanced, and that to achieve equilibrium, the Judge should have pointed to aspects of the evidence on which the defence placed significance. These included the absence of evidence of bruising to the neck, the fact that house-to-house enquiries of neighbours did not reveal any knowledge that anything untoward had happened on 18th/19th December, and there being no indication of screaming on that occasion, or indeed on other occasions, contrary to the prosecution's narrative.
14. The appellant has a broader criticism of the Judge's charge. It is said that the fact that he returned to the issue of corroboration and the potentially corroborative evidence that was available late in his charge meant that this aspect achieved completely disproportionate significance. Counsel stresses that he is not for a moment suggesting that the Judge was seeking to do anything other than be scrupulously fair, but he says that the way the charge was structured meant that the jury found themselves listening to a charge which concluded by bringing together and restating the most significant aspects of the evidence from the perspective of the prosecution. The Judge is criticised for making no effort to balance this by pointing to aspects of the evidence on which the defence placed emphasis, and indeed, on areas where the defence attached significance to the fact that there was simply no evidence. In that context, the appellant refers to the fact that in the first statement of complaint, there was no reference to strangulation, there was no bruising on the neck, the fact that house-to-house enquiries in the aftermath of 19th December had not produced anyone who had seen or heard anything untoward, and the fact that neither on that occasion nor on previous occasions, when, on the prosecution narrative, there had been screaming, nobody had been brought forward to say that they heard anything.
15. In the Court's view, the criticisms advanced of the Trial Judge and of his charge are considerably overstated. Taking the trial as a whole, it is clear that the Judge was absolutely determined to ensure that the accused receive a fair trial. Reading the charge

as a whole, we do not believe that it could be seen as skewed or unbalanced. The criticism of the way the issue of corroboration was dealt with ignored the fact that while the Judge pointed out that there was evidence which was capable of providing corroboration in respect of the events of 18th/19th December, that the Judge also pointed out, correctly, that there was no corroboration in respect of the other counts on the indictment.

16. It seems to us that if one considers how the charge would have impacted the jurors listening to it, that they would have heard the Judge balance his remarks by saying, in relation to the bulk of counts, that there was no evidence capable of amounting to corroboration, and in respect of a minority, that there was certain evidence which was identified. The Court does not feel that such a charge can be categorised as unbalanced or unfair. The Court does not ignore the fact that counsel for the appellant says that his client receives no comfort from the fact that the jury was told that there was no corroboration in respect of some of the counts on the indictment when his client was convicted on others. From his client's perspective, the damage was done once he was convicted on any of the counts advanced. If the appellant's trial on the counts on which he was convicted was unsatisfactory, and if the Judge's charge in relation to those counts was unfair or unbalanced, pointing to the fact that he was acquitted on other counts provides cold comfort.
17. While conscious of the force of that argument, the Court has not been persuaded that the trial was unfair or unsatisfactory or that the verdict was unsafe. The jury returned verdicts which would seem well-justified in the overall context of the case. In those circumstances, the Court will dismiss the appeal.