



**THE COURT OF APPEAL
CRIMINAL**

UNAPPROVED

Record Number: 0158/2019

Bill No.:WXDP0035/2018

[2022] IECA 96

Edwards J.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN/

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

RESPONDENT/PROSECUTOR

-AND-

M.C.

APPELLANT/DEFENDANT

**JUDGMENT of the Court delivered by Ms. Justice Ní Raifeartaigh on the 7th day of
April 2022**

Nature of the Case

1. The appellant was convicted by a jury of three counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by section 37 of

the Sex Offenders Act, 2001. He appeals against conviction on a variety of grounds including the absence of a corroboration warning and a failure to grant a direction in circumstances where the Gardaí failed to take a statement from a particular individual as part of their investigation.

Summary of the evidence adduced at the trial

2. The appellant was born in 1951 and the complainant in 2006. The appellant is the complainant's paternal grandfather. On occasion, the complainant and one of her brothers used to stay overnight with the appellant and his wife (i.e. the complainant's paternal grandparents) from time to time when her parents went to various social events. The complainant alleged that the offending took place on some of those occasions.

3. The indictment contained three counts of sexual assault: the first on a date unknown between the 1 July 2015 and the 30 September 2015; the second between the 1 October and the 31 December 2015; and the third between the 1 January 2016 and the 31 May 2016. Her 10th birthday fell in July 2016.

4. A particular focus in the trial and appeal was the date 29 December 2015. This was the date of the wedding of one A, a friend of the complainant's mother. The complainant described an incident of offending as having taken place on that date while her parents were at the wedding. The complainant's mother was not certain whether the complainant stayed overnight at the appellant's house on that date. The appellant's wife gave evidence that the complainant did not. This formed an important part of the the appellant's application for a direction (which was refused) and for a corroboration warning (which was also refused). We will return to it below.

The complainant's evidence

5. The complainant was aged 12 at the time of the trial. Her evidence-in-chief consisted of a DVD recording of her interview by the Gardaí, which had been conducted by a specialist Garda interviewer. She was sworn at the trial and cross-examined after the DVD was played. The following is a summary of the answers she gave during the specialist interview which was video-recorded.

6. The complainant said that the appellant tickled her whenever she went to his house and that at night she would go to bed and in the morning he would say “do you want a back rub” and then he would give her a back rub, and then “he goes too far and he touches me in my places”. She said “he always he does it when granny is not there”. When asked to explain about the tickling, she says “he tickles me but then he goes too far and touches my places”. She said that she sits on a chair and then “he starts tickling me and then sometimes he rubs my places and then when my granny comes into the room, then he goes back to tickling”. When asked to explain what she meant by “my places”, she indicated “my private parts”. When asked whether this was over or under her clothes, she said “sometimes over or sometimes under”. She said that it happened more than one time.

7. She described how it happened the first time. She said he was going to give her a back rub and then he went into her places and she said stop and then he kept going and then he went in to wake up granny. She said it was in the morning when she was in bed: “he always does it in the mornings”. She said it first happened when she was nine years old. She said he did it and then she went back to sleep and then she woke up and he came in and he was watching her and then he came in and did it to her and then he went back out. She said she was wearing her pyjamas and that it was happening in a spare room in the double bed. Her brother was in the sitting room at the time.

8. She described another time when she was on “his” chair in the sitting room, and he started tickling her and then he “tried to go over” but granny came in and he just let go. She said that he tickled her under her arms and on her belly and on her legs.

9. She also described that her mum and dad went off to various places for a night or to a wedding or a christening. She said that was when it would happen.

10. She was asked to describe what happened when she was in the spare room. She said she was in the bed because there were two spare rooms but one of them was a playroom and the other was where she and her brother slept. She said that the appellant would tickle her and then he would start rubbing her “there”. She said she felt uncomfortable. She said the first person she told was her mother. She said it happened sometimes in the mornings and she also said that he did it “whenever I go over there”.

11. She said that the last time it happened was before her 10th birthday. She said she would be lying in the bed, and her grandfather would be standing right beside her and he’d be doing it and she said “stop or I’ll wake granny”. She was asked if she noticed anything about his body when he did that and she said no. She repeated that it felt really uncomfortable when he did that to her.

12. She also said that she remembered “last year a really really really long time ago”, he grabbed her hand and he said “touch here” and she let go and then she turned back to the wall. She said that it was “his place” that he was asking her to touch and she didn’t want to touch there. She did not have another name for his place but he used it to go to the toilet. She said that this was over his clothes rather than under and she did not know anything about his body when he did this. She said that happened just one time and it was before he started rubbing her. She thought it was “the morning or the evening time”. She was asked was there a particular reason she was in the house at the time and she said she thought it was because

her mother was at a friend's wedding with her daddy. She gave the name of the woman getting married. We shall refer to this person as A.

Other evidence at trial

13. The complainant's mother said that matters came to light on the 23 May 2016. She had collected the children from school and brought them home. At the time, her daughter was learning the Stay Safe program at school and on this day, she told her mother that something "bad" had happened with grandfather. The complainant then told her that the appellant had been touching her in her private area. The appellant's mother made a statement to the Gardaí on the same date.

14. The mother said that the complainant occasionally stayed overnight with the appellant and his wife. She explained that because they had four children, it was hard to find anybody who would babysit them all, so if they wanted to go out for a social occasion, she and her husband used to split the children up, with two of them going to one set of grandparents, and the other two to the other set. She thought that the complainant had stayed with her paternal grandparents approximately four times during the relevant period.

15. She recalled on one occasion in August 2015, the complainant was very clingy and said she not want to stay at the appellant's house, and that in general from then on, she was expressing that she did not want to stay there. Prior to that, she had loved going there.

16. In cross-examination, the complainant's mother said that she had not discussed the matters since the interview was recorded with the complainant.

17. She was also cross-examined about some relationship difficulties she and her husband had in earlier years, and the extent to which the complainant would have been aware of this and worried about the possible break-up of her parents.

18. The complainant's father was also mostly cross-examined about his previous relationship difficulties with his wife and how this impacted upon the complainant.

19. There was evidence that the complainant sometimes stayed the night with her friend T, who lived near the appellant. T's mother was P. The complainant's mother was not entirely sure where the complainant had stayed the night of the wedding on the 29 December 2015; she thought that the complainant might have been collected from her grandparents' house after spending the day there and spent the night at P's house. (Later in the trial, the appellant's wife gave evidence to the effect that the complainant had not spent that night at her house). One of the central points of complaint by the defence in this case is that the Gardaí never sought to interview P on the question of whether the complainant had or had not stayed with her on that night.

20. Evidence was given by the Garda specialist interviewer who described her initial "clarification" meeting with the complainant and the subsequent statement-taking process. Her interview with the complainant was video-recorded on the 18 August 2016.

Evidence as to the appellant's response during Garda interviews

21. The relevant Garda officer gave evidence of the appellant's response during the Garda interview. The appellant was arrested on the 10 December 2016 and was interviewed on three occasions during the course of his Garda detention. He denied the allegations completely and this evidence was put before the jury.

22. In those unsworn Garda interviews, the appellant said he played with the children and would bring them for walks. He said that his wife would always put the children to bed, never him. He said that his wife was always up in the morning before him. When asked if he was alone much with the children when he stayed over, he replied "Never". He said that

he and his wife would always be there and that he was never alone with the children. He denied ever having touched the appellant inappropriately and insisted that he was never alone with her. He said he did not know why she had made the allegations about him. He denied that he ever rubbed her back but accepted that he tickled her, saying that it was only under her arms.

The defence evidence at trial

23. Several former neighbours and/or friends of the appellant's children gave evidence of having stayed over at the appellant's house when they were minors, or of getting lifts from him, and said that the appellant had never behaved inappropriately towards them.

24. The appellant gave evidence at the trial and denied having ever touched the complainant inappropriately. He said he was never alone with the children. He said his wife would always get up first in the morning and make the breakfast. He described the complainant's parents having marriage difficulties and said that the children stayed with him and his wife for four months.

25. His wife gave evidence and stated, *inter alia*, that on the 29 December 2015, the "three boys" i.e. the complainant's brothers, had stayed with them. Implicitly, therefore, her evidence was that the complainant had *not* stayed there overnight on that occasion. She also said that she would always be up in the morning before the appellant and would make breakfast. Like the appellant, she maintained that the children had stayed with them for four months at one stage. I should say that the complainant's parents did not accept this in cross-examination and said that the children had stayed with their grandparents in that context for a much shorter period.

Application for direction at the close of the prosecution case

26. Two particular points were argued in support of the application for a direction. The first limb concerned the timing of the offences as described by the complainant. It was submitted that the complainant had said that the December 2015 incident was the first incident and therefore there was no evidence to sustain counts prior to that date. The second limb concerned the fact that the prosecuting officer had failed to take a statement from P (or her daughter T) on the question of whether the complainant had stayed the night in their house on the night of the wedding of the 29 December 2015. In relation to that issue, counsel for the appellant submitted that Garda Hayes had accepted in cross-examination that potential evidence in this regard would be relevant and that it would have a bearing on the credibility of the witness, but had nonetheless failed to seek it out without providing any explanation as to why not.

27. The trial judge rejected the application for a direction. As regards the evidence that had not been sought out, he said that the value of the evidence asserted was speculative, and purely for the jury to consider. He was not persuaded that the matters were such that there was a real risk of an unfair trial such that he should halt the trial at that point. He was also unpersuaded that the complainant's evidence ruled out the possibility of offences prior to the 29 December 2015.

Ground 5: failure of the trial judge to grant a direction

28. Although it constitutes Ground 5 in the Notice of Appeal, we will start with the contention that the trial judge erred in failing to give a direction in relation to the assaults alleged to have occurred on the 29 December 2015, the date of A's wedding.

29. It will be recalled that Count 2 on the indictment contained an allegation of sexual assault occurring between the 1 October 2015 and the 31 December 2015. The appellant drew attention to the following extract from the complainant's specialist interview:

“Q. Describe how he did that.

A. He grabbed my hand like that and then he said touch here, but I just let go and I went back asleep facing the wall.

Q. Tell me when did this happen.

A. I think it was a really long time ago and that was before when he started rubbing me, I think it was when he started rubbing me.

Q. OK, Tell me did this happen one time or more than one time.

One time.

Q. Tell me what was that time.

I think it was last year.

Q. Tell me was it in the morning time, the nighttime, the evening time or the daytime.

I think it was the morning or the evening time.

Q. Tell me what time of year was it that this happened.

2015 when he started it.

Q. Do you know what month that this happened.

No.

Q. Tell me can you remember was there a particular reason you were in Granny and Grandad's house at that time.

Because Mammy I think she went out for her friend's wedding and Daddy went with her.

Q. Tell me do you remember the names of the people who got married.

A [name deleted] and I can't remember."

30. When giving evidence, the complainant's mother was not able to remember whether the complainant stayed the night of the 29 December 2015 with the appellant and his wife, or whether she might have spent the day there and then been collected and gone to her friend T for the night. She accepted the latter was a possibility.

31. The appellant's wife gave evidence that she recalled the night of the wedding on the 29 December 2015 and that on that particular night, "the three boys" (i.e. the complainant's brothers but not the complainant) had stayed over.

32. The relevant Garda officer was cross-examined about her failure to take a statement from T's mother, P. She accepted that it would have been "*relevant*" had a statement been taken from P potentially indicating the complainant had stayed over in her house on the evening in question. She said she considered taking such a statement and accepted that the taking of one could have been done without any difficulty. Nevertheless, having "*discussed*" the matter with her superiors, the taking of such a statement was not deemed "*necessary*" for the investigation.

33. An application was made to the trial judge for a direction arising in relation to all counts/allegations concerning offending *prior* to the 29 December 2015 on the basis that even taking the prosecution case at its height, a properly directed jury could not be satisfied of guilt to the requisite standard. The application was refused. The appellant contends that this was an error on the part of the trial judge because the evidence all concerned the issue of when the alleged offending took place; there was no evidence at all of offending on the

dates prior to the 29 December 2015 and therefore the counts relating to offending prior to that date should have been withdrawn from the jury.

34. A related argument concerned the failure to take a statement from T's mother, P, as to whether the complainant had stayed with them on the night of the 29 December 2015. The appellant relied on *DPP v. C.CE* [2019] IESC 94, in particular the following passage:-

The assessment of whether the trial is fair involves a conscious determination by the trial judge whether... it can be said that the test identified by Hardiman J. in S.B. has been met, being "that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence".

.. it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which render a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of the investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity

35. The trial judge rejected the application for a direction. He ultimately directed the jury that if they found that the complainant was making an allegation that the offending had occurred during the *night/next morning* of the 29 December 2015, the evidence was simply not there as to offending at that time, i.e. they should acquit. However, if it related to alleged offending during the *daytime* of the 29 December 2015, there was a conflict of evidence between the complainant and her mother, on the one hand, and the appellant's wife, on the other, as to whether she was at the appellant's house. This conflict of fact, he said, was for the jury to resolve.

36. The appellant criticises the trial judge's view that there was no risk of an unfair trial in leaving this count to the jury in circumstances where there was evidence that the complainant was at the appellant's home for at least some of the 29 December 2015 (albeit not necessarily overnight). The appellant complains that having regard to the totality of the complainant's evidence, it was simply not plausible to suggest that she had been assaulted during the day in the manner she described, i.e. in the double bed in the spare room while/after she was asleep and while her grandmother was asleep.

37. Criticism is also made of the trial judge's citation of *DPP v W.T.* [2015] IECA 140, because the speculative nature of the evidence in *W.T.* directly arose due to the death of the potential witness in respect of which no culpability could arise whereas in the present case, the witness P had been mentioned by both prosecution and defence witnesses during the investigation and was available, yet the taking of a statement from her had been inexplicably deemed "*unnecessary.*" The Gardaí were at fault in failing to take the statement, it was submitted.

38. The respondent disputes the appellant's characterisation of the complainant's evidence as leaving only one interpretation available to the jury, namely that there was absolutely no

evidence of assaults occurring prior to the relevant date, namely, the 29 December 2015. The respondent submits that the portion of the transcript relied upon by the appellant does not portray the full picture presented by the complainant. The respondent cites additional extracts from the child's interview and submits that the appellant's characterisation wrongly places emphasis on the use of the words "before" and "started", by a 10 years old vulnerable complainant, discussing an extremely delicate and difficult topic, with a stranger. Further, it is submitted that it ignores and distorts the earlier evidence of the complainant pertaining to when the abuse started.

39. The respondent also defends the trial judge's decision in relation to the impact of the failure of the Gardaí to take a statement from P. The reference to *W.T.* is defended on the basis that is merely authority for the proposition that applications based on missing evidence can sometimes amount to no more than speculation as to what that evidence might have been.

Decision of the Court

The failure of the Gardaí to take a statement from P concerning the 29 December 2015

40. Much of the appellant's case on this appeal, both directly and indirectly, concerns the evidence as to the alleged events on the 29 December 2015 and the failure of the Gardaí to take a statement from P as to whether the complainant P stayed over at her house. Accordingly, we will address that issue in the first instance.

41. It is important to note, first, that this was not a case where there was delay, whether (i) by the complainant in reporting the matter to the Gardaí; (ii) by the Gardaí in investigating; or (iii) by the DPP in prosecuting. It is therefore distinguishable from the many "delay" cases

in which evidence of a particular kind is no longer available by reason of the passage of time. In some of those cases, the evidence no longer available consisted of testimony from a witness, being testimony which the defence contended would have been relevant but which was no longer available (because the witness has died or become incapable of providing evidence by reason of dementia or the like) between the time of the alleged events and the trial. In such cases, there is not only an interrogation of the probability that the witness might have had relevant exculpatory evidence to offer but also an interrogation of the responsibility for the passage of time which led to the witness becoming unavailable whether through death or illness. In the present case, there was no delay in the complaint, or in the investigation or prosecution of the case. Further, the witness said to be relevant has not died or become incapacitated in any way. Accordingly, the drawing of parallels with those cases must be approached with considerable caution.

42. It is also important to note that there was at the time of trial (and on appeal) simply no indication at all of the type of evidence that might have been forthcoming from P. The appellant correctly says that *if* P could give evidence that the complainant stayed at her house on the 29 December 2015, this would have been relevant. However, it is also possible that P might have said she could not remember the night at all, or whether the complainant stayed with her; she might equally have said that the complainant definitely did not stay at her house, thus corroborating the complainant. The suggestion that P might have provided exculpatory evidence for the appellant was and is entirely speculative. The position is not even as favourable to the defence as it was in *DPP v. C. CE*, where the deceased witness had, before her death, told three witnesses that certain allegations of sexual abuse against the appellant were “all lies”. And it will be recalled that even in those circumstances, a majority of the Supreme Court took the view that the trial should not be halted by reason of the

absence of the witness. There is no indication whatsoever in the present case that P might have provided exculpatory evidence for the appellant.

43. It is also important to note that another line of cases, those concerning “missing evidence” *simpliciter*, involving no delay (e.g. *Braddish* [2001] 3 IR 127, *Dunne* [2002] 2 IR 305, *Bowes and McGrath* [2003] 3 IR 25), mostly involved an item of real evidence such as a vehicle or a videotape, of which the Gardaí alone had possession and which was no longer available for the defence to examine or have tested on their behalf. The position in those cases is not capable of easy comparison with the present case where the witness in question is an identifiable person who is still alive and capable of being questioned. The issue in those cases was the failure of the Gardaí to *preserve* an item of evidence so that the defence could conduct tests upon it. It is not apt to make simple comparisons between failures to preserve items of real evidence with a failure to interview a witness who is still alive and available for questioning.

44. In that context, it also bears saying that the appellant could have (i) requested his solicitor to write to P, asking whether she would consent to being asked about this matter; or (ii) written to the prosecution and asked them to interview P, if the appellant’s solicitor received a negative response from P to his/her request for interview, or anticipated that he would get one. This was not a case of evidence which had been damaged, destroyed or had vanished for all time; nor of a witness who was dead or whose capacity was impaired for all time. The prosecution does not have ownership of witnesses and there is nothing to prevent the defence from making inquiries of their own or pointing out to the prosecution other lines of potential evidence and requesting that further steps be taken.

45. We accept that it would have been preferable if the Gardaí had interviewed P as part of their investigation; we also accept that, on the basis of the information/evidence available

to the Gardaí, P's evidence *might* have helped to shed light on this matter (*if* she could remember whether or not the complainant stayed with her on the 29 December 2015). However, by the time the appellant had received the Book of Evidence and disclosure, his state of knowledge was the same as the Gardaí; the same possibility could have occurred to him and been acted upon. Further, it was the defence who called the appellant's wife to give evidence that only the three brothers had stayed at her house on the 29 December 2015, thus introducing a direct conflict into the evidence concerning the issue of whether or not the complainant had stayed at the appellant's house on the night in question. The appellant must therefore have been alert before the trial as to the potential relevance of P's evidence; this was not a matter which arose in the course of the trial. In those circumstances, the fact that they did not raise it at all either with P directly or the prosecution in advance of the trial is a factor which should be factored into the analysis as to the fairness of the trial in the absence of the evidence.

46. Further, there is less speculation in the context of a piece of real evidence such as a vehicle or videotape or telephone records. If, for example, it is known that there was a videotape of the location at the time of the alleged offence, it can almost certainly be said that this item would be likely to have yielded relevant evidence whether inculpatory or exculpatory. Similarly, telephone records would yield objective evidence as to whether certain calls were or were not made. The same cannot be said of a human witness who is asked to recall events on a particular date. They may or may not remember the day or evening in question. Human memory is not mechanical like a videotape. Therefore, whether relevant evidence exists in the mind of the human actor in question is uncertain, and to that extent speculative, unless there is some particular reason to think that the witness might have given evidence favourable to the accused person in a given case.

47. In all of the circumstances, it does not appear to the Court that there was a real risk of an unfair trial by reason of the fact that no statement had been taken from P, nor was the trial judge in error in failing to withdraw the case on this ground, whether as a standalone ground or in conjunction with the other limb of the application.

Withdrawal of case insofar as it involved allegations prior to the 29 December 2015

48. As to the second limb of the application, having reviewed the transcript of the complainant's testimony in its entirety, we are not convinced that it admits *only* of the interpretation that all the alleged offending took place from the 29 December 2015 onwards. It is an interpretation, certainly, but in our view it was a matter of fact for the jury to decide on the basis of the totality of the complainant's evidence and we are satisfied that it was in order for the trial judge not to remove the case from the jury on the relevant counts on this ground.

Grounds of appeal 1 and 2: (1) Failure of trial judge to give corroboration warning and (2) That the trial judge erred in fact and/or law in failing to give any direction to the jury in relation to how, as a matter of law, the evidence of the complainant should be treated considering her young age.

49. The first ground of appeal is that the trial judge erred in law and/or fact in failing to give a corroboration warning. The appellant submits that the trial judge erred in failing to provide a corroboration warning to the jury. The respondent submits that the trial judge carefully exercised his lawful discretion in this regard and that the trial judge clearly had the relevant law at the forefront of his mind.

50. The application that was made to the trial judge requesting that a corroboration warning be given was based both on the fact that the allegations were of a sexual nature and that the complainant was a child, reference being made both to s.7(1) of the Criminal Law Amendment Act 1990 and s.28(2) of the Criminal Evidence Act 1992. Among the matters adverted to were that the offences were alleged to have taken place in the appellant's home where no other person observed it despite the residence being occupied by others at the material time; that the evidence actually given during the trial in relation to the commission of the offences was vague; the particular problems in connection with the dates/sequencing of the offences; and the linkage of the complaint to the wedding of A on the 29 December 2015 and the evidence concerning that date. All of this evidence indicated unreliability on the part of the complainant.

51. The appellant also referenced the fact that there had been marital discord in the complainant's home, which she had been worried about. This raised the possibility, it was submitted, that her complaints stemmed from a fear of her parents separating thus directing their attention onto her difficulties as opposed to theirs. The appellant also drew attention to the conflict of evidence as between the mother and the complainant as to whether they had discussed the subject-matter of her complaints. It was suggested that there was a risk of the complainant being susceptible to suggestions from her mother.

52. Complaint is made that, instead of taking these concerns into account and deciding in favour of a corroboration warning, the trial judge had instead referred to non-specific factors such as "*demeanour*" of witnesses and the "*manner*" of the witnesses' evidence and wrongly concluded that it would not be appropriate to give a corroboration warning.

53. The respondent defends the trial judge's decision not to give a corroboration warning and cites the observations of the Court in the *Wooldridge* [2018] IECA 135 and *V.E.* [2021]

IECA 122 decisions. The respondent points to the safeguards in the video-recording process as well as the fact that the child was cross-examined, and says that the trial judge was in the best position to judge the reliability of the child complainant in the case and to exercise his discretion with regard to the sought-for warnings/directions.

Decision

54. It should not be forgotten that the corroboration warning, if given, goes further than merely pointing out that the fact there is an absence of corroboration; it gives a *warning* as to the *danger* of convicting in those circumstances. The decision of the Court in *Wooldridge* explains why the warning should not be treated as something which should be routinely given.

55. More recently, the Court said in its judgment in *DPP v. Richard O'Mara* [2021] IECA 243, at paras 72-3:

“The corroboration warning which was formerly required to be given in all rape cases was based upon certain assumptions which are no longer accepted in Irish society. These included an assumption that a rape allegation is easy to make and difficult to disprove, and that a rape allegation should be treated with more than the usual scepticism which any allegation of a crime should be scrutinised. Historically, because of these assumptions, it was considered dangerous to convict in the absence of corroboration of a rape complainant's testimony; the testimony of a rape complainant was considered to be inherently reliable, irrespective of the circumstances of the allegation or the character, age or other characteristics of the complainant. By enacting s.7 of the Criminal Law (Rape)(Amendment) Act 1990, the Oireachtas rejected those assumptions and indicated that a blanket approach of giving a corroboration warning in every case was no longer considered to be

appropriate. The Oireachtas chose to leave it to trial judges to give a warning if they considered it appropriate in a particular case. The discretion of the trial judge has been emphasised in a series of cases by this Court and its predecessor...

Logically, if the warning falls within the trial judge's discretion and is not required to be given in every case, there must be something in a particular case which warrants it being given to the extent that a failure to do so would amount to an error of law which requires intervention by an appellate court (“incorrect legal basis or clearly wrong in fact”; *DPP v. Ferris*). This Court defined that ‘something’ in *Wooldridge* as ‘something special and peculiar in the evidence which could give rise to the danger of convicting a person on the uncorroborated evidence of that other person...’. The Court in *DPP v. RA* referred to ‘factors taking the case out of the ordinary’. It is important in our view not to become overly entangled in semantics. What is important is that the trial judge avoids giving the warning simply as a matter of routine or out of an excess of caution (*DPP v. JEM*, *DPP v. Wallace*) and instead considers whether, on the evidence in the particular case before her, it would be “dangerous to convict on the uncorroborated evidence of the complainant”. The statutory intent, in our view, is to move away from a blanket giving of the warning and towards a case-specific consideration of whether the warning is required in each individual case. .. “

56. Further, the Court considered the question of the evidence of children in the case of *DPP v. V.E.* [2021] IECA 122. At para. 79, it quoted the following passage from the English case of *Barker* with approval-

“We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children, with for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.”

57. In the present case, we consider that the trial judge was well within his discretion in deciding not to give a warning. There was nothing particularly vague or unusual in any respect about the complainant’s evidence in the present case, based on the Court’s collective experience of the evidence of child complainants. The appellant lays particular emphasis upon the fact that the complainant said that she had discussed the matter with her mother “a couple of times a week” after the Garda interview, while her mother said they never discussed it. This was a matter for the jury to consider. It may be noted that the complainant was not cross-examined as to whether her mother had influenced her in making the allegations; nor was it was never suggested to the mother that she had influenced her

daughter, improperly or otherwise, in her making of the allegations. The issue featured in the mother's cross-examination only to the extent that she was asked if she had discussed it with her daughter after the Garda interview, to which she replied that she had not, and there was then a question "so if someone were to suggest that you had discussed these matters after that date, they'd be incorrect, would they?", to which she gave an affirmative answer. In comparison to other matters which were explored in cross-examination, this was an issue on which there was a very light touch. We do not consider that this was a matter of such significance at the trial that it amounted to an error of law on the part of the trial judge not to have given the corroboration warning because of its presence on the evidence.

Ground 3: That the trial judge erred in fact in refusing to recharge the jury in accordance with the requisitions made on behalf of the appellant concerning the discrepancy between the evidence of the complainant and her mother concerning discussion of the matters in issue in the trial

We repeat our observations in the preceding paragraph and reject this ground of appeal.

Ground 4: That the trial judge erred in fact and/or in law in directing the jury to disregard the submission in respect of the case of *DPP v Feichín Hannon* [2009] IECCA 43.

58. The appellant submits that he mentioned the *Hannon* case to the jury solely for the purpose of demonstrating to them the possibility that truth is not always the actual motivation for the making of such allegations by a child complainant. He submits that the absence of apparent motivation for such allegations was something the appellant had to deal with because he had been specifically asked during the Garda interviews why his granddaughter would make these allegations against him if they were not true. He was therefore entitled in

his defence to suggest an ulterior motive or intent, or more importantly, no motive at all. Complaint is made as to the manner in which the trial judge dealt with the matter in his charge to the jury, which was as follows:

“Now, there was a reference by Mr Sheahan about other cases and he talked about a case involving a miscarriage of justice. There are miscarriages of justice. There are also cases where convictions where people are convicted of horrendous assaults, but you do not have regard to other cases. If you were to start to do that the defence could start reading any number of cases where people were acquitted or wrongly convicted, the prosecution could start reading out numerous cases where people were correctly convicted. You are not trying any other cases. You are trying this particular case. So, bear that in mind.”

59. The appellant contends that this was a mischaracterisation of the reason he had referred to the *Hannon* case. Further, the jury might have been misled by the trial judge into thinking that the question of motive, or that false allegations are sometimes made, was not relevant to their deliberations at all. A requisition was made to that effect but refused in the following terms:

“I think it’s only fair that a jury should be told that and should be told that both sides could start reading out lengthy cases to them trying to convince them so I did tell them that. Mr Sheahan told them that he wasn’t using it for that purpose, However, he read out large tranches of it and clearly the import on a jury can be something, late on a Friday, which could excite certain emotions in a jury. So I think, based on telling or suggesting to a jury that there could be a hidden miscarriage of justice which would wreak terrible wrong to an accused person if the jury did convict them,

I think its proper to correct it by simply telling a jury that they are dealing with this case, So, I am not going to recharge them on that.”

60. The respondent submits that it was correct to tell the jury to disregard the *Hannon* case, which had been opened at length in the appellant’s closing address, and that it introduced emotive matters into the case at a very late stage in the day.

61. There is nothing particularly wrong with an accused person telling the jury, through his counsel, that false allegations may sometimes be made by complainants, and/or that this can happen without any apparent reason or particular motive on the part of the complainant. Nor would it be inappropriate *per se* for counsel to refer to the *Hannon* case as an illustration of this phenomenon. However, it is important that the jury focus on the facts of the case in front of them and that they are not distracted from that task. In a context where the appellant’s counsel took the unusual course not merely of mentioning the *Hannon* case but of reading out extensive portions of the judgment to the jury as part of his closing speech, we see nothing wrong with what the trial judge did say and his subsequent refusal of the requisition in question. In effect, the trial judge was doing no more than reminding the jury that they should concentrate on the case before them in reaching their decision and that thinking about other cases would not be particularly helpful for them in this task. There was nothing wrong with this nor did the matter require further revisiting in the manner requested by the appellant. The Court rejects this ground of appeal.

62. In all of the circumstances, the appeal against conviction is refused.