**THE COURT OF APPEAL**

**Record Number: 217/19**

**Edwards J.**
**McCarthy J.**
**Kennedy J.**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
**RESPONDENT**

**- AND -**

**KMCD**
**APPELLANT**

**JUDGMENT of the Court delivered on the 11th day of July 2022 by Ms. Justice Isobel Kennedy.**

1. This is an appeal against conviction. On the 30th July 2019, the appellant was convicted of; one count of rape contrary to s. 48 of the Offences Against the Person Act, 1861 and s. 2 of the Criminal Law (Rape) Act, 1981; two counts of indecent assault contrary to s. 10 of the Criminal Law (Rape) Act, 1981; and two counts of sexual assault. An effective sentence of seven years was imposed on the 21st October 2019. This appeal is one against conviction only.

**Background**

2. The appellant in this case, KMcD, was convicted of five counts of certain sexual offences in respect of the complainant, AR, who was the younger sister of the appellant's long-term partner. The offences in question took place on various dates between 1987 and 1994, when the complainant was aged between seven and fourteen years old. AR gave evidence during trial as to the events which occurred during her childhood.

3. AR described being indecently assaulted and later raped by the appellant in the bedroom she shared with a third sister, while she was between the ages of seven and eight. She further described a later indecent assault, which occurred when she had moved into a room usually occupied by a fourth sister, while the latter was living abroad between 1989

and 1990. During this period, the complainant made a disclosure about the events to her cousin.

4. In 1990, the appellant and his partner moved in together, and their first child was born. The complainant described babysitting the appellant's children on a number of occasions, and being sexually assaulted by the appellant while staying over at his house. She described another incident of sexual assault occurring outside the family home between 1992 and 1994.

**Grounds of appeal**

5. The appellant now relies on five grounds of appeal, as follows:

    1. It is said there was a failure of the trial court to ensure a fair trial, as a result of constant interruptions from the bench during the cross-examination of the complainant. This includes complaint as to a comment to both the complainant and the jury that counsel for the accused was simply cross-examining on the basis of accusing the complainant of "making it up."

    2. There is a complaint that the trial judge, despite the fact that cross-examination of the complainant had been completed, amended the indictment, where re-cross-examination would have been futile and;

    3. Linked with ground 2 above, there is a complaint in relation to the decision of the court to amend the indictment, in the circumstances of "the extreme age of the case", where the appellant was unable to rely on alibi evidence "where the allegations kept changing, in time."

    4. There is complaint in relation to the refusal of the trial judge to give a corroboration warning.

    5. Issue is taken with the trial judge's refusal to avoid informing the jury that the complainant had travelled from Australia in order for the case to be prosecuted, in circumstances where the allegations took place between 27 and 32 years before the trial.

6. The above grounds can be more aptly placed under five headings, considered below.

**Interventions by the trial judge**

7. It is said that the trial judge "entered the arena" during cross-examination of the complainant more than was necessary, including by interpreting questions by counsel. In particular, issue is taken with the judge's interpretation of certain questions, which were to the effect that counsel was suggesting that AR was fabricating her evidence. The appellant refers to certain clarifications that the judge requested of defence counsel on Days 2 and 3 of the trial. Moreover, it is said that the judge intervened excessively in the complainant's direct testimony.

8. On behalf of the Director, it is said that the interruptions of the judge were "with a view to clarifying points of detail" and, moreover, that the interventions were not confined to

cross-examination, but also occurred during direct evidence. It is accepted by the Director that the trial judge did intervene "on many occasions, quite often." It is noted, however, that at no point during the trial was this issue raised, and moreover, at certain points, defence counsel thanked the trial judge for his interventions.

9. In relation to the particular issue of the judge interpreting defence counsel's questions as suggesting that the complainant was "making up" the allegations, the following exchange took place in cross-examination:

"Q. […] And I'm putting it to you that you're saying that the period is much, much shorter than in fact it was to get over the difficulty of what you say in your statement about where you say you were sexually attacked?

A: I'm sorry, I don't understand your question.

Q: I'm saying to you that you are now saying to the Court that you only spent two weeks with [brother M] in the room, in the -- what I've just called the nursery bedroom because you *want to make out* that you were sexually interfered with in room seven?

JUDGE: I'm not clear --

A: I still don't understand your question. I'm sorry, Judge.

Q. Very good. I'll ask the question a different way.

JUDGE: What counsel is putting to you is that you're making it up. That's -- that's the essence of what he's putting to you, and I want to --

A: No, that's not true.

JUDGE: I see.

Q. Well, Judge, you really got to the essence of the question. […]"

10. At another point on the same day, the following exchange took place:

"Q. And if they went to take the soiled clothes out of the basket in the bathroom, wouldn't they have absolutely, with certainty, noticed a pair of your knickers that had blood on them, and also ejaculation?

Mr Delaney: Well, sorry, I don't think the witness said – –

Judge: Well, the witness has – –

Mr Delaney: Yes.

Judge: There has been no evidence that somebody has ejaculated, that I recall, in relation to matters. The witness has simply given evidence that she noticed blood.

Q. : All right, I'll stay with blood. That there was blood on your knickers?

A. I don't think that that would be pointed out or obvious, given that there was five women in the household.

Q. See, you're only a little girl. You're seven, or maybe eight, maybe six. So, your knickers will be quite different from the grown-ups?

A. That would assume that there was examination of every piece of laundry that was going to the washing machine.

Q. And they would have seen -- if you had left your underwear like that in the bathroom, I put it to you that it would have been completely obvious. Isn't that right? You see, of course, if it didn't happen, this would not have occurred. There would be nobody finding any brown knickers in… Isn't that right?

A. I can't talk to assumptions.

JUDGE: I think, again, counsel is putting to you that you're making it up in relation to the knickers?

Q. Yes, I am, Judge?

A. That's not true, Judge."

11. On another occasion, the trial judge intervened where the following question was asked:

"Q…… And that if you did, you would be able to use that as an island of fact in which to sit what you say happened to you?

A. I don't understand what – – the question is, Judge.

Judge: I'll tell you what he's saying. He saying that, again, that you're making it up….."

12. The appellant cites *The People (DPP) v McGuinness* [1978] IR 189 in this regard. The respondent distinguishes that case from the present case on the basis that the interventions of the trial judge in the present case were to assist the witness, counsel, and the jury, and in order to ensure cross-examination was properly conducted.

**Discussion**

13. We have read the transcripts of the complainant's testimony which is where the criticisms of the judge lie. It is correct to say that during the detailed cross-examination, the judge intervened on a number of occasions.

14. In The People *(DPP) v McGuinness (ibid),* this Court approved a passage of the judgment of Denning LJ in *Jones v National Coal Board* [1957] 2 All ER 155 as follows:

"Now it cannot, of course, be doubted that a judge is not only entitled but is indeed, bound to intervene at any stage of a witness' s evidence if he feels that, by

> reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying."

15. A judge is entitled to intervene in a wide range of circumstances in addition to mere clarification; such as, where the question asked is unfair, misleading or where it is sought to elicit inadmissible evidence.

16. In the present case, the preponderance of the interventions arose in order to clarify questions, either of the judge's own volition or where the witness indicated she did not understand the question asked or where counsel asked several questions rolled into a single question, or in order to ensure questions were posed with accuracy. There are many instances where the judge sought to clarify questions asked, or where there was a level of inaccuracy in putting aspects of the complainant's own statement to her. It must be said that counsel responded with courtesy and appreciation to the judge's interventions.

17. In our view, the question to be considered is whether the interventions of the judge rendered the trial unfair. As said in *R v Clewer* (1953) 37 Cr App R 37 at p. 39:-

> "At the same time, the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury."

18. Counsel for the appellant computed the interventions by the judge at a figure of over 200, and argues that this in and of itself rendered the trial unfair. As this Court has stated in the recent decision of *The People (DPP) v AH (2022)*: "we deprecate the over-simplification implicit in simply computing the number of interventions and using that as a basis for criticism in and of itself."

19. Frequent interventions by a judge may not necessarily render a trial unfair, consideration must be given to the reason for and nature of the interventions. These aspects, rather than the quantity of the interventions may inform the fairness or otherwise of the trial.

20. Insofar as the appellant takes particular issue with the judge's interventions to the effect that the questions asked were really whether the complainant was making up the allegations, we do not find that such clarification rendered the trial unfair. Indeed, counsel, who is best placed at trial to determine whether a real issue arises, did not express any qualms about the judge's clarification, but was satisfied that the judge properly identified the essence of the question.

**Conclusion**

21. In conclusion, this Court does not consider that the interventions by the judge in the present case rendered the trial unfair. The interventions were for the purpose of achieving clarity, removing ambiguity and ensuring that the witness understood the questions asked. In these circumstances, we reject this ground of appeal.

**Amendment of the indictment**

22. Issue is taken with the fact that the trial judge amended count 4 on the indictment to date for a period of two years and three months, instead of its original six-month timeframe. Originally, the count was framed from the 1st July 1990 to the 31st December 1990; this was amended to the 1st July 1990 to the 30th September 1992. It is said that due to the timing of the amendment, it was impossible for the defence to re-examine the complainant and that this caused substantial prejudice.

23. Count 4 relates to a sexual assault, which, on the complainant's evidence, occurred when she was babysitting at the home of the appellant. She said she was around 12/13 years old and that the first of the appellant's children was a toddler. In cross-examination, it was suggested to the complainant that she was too young to babysit a very young baby. The cross-examination was conducted on the basis of the dates on the indictment as originally framed. Moreover, it was suggested to her that an older girl babysat for the family.

24. Towards the conclusion of the prosecution case, counsel for the Director flagged to the judge that there might be an application concerning the indictment. This occurred at the end of Day 3. On Day 4, counsel applied to amend certain counts on the indictment, including count 4 on foot of the evidence adduced at trial. That evidence was in the terms outlined above. Counsel for the appellant herein objected to the amendment on the basis that this was an old case and that the count, if amended as sought by the Director, would extend beyond a period of two years. Counsel also expressed concern that the cross-examination of the complainant had taken place on the basis of the dates initially preferred and it was their view that a young girl of the complainant's age would not have babysat an infant.

25. The trial judge considered the evidence adduced and ruled in permitting the amendment that no prejudice was caused to the appellant. The appellant however, contends that the amendment would have had significant effect on the minds of the jury, and should have led to their discharge. It is further said that the delay associated with the case compounded the difficulty brought upon the appellant as he was unable to rely on alibi evidence due to the changing time interval.

**Discussion**

26. The power to amend an indictment is to be found in s.6(1) of the Criminal Justice (Administration) Act,1924, the relevant portion of which provides:-

> "Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice.."

27. As is clear from the wording of the statute, an indictment may be amended at any point in a trial, as long as the amendment does not cause injustice to the accused person. In every case where an amendment to an indictment is sought, it is necessary to carefully consider whether an injustice will be caused, that is whether the accused person will be prejudiced by the proposed amendment. This will depend upon the facts in any given case.

28. In the present case, it seems that the complainant's proposed statement of evidence in the Book of Evidence, when referring to the incident which is the subject of count 4 on the indictment, stated that this event occurred when she was asked to babysit and when the child she was to babysit was a toddler. Her evidence at trial was that she was aged 12/13 years old at the time of this incident and that the child she was babysitting, (being the appellant's daughter) was a toddler. The count on the indictment was originally preferred with dates which placed the appellant's daughter at a younger age. It cannot be said that the amendment prejudiced the appellant, as he must have known his daughter's date of birth and, indeed, gave evidence of this, moreover, his defence was that the complainant never babysat for the family and that the events in question never occurred at all.

29. In *The People (DPP) v Walsh* [2010] IECCA 80, the offences also concerned historic sexual abuse, where it was held that the amendments to the indictment were necessary to correct the timeframe in which the offences were alleged to have occurred. In that regard Fennelly J. stated:-

> "The purpose of any amendment must be to ensure that the jury will address the true issues when they come to deliberate on their verdict. The counts in the indictment should correspond as closely as is reasonably possible with the real case for the prosecution… The section sets no time limit to the exercise of this power… It may well be that, in a particular case, a late amendment cannot be 'made without injustice…' A court should not exercise the power in circumstances involving prejudice to the defendant in the defence of the charges against him. This is prejudice in the legal sense."

30. An amendment may be necessary in order to ensure that the indictment properly reflects the evidence at trial. It is against these principles that the amendment in issue must be examined.

31. The variation in the "end" date of the offence preferred came about as a consequence of the evidence given by the complainant. She said that the sexual assault occurred when she was aged around 12/13 years and that the appellant's daughter, whom she was babysitting, was a toddler. The date was framed with reference to the time she started 1st year in secondary school.

32. Moreover, as we have stated, the appellant had knowledge of his own daughter's birthdate. The complainant also gave evidence that the second child was not born when this offence occurred.

33. Whilst complaint is made that the amendment prejudiced the appellant in that the cross-examination made the point that the complainant would have been too young on the initial indictment to babysit an infant, we are satisfied that no actual prejudice arose in the context of the defence; where the appellant denied any sexual offending and asserted that the complainant never babysat for his family. The amendment simply ensured that the dates on the indictment corresponded with the evidence given by the witness.

34. The trial judge carefully considered the matter and properly amended the indictment. In addition, he acceded to the defence request to inform the jury of the amendment during the appellant's evidence-in-chief. We are entirely satisfied that no injustice was caused to the appellant and reject these grounds of appeal.

**The refusal to provide a corroboration warning**

35. On Day 5 of the trial, counsel for the appellant applied to the trial judge for a corroboration warning in circumstances where there was no corroboration and given the passage of time. The trial judge ruled that the default position was that there should not be a corroboration warning, and that it should not be given unless there is evidence pointing to the unreliability of the complainant. The Director contends that the trial judge was entirely correct to refuse the application and noted that the appellant had not provided some evidence as to the unreliability of the complainant as required.

**Discussion**

36. S.7 of the Criminal Law (Rape) (Amendment) Act, 1990, vests a discretion in the trial judge as to the necessity for a corroboration warning and so, the starting point for consideration of this issue is that for in excess of 20 years, the requirement for a mandatory corroboration warning has been removed. Where a trial judge has a discretion to exercise, an appellate court will be slow to intervene unless it is apparent that the discretion has been incorrectly exercised.

37. In *The People (DPP) v M (Otherwise J) D* [2019] IECA 92, this Court stated:

> "We have stressed before, and stress again, that whether or not a corroboration warning should be given is in the wide discretion of the trial judge in the first instance. It is obvious that a trial judge is well placed, compared to this Court, to make a judgment on the evidence, having regard to the run of the case on issues of credibility or reliability relevant to a decision as to whether or not a warning should be given. "

38. Insofar as the present case is concerned, there was no evidence capable of amounting to corroboration. However, the fact that the case was an old one, coupled with the absence of corroboration does not, necessarily give rise to the requirement for a corroboration warning. Counsel for the appellant indicated that the evidence of the complainant was unreliable and pointed to certain issues, such as the failure of a young child to complain and the suggestion that a young child would be unable to operate a particular type of bath tap. However, these examples are not, in and of themselves, indicative of unreliability.

39. The question for this Court is whether the judge properly exercised his discretion in refusing to grant such a warning. In so refusing, he stated:-

> "[I] think the position well is that the default position in these cases is that there should not be a corroboration warning. That warning should be abolished, both in relation to the evidence of children and also in relation to these types of cases for very good reasons."

40. Having made these observations, he then went on to say:-

> "A warning is only given in my view, if having looked at the matter, I have a genuine concern about the ---about the question mark in my mind about some, if you like, discrete aspect of the evidence which points to the evidence being unreliable."

41. Thus, the judge had regard to the dicta in *R v Makanjuola* [1995] 3 All ER 730 as approved in this jurisdiction and considered the issue of whether the complainant was or was not unreliable in her testimony. He found this not to be so and considered the issue of the age of the case to be best addressed by a delay warning. He ruled as follows:-

> "[t]hat if you like the age of the case itself, while it's something to be taken into consideration in whether a warning should be given is really the subject matter for a different warning. And that is of course, the warning that the jury have to take extra care in relation to the assessment of evidence in this type of case. So again, having considered the matter and having considered the evidence in relation to the matter, I don't feel that this is a case where it is appropriate to give a corroboration warning."

42. It is apparent that the trial judge was very conscious of the fact that he had a discretion and he carefully and conscientiously exercised that discretion. This Court sees no basis whatsoever for interfering with same.

**The refusal of the request not to inform the jury of the fact that the complainant travelled from Australia for the trial**

43. Prior to the commencement of the trial, counsel for the appellant sought a direction that no reference be made to the jury as to the fact that the complainant was now residing in Australia and had travelled in order to participate in the trial. It was contended that it was prejudicial to the accused for that information to be revealed to the jury. The trial judge made no such exclusion order. He stated that he would refer to the complainant as living "abroad", but that it would likely come up in the course of the trial, which it did at points to which the appellant makes reference in submissions. The appellant considers that, as the jury should "approach the allegations dispassionately and not be swayed by extraneous information", it was important that the fact of AR's living in Australia not be revealed. The Director contends that no prejudice in a legal sense arises from the situation and agrees with the trial judge in his refusal to grant the exclusion order.

**Discussion and Decision**

44. The judge rejected the appellant's application and in so doing informed counsel that he would, in due course advise the jury as to what constituted evidence. He did not agree that the very fact the complainant had travelled from Australia to give evidence would influence the jury, as contended by the appellant.

45. In opening the case for the prosecution, counsel informed the jury that many years after the events giving rise to the within allegations, the complainant had emigrated to Australia, where she now lives. Evidence was given in this regard.

46. In our view, this ground is without merit; the matter complained of provided background information regarding the complainant, as to her current residence and occupation. Whilst it could be said that the evidence was of little relevance, it cannot be said that it was prejudicial.

47. Moreover, the judge gave the usual legal directions to the jury in his charge and advised the jury that the fact that the complainant came from Australia and made a statement was not evidence which verified the content of her statement.

48. We reject this ground.

49. Finally, the appellant contends that the trial was unfair on a consideration of the cumulative grounds of appeal. We have rejected all grounds of appeal and the cumulative grounds do not bring the matter further.

50. Accordingly, the appeal is dismissed.