THE COURT OF APPEAL

Record No: 62/2020

The President.
McCarthy J.
Kennedy J.

BETWEEN/

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

RESPONDENT

V

G.M.

APPELLANT

JUDGMENT of the Court delivered on the 25th day of May by Ms. Justice Isobel Kennedy

1. This an appeal against conviction. The appellant was convicted of sixteen counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, the complainant being his former wife.

2. Further counts of indecent assault and rape were preferred on the indictment in respect of which, the appellant entered pleas of guilty and are not in issue in this appeal.

3. The appellant's trial began on the 24th of October 2019 and ran until the 8th of November 2019, on which date the jury returned a guilty verdict in respect of the s. 4 rape counts.

Grounds of Appeal

4. The appellant challenges his conviction on the basis that the trial judge erred in directing the placement of a screen between the complainant and the appellant; in ruling that the prosecution could lead evidence which the appellant describes as having been of a highly prejudicial nature and of insufficient probative value, and; in giving a corroboration warning which the appellant regards as having been inadequate in the circumstances.

5. The specific grounds of appeal state:-

"*The learned trial judge erred in the following respects:*

(i) Directing the placement of a screen between the complainant and the Appellant while the complainant was giving evidence pursuant to Section 14A of the Criminal Evidence Act, 1992;

(ii) Ruling that the prosecution could lead evidence from the complainant of a highly prejudicial nature concerning allegations of physical violence, threats and abuse on occasions other than the offences charged which evidence was of insufficient probative value to warrant being admitted;

[...]

(iv) Giving a corroboration warning which, in all the circumstances, was inadequate in that it failed to reflect the full breadth of matters arising in the evidence which point to unreliability on the part of the complainant."

Placement of the Screen

6. On the 24th of October 2019, the respondent made an application pursuant to s. 14A(2) of the Criminal Evidence Act, 1992, as inserted by s. 30 of the Criminal Justice (Victims of Crime) Act, 2017, for a screen to be placed between the complainant and the appellant for the purpose of her evidence. This application was made under s. 19 of the 2017 Act, having regard to the specific protection needs of complainant which needs were assessed by An Garda Síochána pursuant to s. 15 of the same Act.

7. Counsel submitted that the complainant was a victim of sexual violence and suffered from mental health issues, that she was very fearful of the appellant and that special protective measures were necessary.

Evidence of Garda Kelly

8. Garda Kelly stated that she initially met the complainant in June 2017 and completed her report in September 2019, that on every occasion she had met the complainant, she had presented as "*fragile, emotional, crying, incoherent at times, unable to speak, extremely embarrassed about the details of the offences. She would be fearful.*" Garda Kelly further stated that the complainant would repeatedly recall the last time she was in court with the appellant which was in relation to threats he had made to kill her, which threats were made in the context of the complainant having provided the appellant's telephone number to a person who was seeking money from him.

9. Garda Kelly further stated that the complainant had sought "*numerous*" domestic violence orders in the past, including an interim barring order granted by the District Court in December 2009, and went on later to describe allegations of significant incidents of domestic violence.

10. Garda Kelly further described how in the course of taking the complainant's statement, which took approximately 9 and a half hours, they would have to break frequently on account of the complainant's crying, and that she would become "*exceptionally upset*" when the subject turned to her children and the effect the appellant's offending had had on them. Garda Kelly carried out s. 15 assessments in relation to this complainant and two further complainants and stated that the complainant was the only one who, in her view, required special measures.

11. Garda Kelly described the complainant as being very open about her mental health issues, that she had felt suicidal, and that she frequently referenced her post-traumatic stress, and the memory loss issues that she has suffered as a result of that disorder. This post-traumatic stress, Garda Kelly described, was linked by the complainant to the abusive relationship she had had with her husband, the appellant. Garda Kelly said that, based on the various GP records in relation to the complainant, the complainant was still under the care of a mental health services provider. Garda Kelly, however, could not gainsay whether the complainant's PTSD was directly related to the abusive relationship she had with the appellant.

12. It was the Garda's assessment that the complainant would not be able to give "*coherent*" evidence in relation to the offences with the appellant sitting so close to her and that special measures were accordingly required to avoid a scenario whereby she would be fearful, upset, and

disorientated. The special measure which Garda Kelly recommended was the placement of a screen.

The Complainant's Statement

13. In her statement, the complainant detailed the history of abuse she alleged she had suffered at the hands of the appellant which the trial judge considered for the purpose of the respondent's application.

14. She described in her statement how she had met the appellant in London in 1993 and that after their first child was born, she noticed a change in the appellant's behaviour, that "*he started to get angry a lot and violent*" and that when she was 7 months' pregnant with their first child the appellant had given her "*a really bad beating*" using a piece of scaffolding.

15. His demeanour turned violent once again when the complainant became pregnant with their second child. She recalled one incident which occurred when the appellant's brother was staying with them at their flat in the UK where following a row between the appellant, his brother, and the complainant, the appellant took a baseball bat and proceeded to beat the complainant with it.

16. The complainant recalled the appellant leaving shortly after the birth of their second child returning approximately a year later. She recalled the appellant returning home on one occasion and informing her that he had been sleeping with prostitutes and that one of them was HIV positive and a heroin user. She was tested for HIV and while she was waiting for the results of this test, she suffered a nervous breakdown. The couple split and the complainant recalled turning to drinking heavily between pregnancies, she ultimately had four children with the appellant. She recalled suffering from post-natal depression.

17. During the currency of another pregnancy, the appellant was very violent and the complainant recalled how he would grab her by the neck or alternatively would put a pillow over her face or punch her in her torso to avoid leaving marks visible to others. The complainant described the appellant as having been "*emotionally abusive*", "*very controlling*", and that he would constantly undermine her by saying that she was incapable of doing anything. As a result of this domestic abuse, the complainant recalled alienating herself from friends and family, which alienation was in part motivated by the appellant telling the complainant that "*everyone*" was looking down on her because of her lack of tertiary education.

18. In or about the year 2000, the complainant on returning home from her job discovered that the appellant had taken the children, their birth certificates, and their passports. She rang the police who intercepted the appellant on his way to a seaport, to board a ferry to Ireland, with the couple's four children in tow. The appellant told the authorities that the complainant was an "*unfit*" mother who had an alcohol addiction, and he subsequently left for Ireland.

19. The complainant moved to Ireland with her four children and lived with the appellant once more in County Tipperary. There, in or about September 2002, the complainant recalled the appellant beating her "*really badly*", hitting her with his fists and kicking her. As a result of her crying and screaming, one of her sons rang the Gardaí. The complainant took her children and they fled to a women's refuge where they stayed for 2 months.

20. The complainant recalled acceding to the appellant's request for her and the children to return home to County Tipperary. After the family moved back, the complainant noticed a complete change "*sexually*" in the appellant and that he became "*very forceful*" and "*rough.*"

21. The complainant recalled the first instance of anal rape. In or around Spring/Summer 2003, the complainant was in the turf shed at a dwelling-house in village A where she was filling a bucket with turf. She recalled the appellant approaching her from behind while she was bent over the turf bucket. He then roughly pushed her underwear to the side and proceeded to penetrate her anus with his penis. The complainant recalled being unable to scream on account of her children playing in the garden outside. The ordeal persisted for approximately 4 to 5 minutes. Immediately following this, the appellant grabbed her face and told her "*you're some woman*" before adding, "*well ya (sic) have had 4 kids, you can expect it like this from now on.*"

22. The complainant described the emotional abuse she suffered at the appellant's hands as "*actually worse*" than the rapes or beatings, and she stated that the appellant "*really got into my head with his poison.*" She further said that she had struggled to stay off the drink as a consequence of the appellant "*constantly pushing me.*"

23. Sometime after the first incident of anal rape, the family moved to another property. There, the complainant recalled being anally raped by the appellant about twice a week which continued from sometime in 2003 to sometime in 2007. It is these anal rapes that formed the subject matter of count nos. 1 to 16 inclusive.

24. The complainant experienced a brief reprieve from sexual violence for a time in and around 2008/2009, this ended when the appellant became "*extremely physically violent*" and began beating the complainant once again.

25. Ultimately, the family relocated to a village in County Cork. The appellant arrived there some time in 2013 and informed the complainant that he had received psychiatric care in the United Kingdom and that he was living in a homeless shelter in Cork City. The complainant allowed the appellant to sleep on her sofa for approximately 6 months, following which he moved to a house. Subsequent to his departure, the complainant received a visit from two unknown males asking for the appellant and claiming that he owed them money.

26. The complainant informed the pair that the appellant no longer lived with her and she proceeded to provide them with the appellant's phone number and address. She later received a telephone call from the appellant threatening to kill her for providing the two males with his details. Having overheard this phone call, two of the complainant's sons contacted Gardaí. The appellant was ultimately convicted of sending a grossly offensive, indecent, obscene, and menacing messages by telephone contrary to s. 13(1) of the Post Office (Amendment) Act, 1951, for which he received a six-month suspended sentence.

Trial Judge's Ruling on the S. 14A Application

27. The trial judge, having regard to the evidence of Garda Kelly, noted that the extent of the violence alleged to have been perpetrated against the complainant was "*very serious in nature.*" He further noted its repetitiveness, and that the alleged sexual violence had occurred over a period from 2003 until 2007. He considered that if the statement of the complainant was "*true in its substance*", then it would provide "*a very clear basis as to why somebody might be distressed and hugely distressed and upset and distraught in relation to what she said was done to her over a very extended period of time by her husband [...] over the many years of their marriage and during the course of the pregnancies which occurred during that period and afterwards.*"

28. The statement, described by the trial judge as "*vivid*", illustrated the complainant's distress and her inability to speak coherently, and the trial judge noted that the statement had been obtained with "*great difficulty.*" He was cognisant of the "*extensive evidence*" given by Garda Kelly in relation to this difficulty, and he noted Garda Kelly's views in relation to the inability of the complainant to give coherent evidence without the use of a screen erected between her line of vision and the appellant. Having regard to the foregoing evidence of Garda Kelly and the statement of the complainant, the trial judge was of the opinion that the description of the complainant's difficulties was of a "*stark nature*" sufficient to justify him exercising his discretion under s. 14A of the 1992 Act.

29. The trial judge noted that the evidence he had heard in relation to the prosecution's application for a special measure was "*non-expert*" in character and related to *inter alia* PTSD and other health difficulties being suffered by the complainant which she attributed to her treatment at the hands of the appellant, in particular, the sexual abuse she suffered. He further noted that Garda Kelly made reference to some medical records which the trial court did not have sight of but the contents of which the trial court had no reason to believe ran contrary to the summary given by Garda Kelly in evidence. While the trial judge took these matters into account as relevant to the application, he noted that "*they're only a small element – a lesser element in terms of the proofs which were put forward to the Court.*"

30. In considering whether to grant the prosecution's s. 14A application, the trial judge noted that the "*overriding test*", having regard to the language of s. 14A, is whether a screen is required in the interests of justice. In determining this, the trial judge held that the court was obliged to consider and have regard to the need to protect the complainant from secondary and repeated victimisation, intimidation and retaliation, taking into account the nature and circumstances of the case and the personal characteristics of the victim. He then defined certain key concepts relevant to this determination:-

> "*Secondary victimisation is victimisation that occurs indirectly through the response of institutions and individuals to the crime. And victim means an actual person has suffered harm, including physical, mental or emotional harm or economic loss, directly caused by the offence."*

31. The trial judge further noted that he had to have regard to the fact that normally when evidence is given *viva voce* by a witness in the presence of an accused, the complainant is subsequently cross-examined by the accused through counsel in front of the jury in relation to their evidence. The existence of a screen would therefore serve as a physical barrier intruding into the normal immediate and spontaneous exchange that occurs in court; an exception to the normal practice in terms of fair procedures.

32. The trial judge noted that the effect of the screen was to be calculated in ease of a complainant, and that it was to be done in the least interruptive manner available. In this regard, he noted that the actual nature of the screen was that it was a projector raised in an *ad hoc* manner beside the witness box, which in the trial courtroom in the present case was situated approximately four feet from the where the appellant was to be seated during proceedings. The trial judge considered that the use of a screen would provide "*an element of protection in terms of*

the feelings which the complainant may have in relation to being in proximity to the accused when giving evidence."

33. The trial judge had regard to the content of Garda Kelly's evidence and her recommendation following on from her s. 15 assessment of the specific protection needs of the complainant. He observed:-

> "*And she considered that the victim would benefit from a protective measure of that kind, particularly having regard to the nature of the offences, in the circumstances of the alleged offences which are said to have occurred, whether there was -- the nature of the harm that if those offences occurred, has been suffered by the victim and her personal characteristics and the history of the case, and it would appear that the -- and the vulnerability which she has as arising out of the alleged sexual violence to which she's been subjected, these are all matters which are highly important when considering the vulnerability of the witness and the necessity in the interests of justice to provide a screen*."

34. The trial judge, having regard to the evidence in support of the application, was of the view that the complainant would not be in a position to give "*a coherent account*", save with the use of a screen, and that accordingly the interests of justice required the facilitation of such a piece of equipment during the course of her giving evidence in the proceedings:-

> "*I'm satisfied beyond a reasonable doubt that the complainant will not be in a position to give a coherent account, having regard to the description which I have received in relation to her condition if this screen is not provided, and that, therefore, this trial would be rendered nugatory, and would not be able to proceed in the manner which is envisaged by the Constitution, and the manner in which it's envisaged the counts on the indictment will be tried with a jury.*"

35. The trial judge further held that the use of a screen was further justified having regard to the object of s. 14A, namely "*to ensure that a witness is not prevented from giving evidence*", in conjunction with the nature and circumstances of the present case and the personal characteristics of the complainant.

Submissions of the Appellant

36. In relation to the first ground of appeal, regarding the placement of a protective screen between the complainant and the appellant, counsel submitted that the placement of the screen reinforced a view that the appellant was a violent man. In this context, counsel proposed that the "*interest of justice*" test comprises of three limbs that need to be considered: (i) the impact on the victim; (ii) the impact on the prosecution case, and; (iii) the question of fairness to the accused.

37. In written submissions, counsel submitted that the trial judge's approach was imbalanced and was informed by the question of whether the use of a screen would be in ease of the complainant and would enable her to give a coherent account, and that this approach did not relate to the evidence presented by the prosecution to the specific matters set out in s. 14AA of the 1992 Act, those matters being: "*(i) the nature and circumstances of the case,* and *(ii) the personal characteristics of the victim."*

38. Counsel further submitted that in the absence of an adequate evidential basis for the conclusion that the complainant would not be able to give a coherent account, the sole evidential

basis grounding the trial judge's decision was the opinion of the investigating Garda. However, counsel submitted that this lacked expert evidence as to the capacity of the complainant, which was necessary to the determination of this issue in circumstances where the application for the screen was grounded on matters bearing on the complainant's mental health.

Submissions of the Respondent

39. Counsel on behalf of the respondent submitted that the provision of expert evidence in support of a s. 14A application is not expressly provided for by the statute and that if the Oireachtas had intended that such evidence was required it would have made provision for such a requirement. For this reason, counsel further submitted that the appellant's contention that this case required expert evidence to be adduced regarding the complainant's mental health does not stand.

40. Rejecting the appellant's argument that evidence of the complainant's mental health was "*inadequate*" to ground the s. 14A application, counsel drew this Court's attention to the trial judge's ruling, in particular the passage in which he held "*And while I take [reference to limited medical records] into account as matters which are relevant to the issue before the Court, they're only a small element – a lesser element in terms of the proofs which were put forward to the Court [...]*"

41. The respondent noted that the trial court availed of "*clear evidence*" from the investigating Garda who had, in conducting her s. 15 assessment, the benefit of some two and a half years' contact with the complainant and in that time had come to a view regarding the complainant's particular vulnerabilities and how the use of a screen might provide some assistance in enabling the complainant to give a cogent account to the jury. The "*entire thrust*" of this evidence was that, in the light of her experiences during her marriage to the appellant and the difficulties arising therefrom and their practical impact, the complainant would not be able to give evidence in proceedings, absent the use of a protective screen.

42. Counsel further submitted that the use of this screen did not impinge the presumption of innocence, that it merely was put in place to prevent the complainant from seeing the appellant, and that the trial judge on the 30th of October 2019, prior to the complainant giving her evidence, enquired the parties' views regarding the positioning of the screen, in reply to which enquiry the defence stated that they had nothing to add "*from the defence view point.*"

43. Counsel further rejected the appellant's suggestion that the trial judge did not have adequate regard to the prejudicial effect of the use of the screen and, in this regard, counsel have drawn our attention to remarks made by the trial judge in the course of his ruling on the s. 14A application as demonstrative of the opposite case being true, which remarks pointed to:-

> "*[…] The existence of a screen [...] in terms of the physical barrier which it provides between the accused and the witness therefore is something of an intrusion into the normal exchange that occurs in court and [...] what is regarded as the norm in terms of fairness of procedures, it is an exception to the normal procedure that applies.*"

44. Counsel submitted that the trial judge was "*acutely aware*" of how the presence of the screen might impact upon the normal practice in a trial. It is submitted that the trial judge applied himself carefully to the relevant statutory provisions as they related to the evidence before him as well as the rights of the appellant.

Discussion

45. Part 3 of the Criminal Justice (Victims of Crime) Act, 2017 provides for the 'Protection of Victims During Investigations and Criminal Proceedings.' S. 30 of that Act inserted additional subsections into the Criminal Evidence Act, 1992 relating to special measures. Insofar as the placement of a screen is concerned, the relevant provisions of the 1992 Act for the purposes of the within appeal now state:-

> *"14A. (1) […]*
> *(2) Subject to section 14AA, where-*
> *(a) […]*
> *(b) a person who is a victim of any offence has attained the age of 18 years and the person is to give evidence, other than through a live television link, in respect of such an offence,*
> *the court may, on the application of the prosecution or the accused, if satisfied that the interests of justice so require, direct that a screen or other similar device be positioned, in an appropriate place, so as to prevent the victim from seeing the accused when giving evidence,*
> *(3) A witness giving evidence under subsection (1) or (2) shall be capable of seeing and hearing and being seen and heard by-*
> *(a) the judge and jury (if any)*
> *(b) legal representatives acting in the proceedings,*
> *(c) […]*
> *and shall be capable of being heard by the accused.*
> *Matters to be taken into account under sections 13, 14 and 14A regarding victims.*
>
> *14AA. The court in deciding –*
> *(a) [ ]*
> *(b) [ ]*
> *(c) whether, under section 14A(2), the interests of justice require that it direct that a screen or other similar device be positioned, in an appropriate place, so as to prevent the victim from seeing the accused when giving evidence,*
> *shall have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation, taking into account-*
> *(i) the nature and circumstances of the case, and*
> *(ii) the personal characteristics of the victim."*

46. As can be seen from the foregoing, the court may exercise its discretion and direct that a screen be positioned to prevent the victim from seeing the accused if satisfied that the interests of justice so require. Part of such a consideration shall include the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation. In this regard, the court shall take into account the nature and circumstances of the case and the personal characteristics of the victim.

47. It is instructive to look to the interpretation provision under s. 2 of the 2017 Act with particular reference to the following for the purpose of this appeal:-

"S.2 ***Interpretation***

(1) In this Act-

"secondary victimisation" means victimisation that occurs indirectly through the response of institutions and individuals to the victim;

"special measure" means a measure referred to in section 17 or 19

"victim" means a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by an offence."

Section 19 of the 2017 Act provides for ***Special Measures during criminal proceedings.***

"(1) Where a victim of an alleged offence has been assessed under section 15 and the Garda Siochana or the Ombudsman Commission have identified specific protection needs in relation to the victim, the Garda Siochana or the Director of Public Prosecutions, as the case may be, shall, in determining whether to make an application to the court for a special measure specified in subsection (2) during the course of any criminal proceedings related to the alleged offence, have regard to the specific needs identified under section 15 in relation to the victim concerned.

(2) The special measures referred to in subsection (1) are-

(a) [ ]

(b) [ ]

(c) measures under Part III of the Criminal Evidence Act 1992 enabling the victim to give evidence through a live television link or an intermediary or enabling a screen or other similar device to be used in the giving of evidence."

48. As is apparent, an application must be made for a special measure which is at the discretion of the court. The court must, in considering whether the interests of justice require the placement of a screen, have regard to the need to protect a victim from secondary and repeat victimisation, intimidation or retaliation and, of significance in our view, must take into account in exercising that discretion the nature and circumstances of the case and the personal characteristics of the victim.

49. In essence, three arguments are advanced by the appellant.

1. That the judge failed to relate the evidence to the specific matters stated in s. 14AA. It is argued that the judge applied the incorrect test and considered whether the use of the screen would be in ease of the complainant and enable her to give a coherent account.
2. The absence of expert testimony on the issue.
3. Prejudice.

These three complaints may be dealt with together.

50. It is argued that there was an inadequate evidential basis, which was the opinion of the Garda Kelly, to enable the judge to conclude that the complainant would be unable to give coherent evidence without a screen. The applicable test is whether it is in the interests of justice to permit the placement of a screen. There is no legislative requirement that expert testimony be adduced in this regard. The judge heard evidence on the issue and was mandated to have regard to the need to protect the victim in terms of the statute, in that respect, he was entitled to take

into account the nature of the case; it being a case of allegations of anal rape in a domestic context. He was also entitled to take into consideration the surrounding circumstances, such as the allegations of significant violence over a protracted period during their marriage, that the appellant made a threat to kill the complainant, that she had sought refuge in a women's refuge centre and the history between the complainant and the appellant.

51. Moreover, the judge heard evidence of the Garda's engagement with the complainant, the difficulties experienced by the complainant in making her statement, taking the best part of eight hours to describe the breadth of the allegations she was making. The judge was entitled to hear that the complainant had broken down and was distressed whilst recounting events.

52. Garda Kelly gave her view that it would be extremely difficult, if not impossible for the complainant to give coherent evidence without the protection of a screen. The complaint is made that no expert evidence as to the capacity of the complainant to give evidence was adduced, in particular, that to the extent the application was grounded on matters connected to the complainant's mental health, evidence should have been adduced.

53. Dealing with the issue of the complainant's mental health; and the issue of post-traumatic stress disorder, and other aspects of difficulties and health issues, no expert evidence was adduced, it seems that the Gardaí had medical records from a GP, but this evidence was solely that of the Garda. We observe that if the respondent, in making an application for special measures was seeking to rely substantially on mental health issues, expert evidence may well be required.

54. This was not the position here however, the preponderance of the evidence concerned the Garda evidence as to how the complainant had grave difficulties in making her statement, together with the nature of the case itself and the personal circumstances of the complainant. Moreover, when the judge assessed the evidence before him, he specifically acknowledged that he had not heard an expert opinion on the issue of the complainant's health, and so, while he took those matters into account, he was satisfied that they constituted a much lesser element in terms of proofs than the other matters put before him.

55. Applications for special measures require an evidential basis, such applications are not granted as a matter of course. It is clear from the statute that as assessment of each individual alleged victim is required, it is not sufficient in itself that a complainant is an alleged victim, there must some factor or factors which point towards a vulnerability on the part of the victim over and above that of being a complainant. Each case will require careful assessment by a trial judge on foot of evidence. On occasion, there may well be expert testimony. The purpose of the legislation is to protect the victim which must, of course be balanced with the right of an accused to a fair trial.

56. It is well established that an accused does not have a right to confront his/her accuser but has a right to cross-examine in order to ensure a fair trial. The presence of a screen however, does not remove the right to cross-examine. An analogy may be made with evidence by video link, placing a witness at a remove from the accused and from cross-examining counsel, however, evidence by video link is now a well-trodden path and cannot be said to place an accused's right to a fair trial in jeopardy.

57. The use of video link for child witnesses is therefore instructive; *Donnelly v Ireland* [1998] 1 IR 321 concerned a challenge to the constitutionality of s. 13(1)(a) of the Criminal Evidence Act, 1992, regarding the use of a video link to enable children to give evidence. The Supreme Court found, *inter alia* that the use of this measure did not impinge on an accused's right to a fair trial which incorporates the right to cross-examine. As stated, special measures are not automatic, a discretion is vested in the trial judge to determine whether it is in the interests of justice to grant such permission, thus protecting the rights of an accused. The court in considering how to exercise its discretion, must strike the correct balance between the competing interests; that of the need to protect a vulnerable complainant and the overarching right of an accused's right to a fair trial.

58. Insofar as the appellant contends that the use of the screen is prejudicial per se and intrudes on the presumption of innocence, placing the appellant at a disadvantage by bolstering the complainant's testimony that he is a man to be feared, the terms of the statute are clear. Such an application will only be granted if the judge concludes that the interests of justice so require. This, by necessity involves an exercise of discretion vested in the trial judge and, as such, safeguards the right to a fair trial.

59. It could also be argued that the use of a video link in itself is prejudicial, but society recognises the need to protect vulnerable witnesses, which may include a child witness or an adult witness for various reasons. A screen will only be granted if it is required in the interests of justice upon determination by the court of trial.

Conclusion

60. The trial judge in the present case very carefully considered the evidence, and properly applied the legal principles in terms of the statutory requirements. He acknowledged the fact that evidence is normally given *viva voce* by a witness in the presence of an accused and that the placement of a screen operates as described by the trial judge as "*somewhat of an intrusion into the normal exchange that occurs in court and the normal[…]what is regarded as the norm in terms of fairness of procedures, it is an exception to the normal procedure that applies."* Therefore, the judge was totally alert to the rights of the appellant.

61. Having identified the applicable test, the judge then carefully considered the evidence in support of the respondent's application taking into account the matters prescribed by statute.

62. We are satisfied that the judge had an evidential basis upon which to exercise his discretion, we do not see that expert testimony was required in this respect, the Act does not mandate expert evidence.

63. The judge rightly observed that one of the objects of the Act is to ensure that a relevant witness is not prevented from giving evidence. In exercising his discretion in favour of the respondent, he had particular regard to the nature and circumstances of the case and the personal characteristics of the complainant.

64. It is apparent that the judge balanced the competing interests and came down in favour of granting the application. We are not persuaded that this was an inappropriate exercise of the court's discretion and consequently, this ground fails.

Application to Adduce Background Evidence

65. This dispute centred on what were essentially two principal issues: first, the introduction of background evidence of a specific nature relating to alleged acts of violence that predated the

relevant period of 2003 – 2007 which the defence criticised as potentially suggesting to the jury that the appellant had a propensity for violence, and; second, the introduction of background evidence of a specific nature relating to alleged acts of violence and threats, including the appellant's conviction for a menacing telephone message, which all post-dated the relevant period and which the defence accordingly argued was of no relevance to the charges the appellant then faced.

66. The prosecution sought to have admitted evidence from the complainant extending from the date on which she first met the appellant when she was 17 years of age (to "*establish the relationship*") to references to the appellant threatening to commit suicide, which the prosecution described as "*one element of a manipulative relationship.*" Further to this, the prosecution wanted to introduce background evidence of the appellant's violent behaviour at the time of the complainant's second pregnancy, an assault with a baseball bat, and the appellant's behaviour around the couple's baby daughter (second child), his subsequent disappearance and then the fact of his attendance at counselling services for anger management. The prosecution further wanted to introduce the part of the complainant's statement which related to a concern regarding contracting HIV and references to the appellant's sex addiction.

67. Accordingly, the scope of the background evidence which the prosecution sought to admit extended from approximately 1995 until circa March 2015 when the appellant was sentenced upon conviction for a menacing phone call. Counsel, at trial, submitted that such background evidence demonstrated "*the continuing nature of this relationship which we submit was one of violence and manipulation and dealing with a person who seems to have been fairly easy prey inviting him back in.*" Counsel submitted that in circumstances where in cross-examination there was a potential for the defence to ask the complainant to give an explanation as to why nothing was complained of for a number of years after the events between 2003 to 2007 then, in any event, the background to the appellant's offending would be relevant inasmuch as would provide the context of the history of violence that the complainant had experienced.

68. Objection was taken to the admission of the evidence on the basis that the probative value was significantly outweighed by its potential for prejudice and counsel for the defence pointed to evidence of the appellant's use of prostitutes, references to HIV, and his sex addiction as matters of limited relevance.

69. Further to this, counsel for the defence took issue with the timeframe of this background evidence and that there was nothing in the complainant's statement to indicate why she had delayed making the complaint in relation to matters which occurred between 2003 and 2007 which formed the subject of count nos. 1 to 16. This, counsel submitted, created a difficulty for the prosecution in identifying precisely why all the background material they sought to introduce should be admitted under *DPP v McNeill* [2011] 2 IR 669 and that it appeared that the prosecution was anticipating certain lines on the part of the defence. Conscious of the potential of such material to arise in the course of cross-examination, counsel on behalf of the defence submitted that the better approach to be adopted by the trial court would be "*to wait and see*" what was said in direct evidence by the complainant.

70. Counsel for the defence accepted that there had to be some context but stated "*that doesn't mean that it's open season on [the appellant]'s character which is what the prosecution are*

seeking to achieve." Counsel submitted in effect, that potential evidence at a remove in time from the offending was less relevant. This, counsel submitted, invited the trial court to operate "*on the basis of an assumption as to why that was*" namely that the complainant was in fear of the appellant.

71. Counsel further submitted that events described by the complainant in her statement were of a "*dramatic*" and "*colourful*" character. It was noted that besides the telephone call in 2013, none of the events described by the complainant were the subject of Garda investigation or attention and that the "*limited admissions*" of violence made by the appellant in interview did not extend as far as the complainant had described.

Trial Judge's Ruling on Background Evidence

72. The trial judge began by identifying the issue at hand in the prosecution's *McNeill* application as:-

> "*a situation where there is repeated alleged sexual misconduct in the form of sexual offences committed by a husband within a marriage against his wife, to what extent is it appropriate that the circumstances beyond the precise elements of the offences alleged over a particular period of time may be given in evidence?*"

73. The trial judge considered that what was of relevance to the prosecution's *McNeill* application was "*the considerable evidence of misbehaviour and misconduct, violent misbehaviour*" repeated over the period of 1995 to circa 2014, including events involving a threatening phone call which post-dated the counts on the indictment and had nothing to do with "*the main body of violence perpetrated against [the complainant] over the years.*"

74. The trial judge had regard to the *McNeill* principles and noted that O'Donnell J., as he then was, was swayed in *McNeill* by the fact that the evidence under consideration in that case would have left the jury wondering as to how various other facts had occurred having regard to the limited number of counts on the indictment in that case. In this respect, the trial judge noted that the query was

> "*if evidence were to be excluded, whether the jury would be, in effect, not given a comprehensible picture about the characters and events which were involved, who were involved, and which were involved in the actions and the dynamic of the relationship between the parties in this case. And that, in itself, it's a question that one has to ask. Is that, of itself, relevant and necessary?*"

75. The trial judge noted that the fundamental relationship between husband and wife, within a marriage, is the subject of encounters between them both on a daily and nightly basis, describing such as

> "*a situation in which their ongoing relationship, in terms of the allegations which are the subject matter of this indictment, seems to me to be of particular relevance. The dynamic of that relationship, the negative dynamic of that relationship: it's not simply a question of exploring any unhappy marriage for the purpose of demonstrating that to the jury*."

76. In this vein, the trial judge considered the violence of the relationship to be part of this dynamic, which dynamic he deemed "*an essential part of the jury's understanding of the life they lived coming into 2003*" and informing the "*state of the marriage.*" This dynamic painted a picture of who "*in essence, had the upper hand in it, in terms of the domination by violence of his wife*

and his family", the trial judge defining this as "*an important, relevant and necessary matter for the jury to understand [...] in the sense that this lady is saying that, in essence, she was repeated (sic) violated over that period.*"

77. The judge expressed a concern that if the marital dynamic were not in evidence, there would run a risk of "*a completely false and artificial presentation*" of the marriage between the complainant and the appellant, thereby depriving the jury of an understanding of the marital dynamic and impeding their comprehension of what happened in the family in circumstances where they would be ignorant to "*the powerful force at work*", that being the domination of the family by the appellant.

78. Accordingly, the trial judge was of the view that this would create a "*completely unjust trial*" if such a presentation was not allowed as having regard to the essential nature of the present case, the very nature of the marital relationship and the lives lived by the complainant and the appellant within that marital relationship all constituted an "*essential feature to the understanding of this case and the alleged offences in it.*" In the interests of a fair trial, the trial judge viewed it as imperative that the jury had a complete and appropriate understanding of the background to the case and the relationship between the parties.

79. The trial judge accordingly permitted the following:-

- Evidence of the complainant having been assaulted with a piece of scaffolding while pregnant with the couple's first child in 1995.
- Evidence of the complainant having been beaten with a baseball bat while pregnant with the couple's second child in 1996.
- General evidence of violence during the fourth pregnancy in 2000 including references to the appellant grabbing the complainant by the neck and him putting a pillow over her face so as to avoid inflicting visible marks.
- Evidence of an attempted abduction of the couple's four children by the appellant.
- Evidence of physical abuse at the family home in village A in September 2002, which incident prompted one of the couple's children to contact Gardaí.
- Evidence of an escalation in violence towards the complainant in the period 2008 to 2009 including references to the use of a spanner to assault her, the appellant forcibly holding her arm down the back of a hot radiator, and a threat to kill her following a visit to their parish priest.

80. The trial judge deemed the following inadmissible:-

- Evidence of disclosures by the appellant to the complainant of his abuse at the hands of childhood neighbours and of his abuse of complainant B.
- Evidence of disclosures by the appellant of his use of prostitutes, references to the HIV test that the complainant had underwent following his suggestion to do so.
- References by the complainant to certain disclosures by the appellant's sister that he was seeing another woman.
- The belief by the complainant that the appellant had a sex addiction and references to the appellant masturbating.
- References to firearms and the finding by the appellant of a third-party friend and confidante.

- References to small trees in the garden of the complainant's home in village D being set alight.
- References to the two unknown males, the threatening phone call and the resulting conviction.

81. The trial judge further ruled that if an issue as to delay arose in the course of the trial in relation to post-2007 issues which he had indicated should not be led, the prosecution were at liberty to make a further application in relation to such issues.

Submissions of the Appellant

82. Counsel for the appellant submitted that it is not contended that the jury should not have been presented with evidence as to the state of the marriage between the complainant and the appellant and that it is accepted that background evidence as to the marriage was required and that some of this would not reflect well on the appellant.

83. At the hearing of the appeal, counsel sought to distinguish *McNeill* and the present case. In this context, counsel submitted that the trial judge ought to have applied the test with greater rigour.

84. In written submissions, counsel submitted that the trial judge erred in admitting certain matters as evidence, namely the assault with a piece of scaffolding in 1995 and the assault with a baseball bat in 1996, at a remove in time from the offences charged and that such background material was not necessary.

85. Counsel submitted that the same was true about other background evidence of misconduct prior to the alleged rapes in 2003 which was admitted; that it would have been sufficient for the jury to have been informed that there was some violence in the marriage and that the couple had separated from time to time, and; that in any event the disclosure of any further detail could have awaited cross-examination.

86. Counsel submitted that the background evidence admitted at trial was "*overwhelming*" and became "*irresistibly, evidence of propensity*" and that this was problematic because, as counsel put at the hearing of the appeal, propensity is not a permissible basis for admitting evidence. Counsel submitted at the hearing that the appellant was prejudiced by the admission of this background material and, in effect, had to defend himself against allegations of assault on top of the counts on the indictment.

87. As regards background material post-dating the timeframe of the complaint, counsel submitted that it is even more difficult to justify admitting such material based on its relevance and necessity and at the hearing of the appeal, counsel submitted that necessity relates only to what is needed to prove the charges preferred against an accused to the requisite standard of proof and that anything that goes beyond this is disproportionate.

Submissions of the Respondent

88. Counsel for the respondent rejects the appellant's submission that the trial judge erred in permitting the admission of background evidence of the violent nature of the appellant's marriage to the complainant outside of the offences charged. While counsel accepted that the test for admission of such material is as set out by the Supreme Court in *McNeill*, *supra*, it is submitted that the evidence adduced was "*an intrinsic part of the story of the relationship between the complainant and the appellant*" and was permitted to allow the jury to hear about the state of the

marriage between the parties from the beginning of the offending to the time when the couple separated in 2009.

89. The evidence was sought to be admitted at trial to render comprehensible the relationship between the complainant and the appellant, relating to issues such as *inter alia* consent or absence thereof over many years. At trial, the prosecution described the basis on which they sought to introduce background evidence was to avoid "*a totally unreal situation*" being presented to the jury in circumstances where the complainant was married to the appellant and was still married at the time of trial, though they had not lived together for a considerable time, it was "*important*" that the "*true nature*" of the relationship that existed between the complainant and the appellant be put before the jury.

90. Counsel noted that the trial judge made reference to the relevance and the necessity of the background material. Counsel submitted that the jury would have had a "*completely false and artificial*" presentation of the dynamic and life of the parties absent the admission of the background evidence, and that the trial judge's ruling was "*a careful and considered one*" in that it distinguished between material that could be led and material that could not.

91. Counsel further criticised the suggestion that detailed evidence could have awaited cross-examination and they submitted that such an approach would have left the jury with doubts over the credibility of the complainant which would have derived from the fact that her evidence had been "*straitjacketed*" in ease of the appellant.

Discussion

92. It is accepted on behalf of the appellant that some background evidence was admissible regarding the state of the marital relationship, but it is said that much of the background material prior to and post the rape allegations was inadmissible. It would have been sufficient if the jury were told that there had been some violence in the marriage and that the couple separated from time to time. The extent of the background evidence admitted, it is argued became "*irresistibly evidence of propensity*."

The evidence can be divided into three periods:-

- Pre-2003
- 2003-2007
- 2007-2017

93. Issue is taken with the admission of such extensive background evidence and also with the judge's rationale in admitting the evidence of violence in that he observed:-

> "…*this lady is saying that, in essence, she was repeatedly violated over that period, that there was repeated violence in her marriage and this, in essence, is part of it*."

94. The timeline of events is of assistance:-

- Met: 1993
- Married: 1994-1995
- Violence pre-alleged offending: 1995-2003
- Alleged Offending: 2003-2007
- Escalation in Violence: 2008-2009
- Complainant leaves: 2009
- Appellant absent: 2010-2013

- Complainant permits appellant to return to family home: December 2013/2014
- Appellant remained in the family home for 6 months.
- Complaint: 2017

95. The respondent sought to adduce the background evidence to demonstrate the true nature of the relationship. Insofar as the background evidence post-offences is concerned, the respondent wished to show the continuing nature of the relationship which it was said was one of violence and manipulation, where the complainant would permit the appellant to return to the family home.

96. In accordance with settled jurisprudence following *McNeill,* where Denham J. (as she then was) said at para. 48: –

> *"Background evidence, in the context under consideration, has a specific meaning. It is evidence which is relevant and necessary to a fact to be determined by the jury. It may be admitted to render comprehensible the relationship between the complainant and the accused. Thus it may relate to such issues as consent, or the absence of a complaint over many years. These examples are not exhaustive of the circumstances where background evidence may be admitted. In such circumstances, even if the "background evidence" is alleged criminal acts not charged on the indictment, such background evidence is not inadmissible and it should not be excluded as such.*
>
> *49. Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence were admitted, the evidence before the jury would be incomplete or incomprehensible. Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible."*

97. The above principles were distilled into a test as follows at paragraph 50:-

> *"(i) Consideration of whether the background evidence is relevant to the offence charged.*
> *(ii) Consideration of whether background evidence is necessary to make the evidence before the jury completed, comprehensible, or coherent. Whether without such background evidence the evidence may be incomplete, incomprehensible or incoherent.*
> *(iii) Consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself ground for excluding the evidence.*
> *(iv) Consideration of whether the background evidence may be necessary to show the real relationship between relevant persons."*

98. The appellant did not take issue with some limited information being furnished to the jury of a violent marriage; however, the crux of this ground is that the material admitted was so extensive so as to amount to evidence of propensity, which is not permitted.

It is important to look to the evidence which the judge permitted, which followed a careful analysis of the material by the judge and a detailed ruling. The material admitted is set out at para. 77 *supra*.

99. The respondent's case was that the complainant submitted to anal rapes, due to the force used by her husband of whom she lived in fear. This fear was caused by years of repeated violence, emotional abuse and manipulation.

100. We see no error with the admission of misconduct evidence prior to the offending, from 1995 to 2003 and from 2003 to 2007, the period of the offending. Nor do we find any error in the admission of the material from 2008-2009, that is to the time the complainant left the appellant.

101. That evidence was relevant to the offences charged and necessary to demonstrate the true nature of the relationship between the parties, which was littered with violent episodes, domineering conduct, forcing the complainant to take refuge, emotional abuse and manipulative conduct. It would not have been sufficient simply to indicate to the jury that the marriage was one with violence and consequential separation from time to time. The detail was necessary to illustrate the depth of the violence.

102. The offences themselves were committed in a violent manner, by a man who was frequently violent towards his wife, and so the jury needed to know that the relationship was one of a pattern of violence where the complainant was in fear and the reason for that fear. This was not straying into the area, as described by the judge of forbidden reasoning, as, without that information, the true relationship would have been unknown to the jury. In those circumstances, the jury may have wondered why the complainant remained in the family home, when she was subjected to violent sexual attacks or why she had not complained at an earlier stage, and so the evidence of emotional abuse and manipulation was relevant and necessary. As the emotional abuse and manipulation were directly associated with the violence, that too was relevant and necessary.

103. As the judge said in his ruling regarding the acts of violence leading up to the offending:-

> "*They were not acts of sexual violence, but they were nevertheless acts of violence. And in understanding the commission of section 4 rapes alleged against the accused over the period 2003-2007, the dynamic of that relationship, and who, in a sense, in essence, had the upper hand in it, in terms of the domination by violence of his wife and his family, is an important, relevant, and necessary matter for the jury to understand, not in the sense that this means that the man had the propensity to commit sexual offences—and they will get an appropriate direction in relation to that—but in the sense that this lady is saying that, in essence, she was repeated violated over that period, that there was repeated violence in her marriage, and this, in essence, is part of it. What she recounts in terms of the story of her married life is a series of events which form part of what is a violent relationship, and that's the reality of the dynamic which has been presented, and sought to be presented, by the prosecution.*"

104. The judge also considered the material relevant and necessary in terms of the delay in making the complaint until 2017 and that the material may have been relevant to the issue of consent within a marriage, albeit that the defence was one of denial of the alleged events and not one of consent. The judge then carefully analysed the material and excluded certain aspects as set out above.

105. He permitted limited evidence from 2008-2009, post-allegations, regarding episodes of violence. The complainant left the family home in 2009. Again, we are not persuaded that the judge erred in this regard, that evidence was relevant to the offences charged and necessary again in terms of demonstrating the dynamic of the relationship; the dominion exercised by the appellant over the complainant. It was relevant to the issue of delay in making the complaint and, while the background evidence in this case was extensive, that material was also necessary in the

context of providing the complete picture to the jury as to the level of dominion over the complainant.

106. In our view, without the evidence, the jury would not have known of the relationship between the parties, before, during and up to the time the complainant departed the family home in 2009.

107. Finally, the judge directed the jury in unequivocal terms as to the purpose of the admission of the evidence and warned the jury that the evidence could not be used to infer that the appellant was guilty of the offence alleged.

108. We are not persuaded that this ground is made out.

The Corroboration Warning

109. A corroboration warning was given by the trial judge and the complaint is made that it was inadequate in failing to reflect all issues of alleged unreliability on the part of the complainant. The warning focused on fresh allegations made by the complainant at trial that the anal rapes resumed in 2008.

110. Counsel relied on the following as pointing towards unreliability on the part of the complainant:-

- Delay in bringing the complaint of s. 4 rapes against the appellant, relevant to credibility as the complainant reported other matters pertaining to the appellant to the Gardai, but not these allegations.
- In 2015, the complainant made a detailed statement about 20 years of violence but did not mention the within offences.
- The new allegation at trial that the offences resumed in 2008.
- Allegations of multiple strangulations – unreported which emerged in cross examination from a note of a mental health nurse in 2017.
- The inconsistent histories of the complainant regarding alleged sexual abuse by her father.
- Notes from a Mental Health Service overing May 2003-June 2004, of positive comments by the complainant about the appellant.
- In similar vein to the above, that the complainant is recorded as saying in 2014 that she loved the appellant.

Trial Judge's Ruling

111. The trial judge noted the various matters raised by counsel and in respect of the strangulations, observed that:-

> "*it would be unrealistic and not really to live in the real world not to realise that marital violence or violence between parties can induce a state of terror in a victim of such violence to the extent that they are rendered virtually powerless within that relationship and not only that but dominated and inexplicably on occasion allow it to resume after an interval and permit that awful state of affairs to continue in their lives for various reasons.*"

The Warning

112. The following corroboration warning was given:-

> "*I want to preface my remarks by saying that this is a criminal trial involving a sexual offence and there is a direction I want to give you in relation to a complainant in a sexual*

offence when a case of this kind arises. Now the first thing I want to say about this is that this has to do with the experience of the courts over years and it's got to do with the fact that when the complaint of sexual abuse of this kind is made, particularly in this context where the alleged offences are said to have occurred in private, there is no other evidence available other than from the complainants against the accused. There is no, what might be regarded in law, as corroboration. Now, what is that? Corroboration is something that -- it is evidence which is independent of the complainant, separate from her account, if you like, separate from her testimony which demonstrates or shows that the accused -- firstly an offence was committed, the offence was committed and that the accused committed it. So, it has to be evidence outside of the complainant and it has to be evidence that shows, independent evidence, that shows or tends to show that the offence was committed, so section 4 rapes were committed, and that the accused committed them. Now, as a matter of law I can tell you there is no such corroboration in this case. It doesn't exist. Corroboration is a legal concept. That's what I am telling you. It is a matter for you to determine whether there is such corroboration but I am giving you a direction that in my view there is no such corroboration, there is nothing outside the testimony of the complainant in this case that constitutes corroboration. And in that context I want to warn you that because the experience of courts has been that there have on occasions been cases in which allegations have been made which are untrue, you have to be aware of the dangers of acting on the uncorroborated evidence of a complainant in a case such as this. That is something which you have to take on board. That warning is a serious warning. It is one which applies to a case of this kind and it is one which you have to take into the jury room with you and consider carefully when you are assessing the testimony and evidence that you heard in a case. That does not mean that if, having considered that warning, and taken it fully on board and into account, it doesn't mean that you cannot convict. It means that, having taken that warning on board, if you are nevertheless satisfied beyond a reasonable doubt of the guilt of the accused on the evidence available you are entitled to convict. You may convict. It doesn't mean you can't. You just have to bear in mind the warning as you go through your deliberations in respect of the case. And that's an important matter that you have to take on board for the reasons that I have given you."

113. Following requisition, the judge re-charged the jury as follows:-

"*You remember I told you about the dangers that -- and the caution, essentially a warning, the dangers of acting on the uncorroborated evidence of a complainant and that that is something that you have to bear in mind in the course of the deliberations considering the verdict. I said to you that in relation to that that is because of the courts' experience in relation to false accusations having been made in the past and that that's why the warning is given and it has to be taken seriously and taken on board and understood by you. In this particular case also there is other evidence in the case which makes it appropriate that you should not only receive that warning but understand it and consider it having regard to the evidence that emerged and which I referred in the summing up in respect of the additional allegations made in 2008 and 2009 and that's an important feature and*

something you should think about and refer to and consider in relation and in the context of that warning when considering the case and the facts of the case. Now, to remind you again that the warning exists and must be taken on board. It is not barrier in the sense that it does not mean that you simply cannot convict in a sexual case because the warning is given. If, having taken into account the warning which I have given you, you are nevertheless satisfied, notwithstanding that warning, on the evidence that you have heard beyond a reasonable doubt you are entitled to proceed to convict."

Appellant's Submissions

114. It is submitted that the trial judge appears to have made the decision to exercise his discretion on the discrete basis of the complainant's evidence that the anal rapes resumed in 2008. Counsel submitted that all other matters set out in the course of the defence's application appear to have been rejected, notwithstanding that those matters pointed to the unreliability of the complainant's evidence. It is submitted that the trial judge treated delay as a separate issue to be dealt with a delay warning notwithstanding that delay in this case went to credibility and reliability in circumstances where the complainant had been living apart from her husband and had been able to report other matters to Gardaí "*in a timely manner.*"

115. It is said that the basis on which the trial judge decided to give the corroboration warning was too narrow: the trial judge should have explained to the jury why the warning was being given, to contextualise it and thereby relate it to the specific elements of the case.

116. Counsel drew this Court's attention to para. 46 of Sheehan J.'s judgment in *DPP v L(M)* [2015] IECA 82 as authority for this proposition, and to the judgment of McGuiness J. in *DPP v PJ* [2003] 3 IR 550, 568 as authority for the proposition that a trial judge in deciding to give a corroboration warning is obliged to "*place emphasis on the specific difficulties to which the absence of corroboration [gives] rise in the particular case.*"

Respondent's Submissions

117. Counsel rejects the appellant's argument and submits that just as it is clear that the trial judge retained a discretion on giving a corroboration warning, so too did he retain a discretion to give such a warning on one ground and not on others. Counsel submitted, relying upon the dicta of this Court in *DPP v CC* [2020] IECA 139 at para. 38, that "*[...] the issue [for this Court] is whether the manner in which the discretion was exercised was an impermissible one.*"

118. Counsel submitted that the trial judge exercised his discretion on the issue of a corroboration warning having considered all the grounds on which it was advanced by the defence together with the evidence and circumstances of the case.

119. In respect of the other grounds on which the application for a corroboration warning was advanced, counsel submitted that the delay issue was dealt with separately by way of a delay warning that was given as part of his charge to the jury on the 6th of November 2019.

120. Delay, the respondent submitted, cannot point to unreliability in this case and counsel further noted that the complainant was cross-examined on the delay issue and provided answers and explanations. As regards the other grounds, counsel submitted that these are typical of matters that arise in many old cases of a sexual nature and could not be classified as matters going to reliability. Accordingly, counsel submitted that the trial judge did not err in the manner in which he exercised his discretion to give a corroboration warning.

Discussion and Conclusion

121. When a trial judge exercises the discretion to give a corroboration warning, it is well established that the terms of the warning are entirely within the remit of the trial judge. It is the trial judge who hears the evidence first hand at trial and who is best placed to determine the nature of the warning required in any given case. This Court is deferential to the manner in which a trial judge exercises their discretion to give the warning and will not intervene unless it is clear on the evidence that the manner in which the discretion was exercised was manifestly wrong. *People (DPP) v Hanley* [2018] IECA 713; *People (DPP) v M (orse J) D* [2019] IECA 92.

122. This applies with equal force to the terms of the warning settled upon by the trial judge given the express terms of s. 7(2) of the 1990 Act that where a judge decides to give a corroboration warning, it *"shall not be necessary to use any particular form of words to do so."*

123. In this case, the judge clearly explained the meaning of corroboration to the jury, that there was no corroboration and explained why corroboration warnings may be given in the experience of the courts, before proceeding to give a strong corroboration warning. On requisition, he made the point to the jury that they should consider the new allegations which had emerged. The warning was clear and unambiguous, the jury can have been in no doubt as to its purpose.

124. The trial judge's view was that the emergence of the new allegation was fundamental and consequently he was persuaded to give the warning. Insofar as the other matters of alleged unreliability are concerned, some relate to the capacity of the complainant to complain on issues other than those of a sexual nature, another to a failure to report numerous strangulations, an inconsistent history of sexual abuse by her father, and that the complainant had said on previous occasions that she loved the appellant, would not in our view serve as a basis for a judge to give the warning.

125. We are not at all persuaded that the judge erred in confining the rationale for giving the warning to the late emergence of allegations of a serious nature. It follows that he did not err in contextualising the warning in the way he did.

126. In our view, the trial judge's charge in relation to corroboration was, in the circumstances of the case, more than adequate and consequently, this ground fails.

Decision

127. As we have not been persuaded on any ground, the appeal against conviction is dismissed.