

No. 1

SUPREME COURT**Application for Leave and Notice of Appeal****For Office use**

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

Director of Public Prosecutions	V	Jack Kirwan
High Court Record Nr		Court of Appeal Record Nr 212 / 16
Date of filing	25 th March 2017	
Name(s) of Applicant(s)/Appellant(s)	Jack Kirwan	
Solicitors for Applicant(s)/Appellant(s)	Michael J. Staines & Company	
Name of Respondent(s)	Director of Public Prosecutions	
Respondent's solicitors	Chief Prosecution Solicitor	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes		<input checked="" type="checkbox"/> No ✓
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Birmingham, Sheehan and Mahon JJ.
Date of order/ Judgment	10 th February 2017

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Jack Kirwan
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Original status

<input type="checkbox"/>	Plaintiff	<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	Michael J. Staines & Company		
Email	mary.hughes@michaelstaines.ie		
Address	Lincoln House, Lincoln Lane, Smithfield, Dublin 7.	Telephone no.	(01) 873 1366
		Document Exchange no.	
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Orla Crowe S.C.		
Email	ocrowe@lawlibrary.ie		
Address	Law Library, Criminal Courts of Justice, Parkgate Street, Dublin 8.	Telephone no.	086 827 1367
		Document Exchange no.	301110
Postcode			

Counsel			
Name	David Perry B.L.		
Email	dperry@lawlibrary.ie		
Address	Law Library, Criminal Courts of Justice, Parkgate Street, Dublin 8.	Telephone no.	087 944 4685
		Document Exchange no.	301101
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> E-mail
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<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)
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3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Director of Public Prosecutions
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?	
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent		
	<input checked="" type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party		
	<input type="checkbox"/> Petitioner	<input type="checkbox"/>		
Yes		<input checked="" type="checkbox"/>	No	

Solicitor			
Name of firm	Chief Prosecution Solicitor		
Email	90 North King Street, Smithfield, Dublin 7		
Address	90 North King Street, Smithfield, Dublin 7.	Telephone no.	(01) 858 8500
		Document Exchange no.	
		Ref.	
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Sinead Gleeson B.L.		
Email	sgleeson@lawlibrary.ie		
Address	1 Arran Square, Arran Quay, Dublin 7.	Telephone no.	087 764 5049
		Document Exchange no.	810237
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any

of the following means?

	Document Exchange
	Post

	E-mail
	Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned

(a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

The relevant orders and findings made in the High Court and/or in the Court of Appeal.

Nature of Proposed Appeal:

The Applicant, Jack Kirwan, seeks to appeal from the entirety of the decision of the Court of Appeal of 10th February 2017, rejecting his appeal against the validity of his conviction.

It should be noted that the Court of Appeal dealt with the Applicant's conviction against the severity of his sentence on 23rd February 2017, which resulted in the Applicant's two year custodial sentence being reduced to a sentence of two years imprisonment with nine months suspended for twelve months. No appeal is taken against this particular decision.

Summary of Relevant Facts:

The Applicant was charged with sexual assault and burglary. The prosecution case was that in the early hours of the morning of 11th October 2008, the Applicant entered a hotel room at the Ferrycarrig Hotel in County Wexford without permission and sexually assaulted the female occupant ("the complainant") by touching her breasts and digitally penetrating her vagina. The Applicant pleaded not guilty to these charges.

Following a trial before His Honour Judge Barry Hickson ("the trial judge") and a jury at Wexford Circuit Court, the Applicant was convicted of both charges on 15th February 2016. He was subsequently sentenced by the trial judge on 5th July 2016 to a two year custodial sentence.

The key prosecution witnesses at the Applicant's trial were the complainant and her sister. The complainant gave evidence of travelling to Wexford on the night of 10th October 2008, booking into the Ferrycarrig Hotel, and consuming a quantity of alcohol before going to bed in her room in the hotel. She gave evidence that she awoke during the night to feel her top being lifted and to find that she was being digitally penetrated. She discovered an unknown male in her room, who eventually left. The complainant's sister gave evidence that she received a phone call from the complainant in the early morning of 11th October 2008 to say there was a man in her room, that the complainant thereafter recounted the assault to her, and that she encountered a man outside the complainant's room.

The trial at which the Applicant was convicted was his second trial for the offences. The first trial had commenced on 26th January 2016, but ended with a discharge of the jury. On the second day of the first trial, the complainant and her sister gave evidence regarding what the Applicant allegedly did with a pair of trousers. These details were not contained in the statements which had been originally provided to Gardaí by these witnesses. Upon being questioned by the trial judge, the complainant's sister accepted that she had spoken with her sister about the case before the trial commenced and went through the evidence that would be given, and gave her evidence at the trial regarding the trousers as a result of these discussions. The trial judge refused a defence application for a directed acquittal based on the unreliability of the evidence of the complainant and her sister, but discharged the jury on the basis that evidence had been given by the complainant and her sister which went beyond what was contained in the Book of Evidence, thereby creating a potential unfairness to the Applicant.

During the course of the second trial, counsel for the Applicant cross-examined the complainant and her sister on their pre-trial discussions. They accepted that they had met for about 20 to 30 minutes the day before the first trial and discussed their recollection of events and the evidence they would give. The complainant had her statement at this meeting and went through it. As a result of this evidence, defence counsel applied for a directed acquittal on two occasions on the basis that the complainant and her sister had colluded on the evidence they would give and had actually acted on these discussions by altering the evidence given during the first trial. It was argued that this rendered their evidence so unreliable that it would be fundamentally unsafe to leave the case to the jury. This application was refused by the trial judge, who noted that he would deal with the concerns arising by administering an appropriate charge to the jury.

During his charge, the trial judge dealt with the issue regarding the discussions between the complainant and her sister by reviewing the entirety of defence counsel's cross-examination on the issue. He then noted as follows:-

“And the defence say there is collusion by the witnesses and I'm reading from a definition of collusion from Murdoch's Dictionary of Irish Law which says defines collusion, ‘As an agreement usually secret for some deceitful or unlawful purpose. It may amount to crime or tort, the tort of conspiracy.’ In other words the parties agree usually secretly for some deceitful or unlawful purpose.

Now, the sisters have both given evidence under oath and have been cross-examined about that and their explanation is, ‘We wanted to get it right in our heads.’ You are in a privileged position because you've seen them and heard them being cross-examined and you're able to assess them. And you bear in mind that it's eight years after the alleged incident occurred and they hadn't had -- it's just sworn evidence, they hadn't had a discussion about this but they wanted their statement. Ms Annemarie Brooks said she wanted to see her statement and the two of them spoke together. Did they intend to be deceitful to mislead you? If they did and it's your view of them doing that then you cannot accept their evidence. So, you must ask yourself was there collusion? Was there an intention to deceive you in doing what they did or is there an innocent and honest explanation that they were trying to get it straightened out in their head. So, you must consider that part first before you move on. If they don't pass that test, if in your view there was collusion and you were intended to be deceived you go no further. That's the end of the matter because it would be unsafe to bring in any other verdict save acquittal after that. If on the other hand you accept the explanation

they gave that they were trying to get it right in their heads then you consider the balance of the evidence then.”

This charge was the subject of requisition by defence counsel, who asked the trial judge to direct the jury that “even if they don't establish in their own minds an intention to deceive that's not the end of the matter at all”, as the risk of cross-pollination between the witnesses discussing the case might render their evidence unreliable. The trial judge refused to provide a further warning.

Before closing speeches were delivered, the trial judge indicated that he believed there was no evidence corroborating the complainant's evidence and stated that he proposed to deliver a corroboration warning. The trial judge initially charged the jury as follows:-

“Now you must be satisfied that all of the facts in this case have been proven. You should look therefore carefully at the entirety of the evidence. In this case, there is no corroboration present in the case and I will speak to you about that now. Corroboration is some piece of independent evidence, independent of the evidence given by the complainant Ms. MB, which points to the guilt of the accused. This evidence must be credible evidence and such that you can rely on it beyond reasonable doubt. Very often – Mr. Peart [defence counsel] gave an example of a fingerprint on the window. In this case, there is no independent corroborative evidence and I must tell you that the reason corroboration is often times required by courts is to ensure that when it resolves to a question of what the complainant says as against what the accused man says, it makes it safer to convict if there is independent corroborative evidence.”

Following requisitions, the trial judge delivered a corroboration warning to the jury in the following terms:-

“Now, ladies and gentlemen, there's just one thing I wanted to say to you and I omitted to say it to you in my charge and I'll recall it now. That there is an absence of corroboration in this case. In sexual cases it's not always required but it's at the discretion of the Judge and I have decided that I will give you what's known as a corroboration warning in this case. Corroboration is independent evidence of a material particular tending to implicate the accused in the commission of a crime. In other words it's independent and must have three ingredients. It must come from an independent source. It must implicate the accused in the offence charged and it must be creditable. So, those three ingredients make up corroboration. And judges in the past always gave warnings about corroboration when in effect it is one witnesses word. In this case it is Ms Brooks' word against the accused man's word. And the courts always in the past looked for corroboration, independent evidence. Credible independent evidence. It may be supporting evidence. It could be for instance scratches on the accused man or something like that. Or if there were other pieces of independent evidence which supports the evidence given by the complainant in this case. And it's dangerous to convict without corroboration. If corroboration is required, if it's to fulfil its purpose it's to make it safe for a jury to convict but that doesn't mean you can't convict but it's to make it safe to convict. That's why we look for corroboration. Evidence will be treated as implicating the accused if it makes it more probable that the accused committed the offence. So, you have no corroboration here so you must take great care. You must be aware that there is no corroboration in this case. The evidence of the sister is not corroboration and I've said that to you before. So, there's no other independent evidence so bear that in mind. That there is no

corroboration here. Take that into account and it can be dangerous to convict without corroboration. But, having regard to all of that you're still entitled to convict. Very good."

Findings by the Court of Appeal:

The Applicant appealed his conviction on three grounds. Each one was rejected by the Court of Appeal.

(i) Unreliability of the evidence: The Applicant argued that the case against him was based primarily on the complainant's evidence and the evidence of consistency provided by the complainant's sister. There was evidence before the trial judge that the complainant and her sister had met together prior to the first trial, discussed the evidence they would give, and actually acted on foot of these discussions to at least some extent in delivering particular items of evidence before the jury during the first trial. The Applicant argued that these admissions rendered the evidence of the complainant and her sister so unreliable that the trial judge should have acceded to an application on behalf of the Applicant to withdraw the case from the jury and direct an acquittal, and that the failure to do so amounted to an error in law.

The Court of Appeal rejected this argument at paras. 18 to 19 of its judgment. It noted that the fact that the complainant and her sister had "checked the completeness of their own statement against the other's is certainly not ideal", but that there was nothing disturbing or sinister about this. The Court stated that in its view, the "fact that the witnesses, two sisters, discussed the events of the night in question and the evidence they would be giving could not possibly have provided a basis for directing an acquittal."

(ii) Sufficiency of collusion warning: The Applicant argued that the evidence regarding the complainant's meeting with her sister regarding the evidence to be given rendered the evidence of both of these witnesses so unreliable as to require a clear warning by the trial judge regarding the dangers in relying on same. It was argued that while this matter was dealt with to some extent by the trial judge, the warning given was unduly circumscribed and incomplete. In particular, the trial judge directed the jury that the evidence regarding the preparations engaged in by the complainant and her sister was only relevant to the reliability of their evidence if that led the jury to conclude that those witnesses had intended to deceive the jury, in line with a technical definition of "collusion", and otherwise should be discounted. The Applicant argued that the trial judge refused to highlight the dangers of innocent contamination and unconscious elision that might arise from discussions between witnesses without any deceitful motive on their part, as recognised in the case law on system evidence, and that this failure by the trial judge amounted to an error in law.

The Court of Appeal rejected this argument at paras. 33 to 34 of its judgment. The Court noted that there was no issue as to "collusion between complainants in the context of system evidence" in this case. Instead, two sisters had discussed their evidence prior to trial, and the evidence they gave at the first trial was influenced by those discussions. These discussions were the focus of considerable attention during the second trial and the issue was "very properly" dealt with in considerable detail by the trial judge in his charge. The Court noted that it was satisfied that the trial judge's treatment of the issues was adequate in all the circumstances.

(iii) Sufficiency of corroboration warning: The Applicant argued that while the trial judge delivered a corroboration warning to the jury, there were two major defects. First, it was perfunctory in nature and did not go far enough in providing a detailed indication of the risks involved in convicting without corroboration. Secondly, there was no attempt by the trial judge to contextualise the warning to the facts of the case by highlighting why it might be dangerous in this particular case to rely on uncorroborated evidence, such as by reference to the evidence of the complainant's alcohol consumption.

The Court of Appeal rejected this argument at paras. 27 to 28 of its judgment. The Court noted that on two separate occasions, the judge informed the jury that there was no corroboration and that it was dangerous to convict in the absence of corroboration. It noted also that "elsewhere in the charge" the trial judge dealt with the question of alcohol consumption and the pre-trial discussions between the complainant and her sister. The Court remarked that "in truth, the defence were fortunate to have the benefit of a warning in such terms" as in its view there was evidence arguably capable of amounting to corroboration. Based on these factors, the Court stated that it was not persuaded that the corroboration warning was defective.

Order of the Court of Appeal:

The Court of Appeal dismissed the Applicant's appeal against his conviction.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—

Please list (as 1, 2, 3, etc) concisely the reasons in law:

- i. why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court and
- ii. why there are exceptional circumstances warranting a direct appeal to the Supreme Court

1. The Applicant seeks to appeal the entirety of the Court of Appeal decision refusing his appeal against conviction. It is submitted that leave ought to be granted to take this appeal on the basis that: (i) the decision of the Court of Appeal involved points of law of general public importance in relation to the warnings which must be provided by a trial judge in sexual offence cases, and an appeal to the Supreme Court would provide definitive guidance on same; and (ii) allowing an appeal is in the interests of justice based on the facts of this particular case.

General Public Importance:

2. This case raises the important legal issue as to the extent of the warnings which must be given in a sexual offence case where there is some possibility that the evidence of the complainant has been subject to innocent contamination or elision for some reason, for example due to discussions about the evidence to be given with another witness to the case. In particular, the issue arises as to whether a trial judge must direct a jury that even where there is no deceitful motive on the part of the complainant, dangers or issues as to reliability arise where there is possible innocent contamination or elision of the complainant's evidence.
3. Various decisions of the Court of Criminal Appeal, given in the context of so-called "system evidence" cases involving complaints from multiple complainants, recognise the dangers that can arise from innocent contamination of a witness's evidence. For instance, in *DPP v. C.C. (No. 2)* [2012] IECCA 86, O'Donnell J. recognised the possibility that there could be "possible contamination or collaboration, conscious or unconscious" between complainants in a sexual offence case. Likewise, in *McCurdy v. DPP* [2012] IECCA 76, Hardiman J. referred to the possibility of unconscious influence by one complainant upon the evidence of another. Similarly, the courts of England and Wales have recognised these dangers in the context of system evidence: for example, in *R. v. H.* [1995] 2 A.C. 596, Lord Mustill referenced the possibility of innocent infection whereby "communications between witnesses, even without malign intent ... may lead to the transfer of recollections between them, and hence to an unconscious elision of the differences between the stories which each would independently have told".
4. Despite this recognition given to the dangers of possible innocent contamination amongst the evidence of witnesses in a sex offence case involving system evidence, there is no general Irish authority outlining whether a warning should be given in a sexual offence case not involving a system evidence component where there is the possibility of innocent contamination or elision of the complainant's evidence, due to the recognised dangers and reliability issues that result.
5. This legal point was directly raised during the course of the present appeal before the Court of Appeal, but it is respectfully submitted that it was not engaged with. If leave to appeal is granted in this case, the appeal before this Honourable Court would involve a definitive ruling on whether a trial judge is obliged to warn of potential dangers in a sexual offence case where there is the possibility of innocent contamination or elision of evidence, and the terms in which that warning should be couched. This is a point of general importance beyond the confines of this case, and which has a significant impact on all sexual offence cases.
6. This case also raises the important issue as to the extent and terms of the corroboration warning that must be given in a sexual offence case. As noted above, the Applicant raised an issue regarding the sufficiency of the warning in outlining the dangers of convicting in the absence of corroboration and in contextualising those dangers to the facts of the case. The legal issues involved are of general importance to all sexual offence cases.

The Interests of Justice:

7. Further or in the alternative, it is submitted that it is the interests of justice to allow this appeal. The Applicant has at all stages maintained his innocence of the offences

which he was alleged to have committed in 2008, when he was 17 years old. He is now a 26 year old man, and the consequences of the conviction at issue in this case will have a devastating impact on the rest of his life. He will, in particular, face lifelong stigma as a convicted sex offender; be excluded from various fields of employment; and be required to sign on to the Sex Offenders' Register for a period of 10 years. Given that the Applicant has maintained his innocence at all stages and given the consequences which follow from his conviction, it is appropriate in the interests of justice to allow the Applicant to exhaust all possible avenues for challenging his conviction, including an appeal to the Supreme Court.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground
2. the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom
3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely
4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

Should leave be granted, the following grounds of appeal will be put forward:

1. That the Court of Appeal erred in law in holding that the trial judge gave an adequate warning to the jury regarding the dangers arising from pre-trial discussions between the complainant and her sister.

2. That the Court of Appeal erred in law in failing to hold that there was an obligation on the trial judge to provide a warning regarding the dangers of innocent contamination or elision in the evidence of the complainant and her sister.
3. That the Court of Appeal erred in law in holding that the corroboration warning provided by the trial judge adequately addressed the dangers arising by convicting in the absence of corroborative evidence and / or adequately contextualised such dangers by reference to the facts of the Applicant's case.
4. That the Court of Appeal erred in law in holding that the trial judge was correct in refusing to accede to the defence application to withdraw the case from the jury based on the unreliability of the evidence of the complainant and / or her sister.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Solicitor: Michael J. Staines & Co. Solicitors

Counsel: Orla Crowe S.C. / David Perry B.L.

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2017] IECA 27

References to Law Report in which any relevant judgment is reported

Not reported.

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An order setting aside the Applicant's conviction.

What order are you seeking if successful?

Order being appealed:

set aside ☒

vary/substitute ☐

Original order:

set aside ☒

restore ☐

vary/substitute ☐

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

Not applicable.

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Not applicable.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

☐ Yes

☒ No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

☐ Yes

☒ No

If Yes, please give details below:

Will you request a priority hearing?

☐ Yes

☒ No

If Yes, please give reasons below:

Signed: Michael J. Stankiewicz

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.