THE COURT OF APPEAL

Sheehan J.
Edwards J.
Butler J.

Record No. CCA 336/2012

The People at the Suit of the Director of Public Prosecutions

Respondent

V

T.V.

Appellant

Judgment of the Court delivered 8th day of November 2016 by Mr. Justice Edwards.

Introduction
1. In this case the appellant appeals, in the first instance, against his conviction by a jury in the Central Criminal Court on the 18th of October, 2012, on a count of rape, contrary to s.48 of the Offences Against the Person Act 1861 and s.2 of the Criminal Law (Rape) Act, 1981 (the Act of 1981) as amended by s. 21 of the Criminal Law (Rape)(Amendment) Act, 1990.

2. On the 26th of November, 2012, the appellant was sentenced to eleven years imprisonment, with the last three years thereof suspended upon conditions. In the event that he is unsuccessful in his appeal against his conviction, the appellant also appeals against the severity of his sentence. However, this judgment deals only with his appeal against his conviction.

The Grounds of Appeal
3. The appellant relies upon three grounds of appeal:

> "(a) The learned trial judge erred in law and in fact when charging the jury in relation to the issue of *mens rea* and in particular failed to charge the jury properly or at all in relation to the issue of the appellant's knowledge as to whether or not the complainant was consenting.
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> (b) The learned trial judge erred in law and in fact when charging the jury in relation to the issue of *mens rea* and in particular failed to charge the jury properly or at all in relation to the meaning of recklessness.
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> (c) The learned trial judge erred in law and in fact and failed to charge the jury properly or at all in relation to the actual facts and circumstances relevant to the issue of knowledge, recklessness and *mens rea*."

The Evidence before the Jury
4. The complainant in the case was Ms A.O'C. On the evening of Friday the 18th of December 2009 the complainant, a young woman in her twenties, who was living with two other girls in a three bedroom duplex apartment in a suburb of Cork, had been celebrating with some friends in advance of her birthday. She and her friends had initially had dinner in the apartment, following which they had visited a number of bars in Cork city. Having left the Bodega bar at approximately 2.15am to 2.30 am on the morning of the 19th of December, 2009 the group travelled back to the apartment in two separate vehicles, one of which was a taxi and the other of which was a private car driven by a member of the group who, as designated driver, had not been drinking. The complainant was in the first vehicle to leave, which was the taxi, and she was accompanied by three other girls. The remainder travelled in the other vehicle, one of whom was J.F who was also living in the apartment with A.O'C., and who had the only key to the apartment.

5. When the taxi arrived at the apartment, the complainant and her companions, not having a key themselves, were required to await the arrival of the second vehicle, before they could gain admittance. As they were waiting another taxi arrived and two men got out. The complainant engaged them in conversation and suggested to them that as she and her friends would be staying up for a while to drink, they were welcome to call over. The two men then went into their own house across the road from the apartment.

6. J.F., duly arrived at about 3.15am and admitted the complainant and the rest of the party to the apartment. Shortly afterwards the complainant telephoned a male work colleague, S. McG., and also invited him to call over, which he later did. After this phonecall the complainant was pouring drinks in her kitchen when the two men she had met earlier arrived into the apartment, and they had bags with them containing some cans of beer. They were Hungarian. One had a tight haircut and was very quiet. The other was more talkative, had dark hair and spoke good English. The talkative one was the appellant.

7. S.McG arrived at around 3.35am. Shortly after this two girlfriends of the complainant, L. O'S., and C.F., who were staying overnight, but who had to get up early next morning, indicated that they were going to retire. They went upstairs and went to bed on mattresses laid out on the upstairs landing.

8. The complainant stayed up drinking in the kitchen with J.F., another girlfriend L.B., S.McG., and the two Hungarian men, and music was playing. At one point the appellant came over and placed his hands on the complainant's hips. He said he was a dancer in Hungary and that she didn't know how to dance. The appellant tried to move the complainant's hips, but the complainant felt uncomfortable and removed his hands and walked away from him. J.F., who had witnessed what occurred, told the jury that the appellant had been dancing with the complainant in "a sexy manner" and that the complainant walked away from him abruptly.

9. At approx 5.00am J.F. went upstairs to bed. The complainant followed her and chatted with her trying, unsuccessfully, to persuade

her to come back downstairs. The complainant then went downstairs herself and met S.McG and returned to the kitchen with him. The only other persons downstairs at that stage were the appellant who was also in the kitchen, and L.B., who was on the telephone in the sitting room. The quieter Hungarian man had gone home a short time earlier. The complainant concluded that the night was over and went back upstairs. At this point it was estimated to be 5.30am/5.45am.

10. The complainant acknowledged consuming an estimated ten drinks in the period between having dinner at 8.30pm/9.00pm on the evening before, and retiring to bed at 5.30am/5.45am.

11. Having gone upstairs to go to bed the complainant undressed, save for her underwear, and put on a nightdress. She then got into bed and went to sleep. The next thing she recalled was waking up due to a stabbing pain in her vaginal area. She opened her eyes and found a man's body on top of her. It was the appellant and he was putting his penis in and out of her vagina, and breathing heavily. The complainant's evidence was that she had not physically resisted because she felt completely paralysed and that she could not move or breathe. She had her nightdress on but it was pushed up, and her underwear had been removed. She recalled pain, and focussing completely on trying to close her legs which she eventually succeeded in doing. After the appellant had stopped, the complainant then lay there for a few minutes.

12. The next thing the complainant recalled was hearing some rustling at the end of the bed. She then got up, turned on the light and told the appellant to leave the house. There was blood visible on the bedsheets and the appellant asked the complainant if she was having her period. The complainant responded "No. Get out of my house". The appellant then asked the complainant if she had been a virgin, and the complainant just repeated "Get out of my house". The complainant stated that the appellant appeared worried. The appellant then dressed himself and left.

13. The complainant told the jury at the trial that she had not agreed to have sexual intercourse with the appellant. She also said that she had in fact been a virgin at the time.

14. When the appellant had left the complainant found that she was bleeding quite a bit, so she put on underwear and applied a panty liner and then went to J.F.'s bedroom and woke up J.F. The complainant was shaking and crying and she spoke to J.F. J.F., in her testimony, characterised the complainant as hysterical. The complainant testified that "I told her that I woke up and that the Hungarian guy from downstairs, the dark-haired Hungarian guy, was in my bed, and I said that we had sex." J.F. recalled asking the complainant "was it forced" to which the complainant had replied "No".

15. J.F. then ran downstairs to see if the appellant was still there, but he had gone, and she then returned to the complainant. Another friend of the complainant L. O'S. then came into the room. However, the complainant who was in physical distress, with trembling and shaking all over, and a lot of pain in her vagina, did not repeat to her what she had said to J.F. She testified that she just cried and complained repeatedly about being in pain, before eventually falling asleep in J.F.'s bed. In her testimony to the jury concerning this stage of events J.F. recalled that the complainant kept muttering "I don't remember inviting him in" and "How did he get into my room?"

16. About an hour later the complainant woke up and found L.O'S still present. Her evidence was that on this occasion "I told her that when I woke up the dark-haired Hungarian guy was on top of me, having sex with me" and that "I said it was without my consent." At this point J.F. rang a doctor.

17. Later in the day, at approximately 11.00 or possibly 11.30, the appellant returned to the apartment. He met JF and requested to see the complainant but was not allowed to do so. The complainant remained upstairs and did not meet with or speak to the appellant. The complainant later put her bedclothes and her nightdress and underwear into a plastic bag, and put it to one side. Later still on the same day she received a telephone call from the Gardaí who had been notified of a possible sexual assault by one of the complainant's friends. This was followed shortly thereafter by a visit in person to the complainant by two female Gardaí. The complainant agreed to their request that she should attend a sexual assault unit, and did so, but was not prepared at that stage to make a formal statement of complaint.

18. The complainant contacted the Gardaí again in mid May 2010 to indicate that she now wished to make a formal complaint. The Gardaí were also handed the plastic bag containing the bedclothes, nightdress and underwear at this stage. A formal statement of complaint was taken from the complainant on the 29th of May 2010.

19. The appellant was subsequently arrested and detained, and was interviewed while in detention. In the course of being interviewed he was asked (inter alia) the following questions and provided the following answers:

> *Q. Can you tell me what you remember happened that morning?*
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> *A. We came home with my friend that night. We saw girls drinking and smoking in the front balcony so I just asked them if it was a house party, they said yes and I ask if we could join them and they said yes. I went home first to collect drink from my house to take to the party, not to arrive empty hands to the party. When we arrived there everybody was friendly. We introduced ourselves and were drinking in the kitchen. We were dancing, listening to music and enjoying conversation. My friend left earlier than me because he was working next morning. I asked the girls if they minded me staying on at the party. When we got tired half of the girls went to sleep and myself [A] her friend another guy and me kept talking in the kitchen. After [A] went to sleep first we stayed for a little while in the kitchen. I asked her friend if they mind if I stay for the night as they say they would have breakfast next day. She said yes it's no problem. Then I asked where [A]'s room was as I felt something between each other and I wanted to sleep with her. So I went to the room everybody went to sleep. I said hello to her when I went into the room and laid beside her in the bed. Then I just hugged her and kissed her and tried to sleep. We were sleeping for a little while after we woke up. We started kissing, touching each other we took off our clothes and we had sex then. I was so gentle with her to make her happy. She didn't push me away and didn't say no. We had sex then, then we finished I switched on the light and I saw blood on the bed. I just asked her what's that, you have period or what happened. She didn't say anything, cleaned herself and lay back into her bed. I felt panic and I told her go home to sleep as it would be better. I didn't sleep very well as I was worried about her. That's why the following morning at 12.30 I went back to her house to make sure she was o.k. and just to speak with her to ask what was that and about seeing each other, go dating, but she wouldn't speak with me she ran upstairs. That why I spoke with her friend who was at the party as well. She told me that [A] was a virgin and when I realised that I felt really sorry and I just told her we didn't use any condom but I didn't went into her vagina with my sperm, that's why I asked her friend should I help with anything as she was a virgin, like go to doctor or something. I told [A]'s friend not to be afraid as I have no problem with sick in my penis. So I'm not sick, she said it's good to know and anyway that they would go to the doctor to check things. I couldn't speak with [A] as she wouldn't come*

downstairs, that's why I told her I lived [at a specified address], so I can help with anything or if she wanted to speak with me, they could come to my house and let me know. I asked [A]'s friend if I came back later if there was a chance to speak with her, but she said I don't need to go back because if she wanted to speak with me she would come to my house. After I went to work. That all that happened. My story is clear and I didn't any bad with her. I wouldn't have sex with her if she said no, but she didn't that's why we had sex. I feel sorry for everything that has happened that night.

…

Q. When you went up to [A]'s bedroom was it dark?

A. Yes.

Q. Was [A] asleep?

A. She was sleeping but I wake her up and say can I sleep with you, she said yes. I didn't switch on the light.

Q. What clothing was [A] wearing?

A. P.J. a shirt and trouser outfit.

Q. Did you undress to get into bed?

A. Yes I was sleeping in underwear

Q. When you got into bed what happened?

A. I hugged and kissed her neck and tried to sleep then

Q. Was [A] asleep at this stage?

A. Yes.

Q. Did you take off her night dress?

A. After she woke up, yes we took if off together, she helped me take it off.

Q. Would you tell me exactly what she was wearing?

A. Just a night dress.

Q. When ye were having sex together were you on top of her?

A. Yes all the time.

Q. What was her reaction when you were having sex with her?

A. She was kissing me and enjoying the sex.

Q. Did she pull her legs together and close her legs?

A. Her legs were closed before we had sex, I was touching her and then her legs were open while we had sex.

Q. During the time you were having sex, did she close her legs to get you to stop?

A. No.

Q. Did you remove all her clothes?

A. No just her trousers were taken off.

…

Q. Why would [A.O'C.] say these things happened if they didn't?

A. Maybe if she not drunk she wouldn't have a one night stand with a guy she just met and I don't think she remembers everything perfectly as we were both drunk.

Q. Do you not think if she wanted to have sex with you she would have brought you up to her bedroom herself.?

A. That would have been the best situation, but she went up to sleep before me, because I still had fun in the kitchen with her friends.

Q. She never told you during the whole night to come up to her bedroom?

A. No she never told me that.

Q. Throughout the night ye never kissed downstairs and she only spoke to you for a small while?

A. No I never kissed her in front of anybody else but we were talking a lot, not just for a while we had a conversation with everybody in the kitchen.

Q. I find it hard to believe that [A.O'C.] who was a virgin at the time, let you into her bedroom for the purposes of having sex. I think it's more the case that she had drink taken and was asleep in bed and that you removed her underwear and night dress and had sex with her while she was asleep, isn't this really what happened?

A. When I went into the bedroom I told her it was me [T] and went to the bed and lay down next to her. I felt she wasn't sleeping, if I see that she was sleeping I wouldn't have sex with her. I think if she not drunk she would have sex with me.

Q. Why do you think that she would have sex with you?

A. Because from the signs when we were spending time in the kitchen I felt she liked me, otherwise when we were in the bed and when I started to touch her nicely and kiss her she wouldn't have kissed me back then would she. That's clear she wouldn't have wanted sex but she kissed me back then.

20. Evidence was given before he jury concerning the appellant's responses at interview, and the notes of the interview, which the appellant had signed, were exhibited. In addition, the video of the appellant's interview was played to the jury.

21. Furthermore, an addendum document was provided to the Jury which recorded a further question and answer not contained in the memorandum of interview and it reads as follows:

Q. Why do you think that she would have sex with you.

A. Because from the signs when we were spending time in the kitchen I felt she liked me, otherwise when we were in the bed and when I started to touch her nicely and kiss her she wouldn't have kissed me back then would she. That's the clear of the situation she don't want to have sex with me if she don't kiss back. "

22. Aspects of the appellant's account at interview were put to the complainant in the course of her cross-examination, but that account was not accepted by her.

23. The jury also heard testimony from L.O'S., S. McG., C.F., as well as from a number of Garda witnesses. In addition, a witness from the Forensic Science Laboratory testified that DNA extracted from semen stains on the complainant's bedclothes matched the appellant's DNA; and a doctor, from the relevant sexual assault unit, who had examined the complainant on the 19th of December 2009, testified that she had found redness and bruising in the complainant's genital area. These findings were consistent with the complainant's account but they were equally consistent with consensual sex.

24. The appellant did not go into evidence at the trial.

The Trial Judge's Charge

25. In the course of charging the jury with respect to the ingredients of the offence of rape generally, and specifically with respect to the ingredient of consent, the trial judge said the following:

"Now, rape is given a statutory definition in section 2 of the Criminal Law (Rape) Act 1981 which provides: "A man commits rape if (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b), at that time he knows that she does not consent to the intercourse, or he is reckless as to whether she does or does not consent to it." And subsection 2 provides: "It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence of absence of reasonable grounds for such a belief is a matter to which the jury is to have regard in conjunction with any other relevant matters in considering whether he so believed." I'm going to try and strip down that definition for you as if I was stripping down a motorcycle. This particular form of rape is one which can only be perpetrated by a man on a woman, and the essence of it is the insertion of the male penis into the female vagina without the consent of the woman. Now, it provides: "A man commits rape if (a) he has sexual intercourse with a woman." Well, sexual intercourse for the purpose of this section is the insertion of the male penis into the female vagina with penetration, however slight, and for as long or as short a period as may be. Ejaculation is not required. Now, sexual intercourse is with a woman who at the time of the intercourse does not consent to it, and that is the essence of the crime. As Ms Kennedy told you, the absence of consent rather than force or violence is the essence of the crime. Now, if the woman is consenting it's none of our business. And the male party must know that the woman is not consenting. Now, I have told you already that you can blind yourself to anything if you set your mind to it, so the law caters for a situation where the man doesn't know that the woman is not consenting because he's made damn sure not to find out. So, the offence is also committed if the reason for the man's lack of knowledge in relation to the woman, whether the woman is consenting or not consenting, is because of his recklessness in that regard. Now, subsection 2 says: "It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard in conjunction with any other relevant matters in considering whether he so believed." Now, that is simply telling you in very flowery legal language that, in relation to the question of consent, you take all the circumstances into account. Now, it is also the situation that you are not entitled to infer consent from the absence of any resistance or struggle on the part of the woman. Now, somebody credited with great clarity of thought is Mr Justice Finlay, former Chief Justice, and I'm going to, as I'm entitled to do, adopt his words as my own in relation to the definition of rape. Giving judgment in the Court of Criminal Appeal, Chief Justice Finlay said: 'Having regard to the terms of section 2, the prosecution in order to establish the commission of the crime of rape must prove beyond a reasonable doubt the following matters: One, that the accused had sexual intercourse with a woman who at the time of the intercourse did not in fact consent to it, and, two, at that time the accused knew that she did not consent, or, three, that at that time the accused was reckless as to whether she did or did not consent.'"

Submissions on behalf of the appellant

26. It was submitted that the trial judge erred in law in failing to direct the jury that the offence of rape is not made out where the accused believed that the woman was consenting and that the test of knowledge is unambiguously subjective.

27. The Court was referred to passages from *The People (Director of Public Prosecutions) v. Gaffney* (unreported, Court of Criminal Appeal, 10th May 1991); *The People (Director of Public Prosecutions) v. Rock* (unreported, Court of Criminal Appeal, 29th July 1993); *The People (Director of Public Prosecutions) v. F.* (unreported, Court of Criminal Appeal, 27th May 1993); *The People (Director of*

Public Prosecutions) v. Creighton [1994] 2 I.R. 570; *The People (Director of Public Prosecutions) v. McDonagh* [1996] 1 I.R. 565; *R v Fotheringham* (1989) 88 Cr App. Rep 206 and *Director of Public Prosecutions v. Morgan* [1976] AC 182 in support of a submission that, in appropriate cases, specific directions should be given regarding s. 2 (2) of the Criminal Law (Rape) Act, 1981. It was submitted that this was such a case.

28. It was submitted that, in respect of subsection (2) of s. 2, the jury in a rape trial must be made to appreciate that the test is not whether the accused reasonably believed the complainant was consenting: the test is whether the accused honestly believed the complainant was consenting, even if that belief was unreasonable, although the question of whether there are reasonable grounds for such belief is a relevant factor which the jury must take into account.

29. Counsel for the appellant has contended that the jury could not have been aware from the charge as formulated that, before convicting the appellant, they would have to be satisfied beyond reasonable doubt not alone that the complainant did not consent to the sexual intercourse but also that the appellant did not honestly believe that the complainant was consenting, or was reckless in that regard.

30. Counsel for the appellant points to multiple facets of the evidence which he contends raised an issue as to the appellant's belief:

> (i) The complainant, who had had about 8 drinks, invited the appellant and his friend whom she saw on the street and who were strangers to her, to join her and her girlfriends for drinks in her home after 3am in the morning.
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> (ii) The appellant, being Hungarian, was from a different cultural background.
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> (iii) Music was being played, there was drinking, chatting and some dancing.
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> (iv) The appellant chatted to the complainant and danced in a sexy manner with her. The complainant had two further drinks.
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> (v) The appellant formed the view that they were getting on well and he sought to ascertain if S. McG, a male work colleague of the complainant, who had arrived at the party at about 3.45am was romantically involved with the complainant and was told that he was not.
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> (vi) After the complainant, who was merry, went to bed at about 5.30 am, the appellant asked where the complainant's room was and S. McG, her work colleague, accompanied him up the stairs and only suggested they retreat when he saw that two of the complainant's friends were sleeping on a mattress on the landing.
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> (vii) The appellant later went back upstairs and passed by the people sleeping on the landing before entering the complainant's room, because he had felt that there was something between them.
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> (viii) The complainant said that she had no memory of being kissed and hugged by the appellant prior to sexual intercourse. She did not cry out or say anything to the appellant, and nor did she physically resist him although it felt like it lasted for a long time. When the sexual intercourse ended, she still did not speak but lay for a few minutes before getting up, turning on the light and only then telling the appellant to leave.
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> (ix) The complainant went to her friend's room and told her that she and the appellant had had sex but when asked if it was forced, she said that it was not.
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> (x) The appellant returned to the complainant's house a few hours later to see her but she would not see him.

31. It was submitted that it was incumbent on the trial judge to have advised the jury that if the accused honestly believed the complainant was consenting that he ought to have been acquitted and moreover should have directed the attention of the jury to the matters which they should take into consideration when considering whether they were reasonable grounds for such belief.

32. It was further submitted on behalf of the appellant that the trial judge provided insufficient explanation concerning what was meant by recklessness. In support of this submission this Court was referred to the test of recklessness in the Model Penal Code drawn up by the American Law Institute and approved by the Supreme Court in *The People (Director of Public Prosecutions) v. Murray* [1977] I.R. 360 (at 403); as well as to passages from the judgments of Geoghegan J, and Hardiman J, respectively, in *The People (Director of Public Prosecutions) v. Cagney & McGrath* [2008] 2 I.R. 111, emphasising the need to communicate to the jury that the required *mens rea* for the purpose of recklessness as to consequences is subjective and not objective.

33. It was acknowledged by counsel for the appellant that in a rape case the accused may be considered to have acted recklessly where he has consciously disregarded a substantial and unjustifiable risk that lack of consent exists. However, it was submitted that in the instant case the jury could not have understood the subjective nature of the test on recklessness because of deficiencies in the charge of the trial judge in that regard, and the verdict accordingly should not stand.

34. Anticipating an objection on behalf of the respondent to the appellant's reliance on the alleged deficiencies in the trial judge's charge now sought to be relied upon, in circumstances where no relevant requisitions were raised at the trial, counsel for the appellant contends that the alleged misdirections were as to "a central issue in the case" and that, notwithstanding that requisitions were not raised, a failure to correct them even at this late stage could result in a fundamental injustice being done to the appellant. In support of this argument the Court was referred to passages from *The People (Director of Public Prosecutions) v. Cronin (No. 2.)* [2006] 4 I.R. 329; *The People (Director of Public Prosecutions) v. Hussain* [2014] IECCA 26 (Unreported, Court of Criminal Appeal, Clarke J, 28th July 2014) and *The People (Director of Public Prosecutions) v. Zhao Zhen Dong* [2015] IECA 189 (Unreported, Court of Appeal, Birmingham J, 26th June 2015).

Submissions on behalf of the respondent.

35. Counsel for the respondent has submitted that, having regard to the principles enunciated in *The People (Director of Public Prosecutions) v. Cronin (No. 2.)* [2006] 4 I.R. 329, this Court should not be prepared to entertain the complaints that the appellant now makes concerning the trial judge's charge to the jury. This is in circumstances where the appellant was represented by an experienced legal team, comprising a solicitor, junior counsel and senior counsel, and he had elected to defend the case by contending that the sexual intercourse between himself and the complainant had been consensual and not on any mistaken basis. The case advanced was consistent with his account given to the Gardai in the course of his interviews. He had made no case that he was labouring under any mistaken belief about the complainant's intentions or actions.

36. It was submitted that it is unsurprising, having regard to the evidence, that he elected to defend the case in that way. After all, the complainant had said or done nothing to manifest any interest in the appellant, indeed her actions were to the contrary. **She** did not dance 'in a sexy manner' with the appellant and rebuffed his putting his hands on her hips. She went to bed, in her own room, in her own bed, clothed in underwear and a nightdress with two girlfriends asleep outside her door, and awoke because the appellant was in the act of sexual intercourse with her. It was submitted that it is of little wonder, after she ordered him out, that she was hysterical and said 'how did he get into my room?'

37. It was further submitted that when the appellant entered her bedroom, he had few reasons, if any, to believe the complainant was receptive to him. But the nub of the defence case was how, according to him, she was receptive, compliant and willing to have him in her bed that night and have, for the first time in her life, unprotected sexual intercourse with a person of whom she knew little, save that she did not care for his advances earlier. The consent case, as advanced by the appellant, stood or fell on what happened when he went into her bedroom. This was not a situation of a failure by the judge to put a defence, either in response to a request from the appellant's legal team or at all. The appellant never sought to make the case of mistaken belief as to the existence of consent, whether reasonable or unreasonable. It was submitted that the prosecution and defence cases were not reconcilable.

38. Moreover, if the jury accepted the complainant's evidence that she was asleep, not awake, when the appellant got into her bed and had sex with her then there was no factual basis for a disquisition on recklessness. Had the trial judge so charged it was only going to be another or an alternative basis for convicting. This was not a case where the ins and outs of recklessness arose for consideration on any view of the evidence. The appellant did not claim that any mistaken belief arose on his part as to the complainant's actions or intentions. Rather, the explicit case made to the jury was that both parties had engaged in the sexual intercourse in a full and consensual manner while both were awake. This was in direct conflict with the complainant's evidence where she asserted that she was asleep until she was woken by a "*stabbing pain* " in her vaginal area and where she stated that she had found her nightdress pulled up and her underwear removed.

39. It was submitted that arising from that, it is not surprising that the trial judge addressed the jury on the law in the case in the manner that he did. Moreover, it was significant that neither of the legal teams raised requisitions on the matters of which the appellant now complains. Indeed, the appellant's then legal team had no complaint about the charge at all.

40. The respondent relies particularly on the following passage from the judgment of Kearns J in the Supreme Court in *The People (Director of Public Prosecutions) v. Cronin (No. 2.):*

> "64. I turn now to consider whether a judge should ever of his own volition raise with the jury a defence which the defence has not sought to raise and which may be in conflict or inconsistent with the chosen line of defence. I share the reservations expressed in this regard by Hardiman J. in his judgment in this case in the Court of Criminal Appeal ([2003] 3 I.R. 377) when he stated at pp. 386 to 387:-
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> > 'It seems to us that this court should be slow to impose an obligation on a trial judge to intervene in a manner adverse to the prisoner's chosen defence, except in very unusual circumstances.
> >
> > In *The People (Director of Public Prosecutions) v. Hanley* (Unreported, Court of Criminal Appeal, 5th November, 1999) this court pointed out that at p. 2:-
> >
> > > "… while the trial judge may regard the defence as being unmeritorious, nevertheless it is a fundamental rule in a criminal trial that the defence must be put to the jury and that it is the right of defence counsel to say what his defence is."
> >
> > The People (Director of Public Prosecutions) v. Hanley (Unreported, Court of Criminal Appeal, 5th November, 1999) was a case where the defence as formulated by counsel was never put to the jury by the trial judge. But the principle underlying the decision is that it is the right of defence counsel (or the defendant) to say what his defence is, and that the defence so identified by the defendant or his advisers is the defence which should be put to the jury in the judge's charge.
> >
> > Where a competently defended prisoner advances a defence, which opens the prospect of a verdict of acquittal if it is accepted, or if it raises a reasonable doubt on any essential matter, it would be a grave responsibility to interfere with its prospects of success by introducing, uninvited, the possibility of what Lord Taylor L.C.J. called 'a compromise verdict'. If the defendant wishes to introduce such topics as provocation or mistake, the threshold for having them considered by the jury is a low one and this fact has presumably been considered by defending counsel. A decision not to introduce them will normally be taken either on the client's express instructions or because of realistic tactical apprehensions which must be presumed to have been discussed with the client. The trial judge cannot, in the nature of things, be privy either to the instructions or the tactical considerations and may run the risk of doing considerable harm to the predetermined defence.'
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> 65. I entirely agree with these views. There may be exceptional cases as, for example, where an accused is unrepresented and has clearly gone down a wrong path in presenting a line of defence, or where utterly incompetent legal advisors have fallen into similar error, that a trial judge may actively intervene in the interests of justice to suggest an alternative line of defence, but such instances will be rare and would require great care on the part of the judge not to do more damage than good.
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> 66. When an accused person is represented by experienced counsel, I would be strongly of the view that a trial judge should not of his own motion raise possible lines of defence which an accused's legal team has not elected to pursue. …"

41. In further support of his Cronin based point, counsel for the respondent also relies on the decision of this Court in *The People (Director of Public Prosecutions) v. T.E.* [2015] IECA 218. In that case the appellant, who was convicted of rape, argued that the trial judge had misdirected the jury on recklessness notwithstanding a failure on his part to raise any requisitions about the judge's charge on that point at the trial itself. While the Court of Appeal accepted that the trial judge's direction contained an error of law it nevertheless dismissed this ground of appeal on the basis of the decision in *The People (Director of Public Prosecutions) v. Cronin (No. 2.)*. It found that *"the central issue in the case was whether the prosecution had proven beyond reasonable doubt that the appellant did not believe that the [complainant] was consenting, in circumstances where he was asserting a positive belief in that regard..."* , and that, *"[r]ecklessness would only come into the picture for consideration if the prosecution, having vaulted the first hurdle by proving beyond reasonable doubt that the appellant did not believe that the complainant was consenting, could not then vault the second hurdle of proving beyond reasonable doubt that the appellant actually knew that the complainant was not consenting. In that*

eventuality, before the jury would be entitled to convict the appellant they would need to be satisfied beyond reasonable doubt that he had acted recklessly, i.e., that the appellant, having adverted to the possibility that the complainant might not be consenting, pressed on regardless in having sexual intercourse with her." In circumstances where no explanation was offered for the failure to requisition the trial judge on his charge as to recklessness, and where the misdirection "was as to a hypothetical state of affairs that simply would not have arisen for their consideration on the run of the case", the essential justice of the case did not require that the appellant be allowed to rely on the point not raised.

42. Finally, the respondent maintains that in any event the trial judge's charge on *mens rea*, knowledge and recklessness was adequate. The full terms of s.2 of the Act of 1981 was opened to the jury. Having regard to the *The People (Director of Public Prosecutions) v. McDonagh* [1996] 1 I.R. 565 no further explanation was required in the circumstances of the case.

43. In addition, with reference to the issue of reckless, the jury was told "*And the male party must know that the woman is not consenting. Now, I have told you already already you can blind yourself to anything if you set your mind to it, so the law caters for a situation where the man doesn't know that the woman is not consenting because he's made damn sure not to find out. So, the offence is also committed if the reason for the man's lack of knowledge in relation to the woman, whether the woman is consenting or not consenting, is because of his recklessness in that regard."*

44. It was submitted that when what the trial judge said is actually teased out, it was consistent with the correct understanding of recklessness. It is consistent because if the man decides that he is not going to question himself about whether the woman is consenting, that's an advertence on his part. He is not a person who does something, i.e., takes a substantial and unjustifiable risk, without thought. Rather, it is a situation in which he says, "*I am not going to ask my self the question because I am a little bit worried that I might answer the question in the wrong way*". It was submitted that even though the trial judge's language was somewhat unparliamentary, it served to convey the essence of recklessness in a form that was not objectionable.

Discussion, Analysis and Decision

45. We have carefully considered the transcript of proceedings in the court below, and in particular the defence closing speech and the judge's charge. We have also considered both the written and oral submissions by counsel on both sides of the appeal, and the authorities commended to us on both sides.

46. When the trial was embarked upon the appellant was presumed innocent and did not bear the burden of proving his innocence. He was not obliged to advance any positive defence. He was entitled to adopt the position vis a vis the prosecution that "*you bring this case against me, I concede nothing and you must prove it beyond reasonable doubt*." He could therefore have opted to defend the case entirely passively, in the sense of putting it up to the prosecution to prove their case beyond reasonable doubt, and solely by means of either seeking to have evidence against him excluded on some legal basis, or by testing the admissible evidence adduced against him in the crucible of cross-examination. However, it was also open to him, at his option, to advance one or more positive defence narratives. Doing so would not operate to shift the burden of proof, which would still remain on the prosecution at all times, but it had the potential to introduce for the jury's consideration an alternative narrative (or narratives) to that being advanced by the prosecution.

47. We are satisfied having read the transcript that the appellant did not opt to defend the case entirely in a passive way. Rather, a single positive defence narrative was put forward, namely that there was actual consent, and in support of that narrative it was strongly urged upon the jury that the behaviour and actions of the parties involved as described in the evidence would, when analysed, be seen to have been consistent only with consensual sexual intercourse and not consistent with rape.

48. No alternative defence narrative was advanced. In particular, it was never suggested in the cross-examination of any prosecution witness that the appellant might mistakenly have been of the subjective belief, whether reasonably or unreasonably, that the complainant was in fact consenting, when in fact she was not. Neither did the appellant suggest mistaken subjective belief in the course of being interviewed by the Gardai, the records of which, comprising both the written note taken at the time and the video recording, were placed before the jury; nor did counsel for the defence make that case to the jury in his closing speech.

49. Rather, having pressed the jury that they should have a reasonable doubt as to the existence of consent based upon the single narrative of consent that was advanced by the defence, counsel for the defence then reverted to what might be characterised as "passive defence mode" and urged the jury as follows:

> *"… we're all in agreement that sex occurred, do you understand? The question is, was it consensual or non-consensual. And of course, you have to ask the further question, if it was non-consensual on the part of Ms O'C, do you understand, did the accused person know, or were reckless as to whether or not it was or was not on consent. It's a double, as it were, hurdle that you have to get over. And you have to get over it."*

50. This was the high water mark of any suggestion from the defence that the jury might need to engage with the issues of knowledge or recklessness. It did not involve commending to them an alternative positive defence narrative of mistaken subjective belief. On the contrary, the effect of it was simply to remind the jury, as a matter of passive defence, that before they could safely convict they would have to be satisfied beyond reasonable doubt that at the time of the intercourse the appellant knew that she did not consent to the intercourse, or was reckless as to whether she did or did not consent to it.

51. The ten initial grounds of appeal against the appellant's conviction that were filed by the original defence team made no complaint about the adequacy of the trial judge's charge with respect to *mens rea*, or with respect to the issue of the appellant's knowledge, or with respect to recklessness. Rather they were based essentially on the contention that, having regard to inconsistencies in the evidence adduced by the prosecution, the conviction was incorrect, wrong and unsafe, and against the weight of the evidence. In particular, the focus was on inconsistencies in the evidence adduced to support the prosecution contention that there was no consent.

52. At some point the original legal team was discharged, and the present legal team was engaged to continue with the appeal. They have sought to abandon the grounds of appeal originally filed, and based on a review of the transcript have sought to substitute the grounds of appeal now being relied upon. The respondent has raised no objection to the abandonment of the original grounds, or to the substitution of the new grounds of appeal, but has reserved her right to argue that the complaints now being made concerning the adequacy of the judge's charge should not be entertained in circumstances where no relevant requisitions were raised at the trial.

53. As anticipated by counsel for the appellant, the respondent seeks to rely on *The People (Director of Public Prosecutions) v. Cronin (No. 2.).* He makes the valid and important point that no explanation has been put forward for the failure to raise a requisition at the trial, if indeed the trial charge's charge was inadequate. Assuming such inadequacy, which the respondent does not concede, just for

the sake of the argument, the point is made that there has been no evidence adduced from anybody on the original legal team to say that the failure to raise requisitions was due to an oversight, or possibly offering some other explanation for not doing so. The *Cronin (No 2)* case makes it clear that an explanation is, in the normal course of events, called for. This is particularly so where there might have been good tactical or strategic reasons for not doing so.

54. In *The People (Director of Public Prosecutions) v. Zhao Zhen Dong* [2015] IECA 189 (Unreported, Court of Appeal, Birmingham J, 26th June 2015) this Court stated:

> *"The absence of requisitions has never been regarded as an absolute bar to a point being successfully raised on appeal. The real relevance of the absence of requisitions is that it provides an indication that a point now sought to be raised on appeal and now said to be important did not strike those engaged in the trial as being of significance….When after the trial, a charge is subjected to criticism on a particular aspect which has not been the subject of requisition, a court may well be disposed to conclude that the point being raised was not one of substance in the context of the run of the trial and that the court should decline to intervene. However, the present case was a particularly balanced one. In those circumstances, it was particularly important that the jury should have the assistance of a charge that was clear, comprehensive and easily understood."*

55. It is clear to this Court that the then defence legal team might well have had good tactical or strategic reasons for not raising any requisition as to the adequacy of the judge's charge. The most obvious potential one is that the defence team may have viewed the trial judge's charge as being perfectly adequate having regard to the single positive defence narrative that had in fact been advanced.

56. The defence narrative was that there had been actual consent communicated by the complainant's reaction to him entering the bedroom, and by her positive participation and demeanour in the lead up to sexual intercourse and during the act of sexual intercourse itself.

57. It will be recalled that the appellant had contended that having entered the complainant's bedroom he had woken up the complainant who was sleeping; that he had then asked her if he could sleep with her and that she had replied "yes"; that he had then got into the bed with her and had laid beside her; that they had then both engaged in kissing and touching each other; that they had then both taken off their clothes with the appellant helping the complainant to take off her clothes; and that they had then proceeded to have sex, with the appellant on top of the complainant and throughout which the complainant was kissing the appellant and manifesting enjoyment of the sexual act.

58. It would have been difficult in circumstances where that narrative was being put forward, and where the prosecution's narrative was radically different and indeed arguably irreconcilable with it, to have simultaneously run a subsidiary defence narrative of subjective mistaken belief. Indeed as counsel for the respondent put it in the course of oral submissions to this Court: *"it would have been absolutely subversive of the main point in the case, which was stated by all the counsel, consent and no consent as the issue."*

59. Elaborating on this, counsel for the respondent further stated in oral submissions before us:

> *"… he could only have done that in my respectful submission by saying 'and by way ladies and gentlemen I have run a defence on consent and I said I went into the room, turned on the light, we chatted, she said she was grand, we kissed, we talked, she helped me off with my clothes' -- how could defence counsel having commended that to a jury turn around and say – 'and by the way if you think that's a pack of lies, I also want you to consider something different'. The jury could only have both accepted the complainant's account and rejected that of the defendant to get to the position of convicting and that in my respectful submission therefore means that it would have been unthinkable that a defence counsel in those circumstances would say 'and by the way if you reject everything we say about the issue of consent what is there left?' That is why we say in a very case specific way this was all bound together and the possibility or the likelihood of any defence counsel saying to a jury 'look if you are satisfied that she was right, if you are satisfied that she was asleep, obviously go on then, did he think she was consenting' because they are all part of the same situation. And the fact that [defence counsel] mentions the question of belief, or that he didn't act like as though he believed he was a rapist, in my respectful submission it does not amount to saying that there was a live issue in the case of an honest but unreasonable mistake. And that then also feeds into the question of the recklessness."*

60. We recognise the force of this submission and agree that it represents a highly plausible possible explanation for the failure to raise a requisition. As the passage from the judgment of Kearns J in *Cronin (No 2.),* quoted earlier at paragraph 40 of this judgment, makes clear, if a defendant has the right to make and chose his defence then he also has the right to say *"I don't want to run a subsidiary case".* If it is indeed the case that a strategic or tactical decision was made not to put forward a subsidiary case that was difficult, if not impossible, to reconcile with the primary defence narrative, then the appellant cannot now be permitted to complain about it, or to seek to have consequential issues revisited.

61. In circumstances where there are reasonable grounds for suspecting that the failure by the original legal team to raise a requisition may have due to a tactical or strategic decision as to how the case was to be defended, it is incumbent on an appellant who has discharged his original legal team and introduced a new legal team, and who contends otherwise, to adduce evidence as to what was in fact the alternative explanation, if indeed there is one, for not raising a requisition. It is fair comment to record that no such evidence has been adduced in this case. This Court has been offered the mere speculation of senior counsel for the appellant that there may simply have been an oversight. We cannot be expected to operate on the basis of such speculation. Evidence is required.

62. It is difficult in the circumstances to see how it can be credibly contended that the essential justice of the case requires that the appellant should now be allowed to complain about the adequacy of the trial judge's charge on the issues of the required *mens rea*, knowledge and recklessness.

63. We are satisfied that, applying the principles set out in *The People (Director of Public Prosecutions) v. Cronin (No. 2.),* the appeal should be dismissed.

64. Although strictly speaking it is unnecessary to engage with the merits of the appellant's grounds of appeal, in circumstances where we are satisfied that the appeal must be dismissed on *Cronin (No 2)* grounds, we nevertheless propose to comment briefly on them.

65. The trial judge accurately rehearsed for the jury the statutory definition of rape as set out in s. 2 of the Act of 1981, as

amended, including both the components in s. 2(1)(a) and (b), respectively. He also read out to them subsection (2) of s.2. Then in respect of each of the components identified, he gave a more detailed and particular explanation stating, as he invariably did, that in doing so his intention was to *"strip down that definition for you as if I were stripping down a motorcycle".* He dealt with the particular form of rape involved; the physical acts constituting rape; that fact that ejaculation was not required; the fact that penetration, however slight, was required, and so on. He further stated "*the absence of consent rather than force or violence is the essence of the crime. Now, if the woman is consenting it's none of our business. And the male party must know that the woman is not consenting. Now, I have told you already that you can blind yourself to anything if you set your mind to it, so the law caters for a situation where the man doesn't know that the woman is not consenting because he's made damn sure not to find out. So, the offence is also committed if the reason for the man's lack of knowledge in relation to the woman, whether the woman is consenting or not consenting, is because of his recklessness in that regard.* The trial judge then went on to immediately recite subsection 2 of s. 2 of the Act of 1981 for a second time, and then added: *"Now, that is simply telling you in very flowery legal language that, in relation to the question of consent, you take all the circumstances into account."* The trial judge also told the jury that they were not entitled to infer consent from the absence of any resistance or struggle on the part of the woman. Finally, he concluded this part of his charge with an apposite quotation from Finlay C.J.'s judgment in *The People (Director of Public Prosecutions) v. F.* (unreported, Court of Criminal Appeal, 27th May 1993), a seminal case on the law of rape, in which the former Chief Justice had stated that *"[h]aving regard to the terms of section 2, the prosecution in order to establish the commission of the crime of rape must prove beyond a reasonable doubt the following matters: One, that the accused had sexual intercourse with a woman who at the time of the intercourse did not in fact consent to it, and, two, at that time the accused knew that she did not consent, or, three, that at that time the accused was reckless as to whether she did or did not consent*".

66. In *The People (Director of Public Prosecutions) v. McDonagh* [1996] 1 I.R. 565, questions were referred to the Supreme Court by the then Court of Criminal Appeal pursuant to s. 29 of the Courts of Justice Act 1924. The questions referred were both generic and case specific. The Supreme Court was expressly asked to answer the following generic query: *"In any rape trial in which the fact of sexual intercourse is admitted and in which the defence of consent is raised is it necessary that the trial judge should refer to and explain to the jury the provisions of sub-s. 2 of s. 2 of the Criminal Law (Rape) Act, 1981*? That question was duly answered as follows: *"In every rape trial in which the fact of sexual intercourse is admitted and in which the defence that the complainant consented to it is raised it is not necessary that the trial judge should refer to and explain to the jury the provisions of sub-s. 2 of s. 2 of the Criminal Law (Rape) Act, 1981 - the need to do so and the terms in which it should be done will depend on the facts of each case."*

67. We are satisfied that in the circumstances of this particular case it was not necessary for the trial judge to go further than he did in explaining s.2(2) of the Act of 1981, as a single narrative was being relied upon by the defence, namely that the complainant had consented. It is true to say that the sentence in the trial judge's charge containing the reference to "*flowery language*" is inelegantly and somewhat infelicitously phrased. Had it been the case that the defence were asserting, even as a subsidiary case, a narrative based upon subjective mistaken belief we consider that the direction given would not have been adequate, because it fails to emphasise the wholly subjective nature of the test, and that, whether in relation to knowledge or recklessness, s. 2(2) does not make the presence or absence of reasonable grounds for a belief that the woman was consenting the determining or only factor, and that the presence or absence of reasonable grounds are merely something which the jury is to have regard to in conjunction with any other relevant matters.

68. We note the contentions of the respondent concerning the trial judge's charge in relation to recklessness. While we are prepared to accept that there was no actual misstatement of the law, and that what was stated was not inconsistent with a correct understanding of recklessness, it was very far from ideal particularly in terms of its failure to state with precision all of the components of the established definition of recklessness. Nevertheless, despite the sub-optimal formulation employed, we are satisfied that it created no risk of injustice in the particular circumstances of the case, and that it did not render the trial unsatisfactory or the conviction unsafe.

69. Ultimately, we find ourselves in agreement with the respondent that the trial judge's charge was adequate in terms of the matters which the jury were going to have to consider having regard to the run of the case. This is in circumstances where we are satisfied that neither subjective mistaken belief, nor recklessness, was in fact a significant issue in the case.

Conclusion:
70. The appeal will therefore be dismissed.