THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J

Record No: 203/2013

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

W.M.

Appellant

JUDGMENT of the Court delivered 15th May, 2018 by Mr. Justice Edwards

Introduction
1. On the 8th of July 2013, the appellant was convicted by a ten member jury of the offences of aggravated sexual assault, contrary to s. 3(1) of the Criminal Law (Rape) (Amendment) Act 1990, and causing serious harm, contrary to s. 4 of the Non Fatal Offences Against the Person Act 1997, respectively.

2. On the 29th of July 2013, he was sentenced on each count to 13 years imprisonment, both sentences to run concurrently. The sentences were to take effect from the 11th of January 2012. The appellant now appeals against his conviction and sentences.

3. This judgment deals solely with the conviction issue.

The facts of the case.
4. The case was concerned with an incident that took place some days prior to the 8th of December 2011 at an address in a small village in rural Ireland. The jury heard that the complainant in the case was a thirty three year old woman who is an alcoholic and who also had had a drug problem, although she was off drugs at the time of the incident. The complainant first encountered the appellant approximately eighteen months prior to the incident. At that time she was living alone in rented accommodation in the village. On the evening on which she first met the appellant she had been drinking and had lost her keys. The appellant, a resident of the village and sixty six years of age at the time, came upon the complainant as she was searching for her keys. He was helpful to her, and when it was evident that the keys could not be found, he brought her to his house and let her stay until she managed to get new keys.

5. Thereafter a friendship developed between them, and the complainant began to visit the appellant's house regularly. She moved away from the village for a time but eventually returned. Throughout this time she remained friendly with the appellant. Upon her return to the village the complainant had nowhere to stay, having given up accommodation she had previously been renting. At the appellant's invitation she moved into his house, and was allowed to sleep on a sofa. Over time the complainant and the appellant became sexually intimate. In her evidence the complainant maintained that this was not because she regarded herself as being in a relationship with the appellant, but rather because it was expected of her in lieu of payment of rent. She stated that he said that if she didn't want to have sex with him she knew where the door was. She further stated that he wanted her to do things that she did not want to do, and sometimes she would *"have to drink a lot of drink to be out of it to do some of the things he wanted me to do."*

6. The complainant described how, on the occasion of the incident the subject matter of the charges, she was woken from sleep in the middle of the night to find her trousers down. Referring to the appellant, she told the jury:

> *"I remember lying -- I remember there, and he got his hand, his whole fist and put it up inside me and I could feel, do you know my stomach, I could feel the pain. I could feel it up in my stomach. It was the worst pain I ever, ever felt in my whole entire life, and I felt his hand twisting around inside and I screamed. I said, "F off." I screamed and he put his hand over my mouth and he told me to be quiet, and I can remember getting my two hands and getting his fist and pulling him. I don't know where I got the strength and I pulled -- pulled his hand out of me and that's when I started bleeding. After that I said, "I think you should call an ambulance." That, "I think I'm haemorrhaging." And he said to me, "Ah no, you'll be okay but if you feel something passing", he said, "It'll just be a clot, a blood clot."*

7. The complainant went on to say:

> *"I can remember after this happened, after I got his fist out from out -- when I took his fist out -- when I took his fist away from me out from inside of me I can remember I started getting, kind of, you know, like, back pains in my back and I started not to feel well, do you know like, in my stomach. I didn't -- really did not feel well. Do you know, I didn't really feel well, and all I know is then I ended up in the hospital."*

8. She was further asked, and answered:

> *"Q. …. did you ever give him permission to put in his hand into your vagina?*
>
> *A. No. Never, ever.*
>
> *Q. Had this ever happened before?*
>
> *A. No.*
>
> *Q. Did he ever want to put any -- anything other than a vibrator into you at any time?*

A. He had this thing called a turkey baster, and he said that if I did not want to have sex with him he wanted to, like, put --

Q. What did he want?

A. He wanted to put sperm inside and put it in - you know like try to put it inside me to try and get me pregnant to have a child for him, and offered me €10,000, that if I had a kid for him they'd give me €10,000 and I wouldn't have to worry about it. He said I'd just have the child and give it to him and go away."

9. In further describing the assault the complainant said:

"A. …as I woke up like I felt him open my -- my trousers. Do you know, my trousers were down. I felt him doing that and I just -- I felt him getting his fist and he just -- he done it so vicious he just went straight up really fast and quick just like that and right up, and I could feel him twisting around in my stomach. I could feel his hand twisting around.

Q. What pain were you in at that time?

A. The pain was unbelievable, like. I have children and it was actually worse than giving birth, this pain."

10. The complainant said that although she had been sleeping on the sofa before the assault, she ended up on the ground as a result of it, next to an electric fire. There was then the following exchange:

"Q. Yes. And were you able to stand at that time or where were you?

A. I couldn't -- I could barely walk -- I couldn't even walk, you know, after it, because when I stood up I could feel the blood was just gushing out of me and it wouldn't stop, and I was so frightened because I thought that it's not going to stop. But that time that I felt that I needed an ambulance to be called, that was the one time he wouldn't call an ambulance.

Q. So what happened then in your own words?

A. He just -- I said to him that sure -- I said I swore, I said, "F-off your hands -- your hand out of me", but he blocked my mouth and said -- told me to be quiet and covered my mouth and as --

Q. Why did he cover your mouth?

A. Because I was screaming, I was in so much pain.

Q. And what happened to you next after that?

A. After that I stood up and I needed to go to the toilet to try and clean myself and the blood -- because the blood was coming out of me, and I just -- I just did not feel well."

11. The evidence was that the complainant became progressively more unwell over succeeding days. Eventually the appellant called the complainant's general practitioner on the 7th of December 2001, who made a domiciliary call, and formed the view that the complainant had a significant infection for which she needed hospitalisation. Although the complainant was initially reluctant to go to hospital, and resisted the suggestion for a further 24 hours, by the evening of the 8th of December 2001 her condition had deteriorated to the point where the complainant was unable to put up further resistance and she was taken to hospital by ambulance.

12. The jury heard evidence from a Consultant Obstetrician/Gynaecologist who, together with a general surgeon, attended to the complainant in the hospital. He told them that she was initially admitted to intensive care in circumstances where he believed her to be suffering from an infection that was most likely intra-abdominal, with a likely build up of pus and fluid in the abdomen. She was taken from intensive care to an operating theatre where the General Surgeon intended to open her abdomen to see where the infection was seated and to clear out any pus and infected fluids found there. The witness was asked to simultaneously examine her from a vaginal or gynaecological point of view. He then described what he and his colleague found in the course of the operation:

"A. -- to look at the poor girl, when she was on the -- on the operating table I am in a position that I can look at her -- at her bottom end, at her vulva. We noticed that she had unusual burns or -- I'm not quite sure, we weren't able to characterise them really, but her buttocks were -- looked like they had been burnt or, you know, chemical burns, it's hard to know what type of burn, was it flame, fire, heat, water, but nonetheless they looked like burns, they didn't look like anything else. Also down below she was very swollen, but that would be in keeping with somebody that was in intensive care and was very sick. Once I examined inside in the vagina up on the left side of the vagina, very high up in the vagina there was a very long laceration, seven or eight -- or six -- six to seven centimetres long. Tough to kind of quantify length-wise, naturally we don't get out rulers, but that's about the length of it. It was very jagged edged. There was -- and I don't want to, you know, upset people by saying, but it was pouring with pus just coming out of it. And as, you know, it was in a location that was near large blood vessels inside in the middle of her pelvis, and as [the General Surgeon] was doing his end of the procedure we noticed that we could actually make physical contact with each other which should never ever be able to be made, it's impossible.

Q. All right, do you mean you made physical contact?

A. We actually -- our fingers -- he was -- he was cleaning out the debris and the pus and that kind of material and when he got down and he scooped a lot of this stuff out, he was actually able to -- there was a hole from this laceration. It wasn't just a laceration, it's not just a cut; this was a defect; a hole right the way up inside this poor woman up into her abdominal cavity. And --

Q. Am I understanding you, you can touch from her stomach down to her vagina?

A. It should never be able to happen, because there's the uterus, the bladder, the bowel, everything's in the way, but this now is a hole that we're -- that was, you know, we were able to meet up and commented almost immediately that, "How is this woman alive?" And that's not for dramatic purposes, this is what we thought.

Q. Did you examine the edges of the laceration?

A. Yes, as best you can see. As you can understand, it's -- it's up inside the vagina so it's -- it's, you know, as best we could, yes, they were rough edged. You know, again with experience I was able to know that they'd partly healed, this wasn't -- this didn't happen the day before or anything, this was a few days on the go."

13. The witness stated that he had rarely seen an injury like this, his only previous experience of anything approaching it was while treating women who had been raped with machetes while he had been working in sub-Saharan Africa. He stated that it could not have been caused by normal sex, or with a vibrator. It would have required *"some sort of object that had length to it, that was sharpish. It doesn't have to be a blade sharp, but it could be sharp enough to push through tissue in that part of the body, so it needed to be an object, and because of the, I suppose, the ability of myself and [the General Surgeon] to make contact with each other, this object had to have a certain degree of length and depth to it."*

14. This evidence was followed by these further exchanges:

"Q. What degree of seriousness would you attach to these injuries?

A. This is life-threatening this is.

Q. And how painful would this be, prior to entering into the hospital?

A. At the time that it was inflicted I'm sure it would have been excruciating. Now, that's -- I mean, again you gave -- or you were saying there that the poor girl was, you know, sort of, had a lot of alcohol in her system, that can, you know, but it's still -- would have caused a serious amount of pain.

Q. Could it be self inflicted?

A. Impossible, that degree of force, impossible."

15. The evidence was that, notwithstanding the gravity of her injuries, the complainant survived and nominated the appellant as having assaulted her. The prosecution's case was that the mode of sexual assault was the insertion by the appellant of his fist into the complainant's vagina as described by her, as well as possibly some hard object with length and depth to it, such as the object described as a turkey baster, not designed for vaginal insertion.

16. The appellant was in due course arrested on suspicion of sexual assault, and was detained at Kilkenny Garda Station. While in detention he was interviewed. While he denied at all stages inserting his fist in the complainant's vagina, he made certain admissions that the prosecution sought to rely upon, including that on occasions he had used a turkey baster to inseminate women with his semen that he wished to impregnate and who had had problems conceiving. However, his admissions in that regard did not extend to an admission that he had attempted this on the complainant.

17. The appellant did not give evidence before the jury.

The Grounds of Appeal

18. There are four grounds of appeal, covering three substantive complaints. They are:

(i). The trial judge erred in not affording the appellant any/or sufficient time to obtain and/or instruct a new solicitor after difficulties arose between the solicitor on record and the appellant during the trial, resulting in the appellant discharging his solicitor.

(ii). The trial judge erred in refusing to discharge the jury and adjourn the trial on the application of the appellant.

(iii). The trial judge erred in not affording sufficient regard to the appellant's concerns as raised over the reduction in the number of jurors prior to the beginning of their deliberations.

(iv). The trial judge erred in refusing to discharge the jury after the complainant, during her evidence, stated that the appellant was a "sex offender" and listed on the "sex offender list"

19. Grounds (i) and (ii) are addressed together in the appellant's written submissions and the Court will adopt the same approach. However, for reasons of chronology and convenience it is proposed to deal first with ground of appeal no (iii), then grounds (i) and (ii) together, and finally ground (iv).

Ground (iii)

20. The complaint here arises in the following circumstances. The trial had been projected to last for seven days (including the arraignment day), starting on a Thursday and to finish on the following Friday. It in fact ran for eight days, with the result that it straddled three calendar weeks instead of the projected two. The trial commenced with a jury comprised of the usual twelve members. However, when it became apparent after some days had elapsed that the case was likely to over run, and would enter a third calendar week, a juror advised the trial judge that that would create a difficulty for him.

21. On being so advised (on day 5) the trial judge addressed the jury and said:

"JUDGE: All right, Mr Foreman, ladies and gentlemen. One of the things we were doing in your absence was we've been trying to look at the timetable, and I'm not really in a position to say anything very certain or very definite at this stage. There's still a prospect that the case may finish on Friday, which I think was the original target date. I think it's more likely that it would spill into Monday and conceivably Tuesday, but that remains to be seen. We'll certainly have a clearer picture, I think, by close of business tomorrow, as to what the timetable is. In the event that it did spill into next week, I gather that we might have the possibility of having the juror available to us on Monday and Tuesday, and that in all likelihood will see the case finished. If - and nobody wants to see this happen - matters went beyond that and it was impossible for the juror to be present, there is provision in law for concluding a case with 11 jurors. I'm sure some of you will have read accounts of cases in newspapers where that has happened. We'd all much prefer to avoid that. We've had the 12 of you from the beginning. the 12 of you as a team have heard the evidence, and we'd like to have you as a complete team. But if the worst came to the worse, that's there as an option. But for the moment we'll simply get on

and try and make as much progress as we can. All right?"

22. The situation did not improve and the case did spill into a third week. In those circumstances, on day seven of the trial which was the Friday of the second week, the trial judge canvassed with the juror who had flagged a possible difficulty whether that was still the case, and he was told that it was. He was then advised by the foreman that not just one, but two, members of the jury were in difficulty because of the over run. The jury was sent away to discuss whether the problems would still exist if the case were to conclude by the following Wednesday by the latest, and they came back after a short time and said that that would not assist.

23. In the absence of the jury counsel were asked:

> *"JUDGE: Does anyone want to say anything about the idea of ten jurors if we're reduced to that?"*

24. Counsel for the prosecution expressed some concern at the prospect, but said it was ultimately a matter for the court. Counsel for the appellant asked for some minutes to take instructions from his client. After doing so, he stated:

> *"DEFENCE COUNSEL: I have my client has no objection, my lord, if the second member of the jury is allowed go on holidays as well."*

25. After the jury had returned to say that there remained a problem, the trial judge addressed them as follows:

> *"JUDGE: All right. Well, it's a very unusual situation; there is in fact provision in law for proceeding with ten jurors. It's it's far from ideal, but it seems to me that's a preferable situation than to put ourselves under a deadline, because the problem is that whereas I can discharge a juror now, I don't believe once you had actually start deliberating, that I could discharge a juror. So if you had a situation where you started and you were still discussing the matter on Tuesday and that your discussions were spilling on to Wednesday, I think my hands would be tied. So I think what we'll do is I'll discharge the two jurors that you've indicated have difficulties. We'll resume at, say, 10.15 on Monday. I note your willingness to sit late on Monday, and we'll do that. If we can do something similar on Tuesday, so it may be that we will avoid the spillage into Wednesday at all. But I think we have to keep that option there available to us. And on that basis the two jurors that have as I gather they have, insuperable difficulties for Wednesday I'll discharge them. So who are the two jurors involved? All right, well, I'm sorry to be saying goodbye to you both. You've obviously committed to yourself to what has been a long and difficult and in some in many ways distressing case, so your willingness to serve is greatly appreciated. But I appreciate that people have commitments over and above their commitments as jurors. So I'll say goodbye to the two of you, and thank you for serving, and I'll see the rest of you at 10.15 on Monday."*

26. On the following Monday, day eight of the trial, the appellant discharged his legal team. In the circumstances in which this occurred, the trial judge refused an application for time to allow him to instruct a new legal team and informed the appellant that he would have to either re-engage his previous legal team or represent himself for the remainder of the case. The appellant re-iterated that he needed a new legal team, and this led to the following exchanges:

> *"JUDGE: No, I'm afraid you're not getting another legal team, so the case proceeds now in the absence of [previous Defence Counsel] and the team he leads, and you defend yourself.*
>
> *ACCUSED: Well, we've only got ten jurors.*
>
> *JUDGE: That's so.*
>
> *ACCUSED: Well, they agreed to give ten jurors; I didn't agree to allow ten jurors.*
>
> *JUDGE: The position is that counsel and solicitors were instructed, have allowed the case to come to this case. The case proceeds with ten jurors. If [previous Defence Counsel] and his team on your instructions continue to represent you, that's fine. If on the other hand, you have discharged them, then you represent yourself.*
>
> *ACCUSED: Yes, the discharge -- because it should have gone for a retrial, it should not have*
>
> *JUDGE: I see, all right, thank you Mr M, I don't need to know why you've taken the decision."*

27. The appellant now complains that there was an unfairness in his trial by virtue of the trial judge allowing the number of jurors to be reduced to ten, and that consequently the trial was unsatisfactory and the verdict is unsafe on that account.

28. We disagree. Section 23 of the Juries Act 1976 expressly provides:

> "23.—Whenever in the course of the trial of any issue a juror dies or is discharged by the judge owing to his being incapable through illness or any other cause of continuing to act as a juror, or under section 9 (7) or 24, the jury shall, unless the judge otherwise directs or the number of jurors is thereby reduced below ten, be considered as remaining properly constituted for all the purposes of the trial and the trial shall proceed and a verdict may be found accordingly."

29. The trial judge therefore had a discretion as to whether or not he should permit the trial to continue with just ten jurors. The only issue is whether or not the discretion was legitimately exercised.

30. Before the trial judge made his decision he took steps to satisfy himself that the flagged problem was real and unavoidable, which it was, and further sought the views of the legal teams on both sides. Moreover, in response to a request that he should do so, he afforded an opportunity to defence counsel to take instructions from the appellant. Defence counsel duly took instructions from the appellant and then informed the trial judge in express terms that *"my client has no objection".* We are satisfied that in the circumstances the jurisdiction of the trial judge was properly and legitimately exercised, and there was no unfairness in allowing the trial to proceed with just ten jurors.

31. In the circumstances we dismiss ground of appeal no (iii).

Grounds (i) and (ii)

32. These grounds are concerned with a development in the trial on day eight when the appellant sacked his legal team. At this point the prosecution's case had just closed. Up to that point the appellant had been represented by an experienced legal team comprised

of senior counsel, junior counsel and a solicitor. Moreover, his senior counsel was a particularly highly experienced and competent criminal law specialist. As part of the appellant's defence the said senior counsel had rigorously cross-examined the complainant and other prosecution witnesses, including the medical witnesses, at length and forensically.

33. However, on the morning of day eight, as the trial was entering its third calendar week, before a jury that had been reduced in numbers to ten members with the consent of the appellant, the following (which includes some exchanges already alluded to) occurred:

> *"JUDGE: Yes, Mr [Defence Counsel]?*
>
> *[DEFENCE COUNSEL]: My lord, before the jury come out, my client has discharged my solicitor, my lord.*
>
> *JUDGE: I see.*
>
> *[DEFENCE COUNSEL]: And that being the case, my lord, my junior and myself have to depart as well.*
>
> *JUDGE: All right. Well, I'm sorry to hear that. Mr M, it's entirely your decision, if you wish to discharge your solicitor and counsel you're free to do so. But don't be under any illusions about that, or any mistakes: The case will proceed and you'll simply end up having to defend yourself.*
>
> *ACCUSED: I am not capable of doing that, sir.*
>
> *JUDGE: You're not capable of doing it?*
>
> *ACCUSED: No.*
>
> *JUDGE: Well, then I think you should reconsider your decision.*
>
> *ACCUSED: No, I need another legal team, sir.*
>
> *JUDGE: No, I'm afraid you're not getting another legal team, so the case proceeds now in the absence of Mr [DEFENCE COUNSEL] and the team he leads, and you defend yourself.*
>
> *ACCUSED: Well, we've only got ten jurors.*
>
> *JUDGE: That's so.*
>
> *ACCUSED: Well, they agreed to give -- ten jurors; I didn't agree to allow ten jurors.*
>
> *JUDGE: The position is that counsel and solicitors were instructed, have allowed the case to come to this case. The case proceeds with ten jurors. If Mr [DEFENCE COUNSEL] and his team on your instructions continue to represent you, that's fine. If on the other hand, you have discharged them, then you represent yourself.*
>
> *ACCUSED: Yes, the discharge -- because it should have gone for a retrial, it should not have*
>
> *JUDGE: I see, all right, thank you Mr M, I don't need to know why you've taken the decision. Mr [DEFENCE COUNSEL], thank you very much, and your junior, for your attendance.*
>
> *[DEFENCE COUNSEL]: Thank you, my lord."*

34. The jury were then recalled, and the trial judge addressed them as follows:

> *"JUDGE: Good afternoon, ladies and gentlemen. There has been a development insofar as Mr M, as he's entitled to do, has discharged his legal team, and apparently, on that basis, the trial will now be proceeding with Mr M defending himself. So Mr M, I should explain the situation where you've chosen to be no longer represented, the options that are available to you. On Friday last the prosecution case closed, and the position now is that there are a number of options available to you. You can, if you wish, give evidence on your own behalf. That would involve going into the witness box, taking the oath, and if you do that you'll be subject to cross examination by Mr [Prosecuting Counsel], counsel on behalf of the DPP. Alternatively, you're not obliged to say anything, and you may simply indicate that you do not wish to go into evidence. It's always the entitlement of a party whether represented or unrepresented to remain silent and not go into evidence. In either event, whether you give evidence and are cross examined on or whether you choose not to, you will have in due course an opportunity to make a speech and make submissions to the jury and you'll have the last word in that regard, speaking only before me. I'll be the only one who will come after you. So Mr M, what do you want to do, do you want to give evidence or do you want to exercise your right not to give evidence?*
>
> *ACCUSED: I need a legal team, your honour.*
>
> *JUDGE: No, Mr M, the State have provided you with a legal team at considerable public expense, it might be said, and it's not acceptable that on, whatever this is now, day 7 or 8 of the trial, that you discharge your legal team. It's too late for new legal teams. Your existing legal team were here up to a few moments ago and were in a position to represent you. If you don't want them, the only choice available to you is to represent yourself. You're now representing yourself, and I've asked you what you want to do. Do you want to give evidence on your own behalf or not?*
>
> *ACCUSED: I want a retrial. I can't give evidence on my own so I'm not going ...*
>
> *JUDGE: There is -- this trial is going to continue through to a conclusion, and the only question is what procedure is going to be followed between now and the end of the trial by you. So the question is, do you want to get into the witness box and give evidence to the ladies and gentlemen of the jury, or do you not want to give evidence?*
>
> *ACCUSED: I did want to give evidence, but I've no legal team.*

JUDGE: So, well does that mean you don't want to give evidence?

ACCUSED: I can't give evidence.

JUDGE: I see, well then we're into the question of closing speeches. Mr [Prosecuting Counsel], do you propose to exercise your right in the circumstances to make a closing speech or do you want to consider your position in that regard?

[PROSECUTING COUNSEL]: I think I'll be very brief, my lord, but I think I should exercise it."

35. In submissions to this Court, the appellant's present counsel has referred us to a passage from the judgment of O'Higgins's C.J. in *the State (Healy) v Donoghue* [1976] I.R. 325 at 350, wherein the former Chief Justice states:

> *"The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing, as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance."*

36. It was submitted that the appellant did not seek to self-represent and therefore there was a special responsibility on the trial judge and prosecution to ensure fairness for the accused. It was submitted that the trial judge's direction that the appellant must defend himself was a decision reached peremptorily and without exploration of the appellant's stated inability to defend himself. While counsel for the appellant accepts that a trial judge must ensure the smooth and efficient running of the trial process, the appellant's right to a fair trial in accordance with law superseded any such considerations.

37. It has been further submitted that the court should have afforded the appellant a short adjournment to re-consider the ramifications of the decision undertaken by dismissing his solicitor. It is suggested that any acrimony between the appellant and his solicitor might well have subsided after a short period of reflection, which should have been afforded to the appellant in vindication of his right to fair procedures under Art 38.1 of the Constitution.

38. While it was not submitted that the trial judge operated a fixed policy the appellant does rely by analogy on the case of *The People (Director of Public Prosecutions) v Desmond* [2004] 3 I.R. 486. In that case the Court of Criminal Appeal (at 495) stated:

> *"18 This court accepts that the granting or refusing of an application for an adjournment pre-eminently is a matter for the discretion of the judge to whom the application is made. An appeal court is always extremely reluctant to deal with or comment on the exercise of such discretion. However, the relevant discretion can only be exercised when the application has been made and the arguments have been heard and considered. If an application is made and refused at the discretion of the court, such refusal must be based on the facts of the particular case and the submissions made to a judge. Every application for an adjournment at whatever stage of the criminal process must be considered on its own merits. An application for an adjournment after the accused person has dispensed with the services of his or her legal advisors and just as a jury is about to be empanelled to try the case should attract rigorous scrutiny. The court will consider such matters as whether this was a first such application, the reasons given for seeking an adjournment, remembering that the accused person does not have to disclose any aspect of his or her defence, the extent to which the accused person has contributed to his or her being unable to proceed, the balance between the constitutional rights of the accused to fair procedures and the right of the people to have offences tried expeditiously, the risk of unfairness to the accused if an adjournment should be denied, which will involve consideration of the nature and gravity of the charges, the complexity of the law involved, the seriousness to the accused of a conviction, the character and education of the accused person and other matters. The court must also consider the disruption of court business the effect such an adjournment would have, (if any) on other trials pending before the court, the length of the adjournment sought or actually necessary and other considerations which will vary with each application. The foregoing are not to be regarded as rules or principles or even guidelines, they are no more than an indication of the sort of issues which may fall to be considered and so ought to be considered when an application for an adjournment of a criminal trial is sought. If these matters are not considered, then the discretion has not been properly exercised."*

39. In response to these submissions counsel for the respondent has argued that there was nothing unfair in what occurred. The appellant was invited by the trial judge to reconsider his position prior to the trial proceeding in the absence of legal representation. He was warned by the trial judge that if he opted to dismiss his legal advisers that the trial would not be abandoned and that the matter would proceed. In neither the written, nor the oral legal submissions, made to this Court on his behalf, did the appellant make any complaint about the conduct of his advocates or the manner in which they conducted the trial up to the point of their dismissal. The appellant informed the trial court that he was unable to defend himself and said that he needed another "legal team". His action appears to have been a strategic decision on his part to seek to have the case withdrawn from the jury and to try to obtain a new trial in front of a new jury in circumstances where he perceived that the case was not going well for him. His basis for seeking to contrive this seemed to rest on the fact that there were only ten jurors remaining on the jury, a position to which he had consented through his legal advisers on the seventh day of the trial. After the interaction with the trial judge (quoted at paragraph 33 of this judgment), the appellant then seemed to intimate that he wanted a retrial.

40. Counsel submitted that the trial judge acted correctly and properly in insisting that the trial should proceed, notwithstanding the discharge by the appellant of his lawyers, in circumstances where all of the prosecution's evidence had by that stage been put before the jury. In particular, the complainant had presented her evidence and was subjected to lengthy and vigorous cross-examination conducted by counsel acting upon the instructions of the appellant. It should not be open to an accused, who senses that a trial may be going against him, to seek to up-scuttle the proceedings and secure a re-trial before a new jury by the simple expedient of discharging his legal team.

41. Counsel for the respondent further pointed out that, while the appellant now complains that "he did not seek to self-represent", this is erroneous and a mischaracterisation of the true position. It was he himself who chose to dismiss his legal advisers. He was not denied the right to legal representation; he was refused new legal representatives at a very late stage in the trial after all the evidence against him had been presented to the jury. The trial judge in legitimately exercising his discretion in that respect had had the opportunity to witness numerous disruptive interruptions by the appellant during the course of the trial. He had the opportunity to see the appellant give evidence on a *voir dire* during the course of the trial. The trial judge had witnessed his interaction with his lawyers throughout the trial up to the point that he sought to discharge them. It was submitted that the trial judge was best placed

to assess whether the step taken by the appellant to dismiss his lawyers was ostensibly strategic, or due to some genuine difficulty; the appellant's capacity to understand the implications of his decision to dismiss his legal advisors; the level of his intelligence; his ability to self-represent for the remainder of the proceedings, and what was required to be done in the interests of fairness and justice.

42. We have given careful consideration to the arguments on both sides and find ourselves in agreement with counsel for the respondent that there is no reason to believe that the trial judge's discretion was not legitimately exercised. This was a very experienced, careful and conscientious trial judge. As pointed out, he had observed the trial dynamics at first hand and was best placed to determine what the interests of fairness required. While he does not in express terms articulate a concern that the appellant's application, which must be interpreted as an application to discharge the jury to enable him to obtain a re-trial, was strategic, we are nevertheless satisfied that that was indeed the trial judge's concern. Moreover, it was, we believe, an entirely legitimate one.

43. While it is true that the appellant was not obliged to reveal the details of any interactions with his lawyers, it is nevertheless of significance that no allegation has been made to this Court of ineffectual representation, of failure to follow instructions, of incompetence or of negligence. Absent any such suggestions, or any other suggestion of a genuine difficulty that might have given rise to a crisis of confidence that might explain the late discharge of his legal team, the appellant faces the difficulty that a strong basis existed on which to infer that the decision was strategic, and involved a cynical attempt to collapse the trial with a view to getting a re-trial. This was in circumstances where the transcript reveals that strong evidence had been adduced against him, that the complainant' s evidence had not at the end of the day been significantly undermined in cross-examination, and he is likely to have perceived that his defence was not going well, or as well as had been hoped.

44. We note that no application was in fact made for a short term adjournment, either for the purpose suggested by the counsel for the appellant or for any other purpose. The application, such as it was, is only capable of being reasonably interpreted as an application for the discharge of the jury, and then the adjournment of the case pending a re-trial. Indeed, we note that ground no. (ii) is expressly framed in terms that the trial judge erred *"in refusing to discharge the jury and adjourn the trial."*

45. In circumstances where the appellant had been fully represented throughout the prosecution case, and where upon discharging his legal team at a very late stage he was fully advised as to his options, including his options to give evidence if he wished, and to address the jury in closing, there was no unfairness in the trial judge's decision not to discharge the jury and adjourn the trial. We are satisfied from the transcript that it is justifiable to draw the inference that the trial judge took his decision in circumstances where, having had the opportunity of observing the appellant throughout the trial, including hearing him give evidence and being cross examined during a *voir dire*, he was fully satisfied as to the appellant's ability to see out the trial to a conclusion as a self-represented defendant.

46. We see no reason to regard the trial as unsatisfactory, or the verdict unsafe, as a result of the matters complained of in grounds nos. (i) and (ii). We therefore also reject these grounds of appeal.

Ground (iv)

47. The complaint that forms the basis of this ground of appeal arises from the cross-examination of the complainant on the fourth day of the trial. The complainant was being cross-examined before the jury concerning the circumstances in which she had become friendly with the appellant and had ended up living in his house. In response to a question designed to elicit for how long, after breaking up with a previous partner, RF, the complainant had been back in the village and living with the appellant before the events of the 8th of December 2011, the complaint volunteered:

> *"A. I did not know what this man was like. No one told me when I met him that he was on a sex offender list, that he's a sex offender. I did not know these things about him.*
>
> *JUDGE: I don't think that that was the question you were asked by Mr [Defence Counsel].*
>
> *WITNESS: Sorry. Sorry, I thought ...*
>
> *Q. [DEFENCE COUNSEL]: I'm just trying to establish, R F, when he came out of prison, how long you were living with him in [a different village], when exactly that period of time was and how close to the 8th of December when you were admitted to the hospital …?*
>
> *A. It'd just be three months; that was just months, like. I don't know ... it'd just be three months."*

48. Significantly, there was no application at the time for the jury to be asked to retire, and there was no application for any action to be taken in response to the unexpected, and clearly potentially very prejudicial, evidence that had been given. Rather, counsel for the appellant continued with his cross-examination as though nothing untoward had happened.

49. Later on the same day, however, counsel for the appellant sought to put a photograph to the complainant, which prompted counsel for the prosecution, who had not previously seen it, to ask to be allowed to look at it before it was put to the witness. In the circumstances, counsel for appellant, correctly anticipating a possible objection to its admissibility, requested the trial judge to ask the jury to retire. The jury duly retired and then, in the absence of the jury, the following exchanges took place:

> *"[PROSECUTING COUNSEL]: Mr [Defence Counsel] intends to put to the witness a photograph which I don't know where it's located but it says, 'A dead man walking and a rapist, bang W'. Now, I don't know is -- where it came from or even the background of the photograph.*
>
> *JUDGE: Well, presumably Mr [Defence Counsel] wouldn't be putting it unless he was in a position to prove the photo?*
>
> *[DEFENCE COUNSEL]: It's on the wall on the house.*
>
> *JUDGE: Well, are you in a position to prove the photo as to when it was taken and when it was developed, Mr [Defence Counsel]?*
>
> *[DEFENCE COUNSEL]: I can -- but in fairness to my friend, I can certainly prove that the photograph was taken of the sign up on the wall, my lord.*

[PROSECUTING COUNSEL]: Well, I do not -- sorry --

JUDGE: Pardon?

[PROSECUTING COUNSEL]: Can I say in the absence of the jury, my lord. In reply to my friend, the complainant made it known that she was aware that he was registered on the sex offenders list. Now, that may pose a problem for the jury and your lordship, but what I -- sorry, I didn't want to deal with this now, but Mr [Defence Counsel]'s line of cross-examination clearly abandoned his shield in that respect, my lord, accusing Ms M of informing Mr F of the €10,000 that led to, apparently, people breaking into the house and looking for that €10,000 of a criminal offence. So, you know, any application that is going to be made, I would be resisting, in relation to the charge to jury on that basis. I just want to -- and this photograph is likely to engender more matters. But that is Mr [Defence Counsel]'s problem. But I just want to flag it, my lord."

50. The photograph was subsequently admitted, nothing turned on that, and the cross-examination continued to a conclusion later that day.

51. On Day seven, shortly before the end of the prosecution case, the appellant's then defence counsel then presented an application to the trial judge for a discharge of the jury on multiple grounds, presented on a rolled up basis, one of which was that the complainant had referred to the appellant as having been a sex offender and as being on a sex offender's list. The application was in the following terms:

"[DEFENCE COUNSEL]: My lord, before the jury come -- my lord, as your lordship is aware in the context of this case, the complainant when she was giving her evidence, made a reference to my client being on the sex register, and he's instructed me to make an application to the Court to discharge this jury and have another jury sworn in. Your lordship will recall that the matter was listed for hearing before your lordship on the last Thursday. And I was informed on that occasion that the prosecution wouldn't be in a position to start, and there was another difficulty, that Dr O'Sullivan was leaving the country, even though the trial had been, I think, fixed about a year before, and my client is 70 years old and has been in custody since his arrest back on the 9th of January. And that is one consideration, my understanding was the complainant wouldn't be available until Monday, and on the Friday, as your lordship will recall, the only evidence was my friend's opening to the jury. And then Dr O'Sullivan was called and cross examined and then the matter was adjourned to Monday. And then in the morning, the complainant didn't appear in court, and we heard that she had missed the train; I think that was the explanation. And then she was located and driven to court by the An Garda Síochána for the purpose of giving evidence. And then during the course of her evidence, she said that somebody had told her and then brought this information into the -- into the public domain. Insofar as the over call case was concerned, I had spoken to my friend as to what the intention of the prosecution was about similar fact evidence, and as I understood the similar yes, I was informed that the intention of the director was to use the similar fact evidence, and if that came in, then it would have completely overwhelmed the point I'm talking about now, my lord.

JUDGE: But Mr [Prosecuting Counsel] actually said in court that he wasn't going down the similar fact?

[DEFENCE COUNSEL]: Oh he did, my lord, yes, so it was subsequent to that then that Mr [Prosecuting Counsel] said that he wasn't going to use similar fact evidence. And now, I -- I come into information, my lord, that the complainant herself had been arrested some days prior to the commencement of the trial. And this information was not communicated to me until well into the trial. And I don't have any details in relation to it, my lord, insofar I've asked Mr [Prosecuting Counsel] to get detail for me, but it's something I think ought to have been communicated to me. And then as your lordship will recall in terms of the cross examination, whether there was inadvertence, or deliberate, the complainant at a certain point in the cross examination said that she was not an idiot and that I thought that I was winning the battle, so to speak. And that seems to be inconsistent with the idea of inadvertence and would put it in the direction of being a deliberate sort of attempt to subvert the trial, my lord. My client is also concerned in relation to telephone records, and he's asked for these records repeatedly and as your lordship will recall, Sergeant McKenna, I questioned him about the phone records that had been seized during the initial search, I think back on the 19th of December and that these records haven't come into existence. The final point my client is concerned about, my lord, is that in relation to TM, the sister of the complainant, that where her evidence is concerned, that she was present in the house back on the 14th of October when my client says that she had seizures. And she -- that's his evidence, my lord, so I'll be leading with that. But then in her statement she talks about her sister B being in her home in [a certain town] and that she was in dire straits from the alcohol and that she was removed by ambulance to [the said town], and your lordship will recall the evidence in relation to her going in to be detoxified. And then she's released or she discharges herself after two days and goes back into her sister's. But the first person she's looking for is my client, and my client, then as your lordship has heard, goes to collect her in [the said certain town], and brings her back. My client is anxious to get records or get confirmation that the -- that an ambulance was used because of the proximity of TM's home to the hospital. And he feels deeply dissatisfied, my lord, and I thought it appropriate to bring those matters to your lordship's attention. And in the circumstances, having regard to the consequences so far as Mr M is concerned, and the grave nature of the charges, I think it appropriate, my lord, to make an application to your lordship to discharge the jury."

52. The trial judge was not disposed to grant the application for a discharge, stating:

"JUDGE: All right. Well, I have to say I find this a somewhat surprising application, particularly surprising in terms of its timing. If there is an application at this stage, as the prosecution case is about to close for the discharge of the jury, I think it's fair to say that the primary ground relates to a remark made by the complainant about the fact that the accused was on the sex offenders register. But that remark was made at an early stage of the trial. There was no application at that stage. Instead, an intense cross examination of the complainant proceeded. And it seems to me that there are questions of natural justice at issue here, there are questions, indeed of human rights. It may even be the European Convention on Human Rights would be in play. The notion that somebody can be subjected to an intense cross examination, and then having endured that, that, as it were, when people have seen how it's gone, that there would then be an application for a discharge is anathema. There's a further point - a number of days have passed; is it seriously to be suggested that the public are to pay on the double for this trial? If there was to be an application for a discharge, the time to make that application was when the remark was made. Instead, a tactical decision was taken to proceed with the trial, and that decision having been taken to proceed with the trial, it isn't possible at this stage to re open that matter. The other matters that have been referred to, designed, as it were, to at weight or balance to the application seem to me to be of no substance. The trial date was fixed a long time ago. If the defence had an interest in

phone records or in the comings and goings of ambulances, then it was open to them to pursue it, either directly or in terms of putting a request to the prosecution, and if that wasn't successful, bringing the matter before the Court. But again, the very last time at which that could have been raised was on the first day of the trial. The notion that witnesses are required to attend, subject themselves to cross examination, and then when the prosecution case has finished that questions about the access to items of interest by the defence should be raised is again, seems to me, absolutely unthinkable. So far as the question as to the arrest is concerned, the position is that Ms M. may, as has been indicated, have been arrested for shop lifting. But as of this moment she hasn't been convicted of any offence, and I don't see that that would have been a legitimate area for investigation. It certainly doesn't provide a basis at this stage for discharging the jury. I really find it almost unbelievable that a case is allowed proceed as far as this one has been allowed proceed, and that there would, at such a late stage, be an application in respect of matters, all of which go back in time. And I refuse the application."

53. Counsel for the appellant maintains that the trial judge was in error in not granting the discharge sought, notwithstanding that it was not sought at the time that the impugned evidence was given. The case is made that that the material that slipped in was so prejudicial that thereafter a fair trial was impossible. In support of that argument we were referred to; *The People (Director of Public Prosecutions) v McGartland* (unreported, Court of Criminal Appeal, 20th January, 2003), and; *The People (Director of Public Prosecutions) v Bowes* [2004] IECCA 44.

54. It was also submitted that, notwithstanding that no application to discharge the jury was made at the time, and that it was only made near the end of the prosecution's case, there was a duty on the trial judge to have discharged the jury either of his own motion at the time, or upon the eventual application of the defence that he should do so, in the interests of fairness and to avoid a real risk of a possible wrongful conviction. In support of this argument reliance is placed on *Stirland v Director of Public Prosecutions* [1944] A.C. 315 where Viscount Simon LC stated:

"It has been said more than once that a judge when trying a case should not wait for objection to the admissibility of the evidence, but should stop such questions himself: see Rex v. Ellis [1910] 2 K.B 746, 747]. If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as was said [1944] K.B 463] in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced...

... but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice"

55. We were also referred to *The People (Director of Public Prosecutions) v D.O'S.*[2006] 3 IR 57, where Murray CJ said (at p. 60):

"6. The principles governing the conduct of prosecutions are not established simply for the benefit of the defence but in the interest of society so as to ensure that a trial is fair, that the risk of an innocent person being convicted is avoided, and that confidence in jury verdicts is maintained.

7. There is also a duty on the trial judge to ensure that these standards are observed so as to ensure that the trial is conducted in a proper manner which is fair to both prosecution and defence. If counsel departs from accepted standards of conduct the trial judge must immediately exert his authority to require that they be observed. The duty of the trial judge for this purpose is not in any way dependent on an objection by counsel who, at least in certain circumstances, may feel that an overt objection would risk exacerbating the adverse affects of an improper cross-examination on the jury."

56. The point is made that, in both *Stirland* and *D. O'S.* the absence of an immediate objection or application was not regarded as determinative, and the trial judge was seen as having an autonomous role, and indeed duty, to act, if necessary of his own motion, to ensure fairness.

57. In further support of this idea we were also referred to *The People (Director of Public Prosecutions) v M.J.* [2014] IECCA 21, where McKechnie J, giving judgment for the Court of Criminal Appeal, stated (at para 24):

"It is also fully accepted that a judge, from the moment he embarks upon a trial until he is functus officio that trial, is under a duty to ensure that both the process and substance of the trial is fair, and that both are duly compliant with appropriate principles – otherwise the trial will not be one conducted within the due process of law. This duty has existed at common law for many years (R v.Lee Kun [1916] 1 K.B 337), but also and of much more significance, it has a constitutional status of particular importance, given that the prime obligation imposed upon the judiciary is, to uphold the Constitution and the rights protected thereunder."

58. In response to these arguments, counsel for the respondent has argued that the trial judge was correct in refusing the application to discharge the jury. The legal advisors for the appellant were very experienced. A decision was made not to request that the jury be discharged when the offending words were uttered. It was submitted that this was not a case of oversight, or ineptitude, where a trial judge might be expected to intervene of his own motion. On the contrary, there was manifestly full awareness on the part of the defence legal team of the significance of the remarks complained of, and a tactical decision was made to proceed with the cross-examination of the complainant for some considerable time after those remarks were made. Further, it was not until the end of the trial when all of the witnesses had given their evidence and some three whole days after the complainant had given her evidence, that any complaint or application was made. It was submitted that the trial judge was correct when he held that the time to seek the discharge of the jury was when the remarks were made and also in ruling that, a tactical decision having been made by the defence legal team not to complain about it at the time, they should not be permitted to do so at a later stage.

59. Counsel for the prosecution points to the remarks made by him at the time of the issue concerning the photograph, which arose very shortly after the witness had referred to the appellant as being on a sex offender's list, and as being a sex offender. Defence counsel, even at that juncture, when implicitly he was invited to do so, did not raise the issue of the remarks now complained about and proceeded thereafter to continue the cross-examination of the complainant for a considerable time. It was submitted that, the issue being remarked upon by the prosecution in the way that it was at this time, clearly serves to dispel any doubt but that the defence legal team were aware of the issue and made a conscious decision to take no action in respect of it.

60. We have given very careful consideration to the arguments on both sides. The remarks made by the witness were undoubtedly

very prejudicial, and they had no probative value in terms of the prosecution's case. They clearly implied that the appellant had a previous conviction or convictions for sexual offending. For very understandable reasons the law prohibits the admission of evidence of previous misconduct save in very limited circumstances none of which applied in this case. However, the impugned evidence was not led by the prosecution. Rather it emerged during cross-examination by defence counsel. That cross examination was being forensically and competently conducted and it could not reasonably have been anticipated that the line of questioning being pursued might elicit the prejudicial answers that were in fact given by the witness. Defence counsel is not therefore to be criticised for the fact that his questions unexpectedly elicited this material.

61. Nevertheless, having received the answers now being complained about, defence counsel was required to make a decision as to what to do about it. Although strenuous efforts are always made to ensure that it does not happen, it is a relatively common occurrence that despite the best efforts of all concerned a jury, through some accident or inadvertence, gets to hear some piece of inadmissible evidence. Where this occurs it should not automatically result in the discharge of the jury. Whether or not it requires recourse to that nuclear option depends in every case on the strength of the potential prejudice, the reaction of those who heard it and were in a position to do something about it, the stage of the trial at which the incident has occurred, and whether it might be effectively addressed in some fashion short of discharging the jury, e.g., a judicial instruction to the jury to disregard it.

62. In this instance it seems to us to be of considerable significance, and the trial clearly regarded it as such, that defence counsel elected to take no action at the time of the incident.

63. This Court is completely satisfied that there was no failure to appreciate the significance of what had occurred, and that the decision to take no action was purely tactical. It may have been felt by the defence team, for example, that the cross-examination that they were then in the midst of represented the best prospect of undermining the credibility or reliability of the complainant who was the prosecution's principal witness. There might well have been a perception on the defence side that some progress towards undermining the witness had been made in the course of the cross-examination up to that point and that it was desirable not to lose momentum; or, if not, that there was a realistic prospect of making such progress if the cross-examination were to be continued with; and a concern that if a halt was to be called and there was to be a re-trial the element of surprise would be lost. Moreover, the witness would have had a dry run and be better able to withstand cross-examination the next time.

64. Indeed, it is not difficult to conceive of yet other possible reasons why a tactical decision might be taken not to seek a discharge, and just leave well enough alone, but the example given is sufficient for present purposes. It is therefore entirely possible that the defence legal team saw advantages in continuing with the trial, notwithstanding the prejudicial evidence given by the complainant, and that they may have calculated that such advantages outweighed the possible disadvantages that would be associated with the inevitable re-trial that would follow any jury discharge.

65. In our view the cases of *McGartland* and *Bowes* are clearly distinguishable on the basis that objections were raised at the proper time, and the defence lawyers did not forbear to object for tactical reasons. We also consider the cases of *Stirland* and *D.O'S* to be distinguishable. *Stirland* was concerned with the avoidance of a miscarriage of justice where counsel had failed to object, as opposed to consciously forbearing to object for tactical reasons. No question of a miscarriage of justice, or of a flagrant denial of justice, arises where action, or in this case inaction, is based on a strategic decision or decisions made on an informed basis with respect to the conduct of an accused person's defence by the legal team that he has instructed. *D.O'S* was concerned with misconduct by prosecuting counsel, and none such misconduct arises in this case.

66. While we acknowledge that the nature of the impugned evidence was of the most prejudicial type, and further that if objection had been raised at the correct time and a discharge refused, it is difficult to see how an appeal against such a refusal would not be allowed; we nevertheless agree with the trial judge in this case that the manifestly strategic nature of the decision not to object at the time precluded him, and us, from entertaining the point after the fact. The appellant was represented by an experienced legal team, and there was no unfairness in holding him to decisions made on an informed basis with respect to the conduct of his defence by the legal team that he had instructed. He has made no suggestion that they exceeded their instructions or acted without authority or that they were inept or incompetent.

67. In the circumstances we do not consider that the failure by the trial judge to discharge the jury due to the matters complained of in this ground of appeal rendered the trial unsatisfactory or the verdict unsafe. We therefore dismiss ground of appeal no (iv).

Conclusion

68. In circumstances where we have rejected all four grounds of appeal relied upon by the appellant, the appeal against his conviction is dismissed.