[1/2017]

Birmingham J.
Mahon J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

M.C.

Appellant

JUDGMENT of the Court delivered on the 10th day of May, 2018 by Mr. Justice Birmingham

1. On 3rd October 2016, the appellant appeared in the Central Criminal Court charged with two offences, one count of rape, and one count of assault causing harm. Both offences were alleged to have occurred on the same occasion at the home of the appellant and complainant in a rural location in the midlands on 8th January 2015. The appellant and complainant were husband and wife. On 3rd October 2016 when the matter was listed for trial the appellant pleaded guilty to the count of assault causing harm but not guilty to the count of rape. Following a seven-day trial he was convicted on 13th October 2017 in respect of the rape count. Subsequently, he was sentenced to seven years imprisonment in respect of the rape offence, and to a concurrent term of two years imprisonment in respect of the assault count, the final two years of the sentence was suspended. He has now appealed against conviction. The appellant argues that the judge erred in failing to accede to an application for a direction, as there had been an application on the basis that the evidence was not such that the jury could be satisfied beyond reasonable doubt that the sexual intercourse, which it was agreed had taken place, was non-consensual. Alternatively, even if it was established that the complainant was not consenting, it is argued that the evidence was not sufficient to enable a jury to conclude beyond reasonable doubt that the accused knew that his wife, the complainant, was not consenting or that he was reckless as to whether she was or was not consenting. Other grounds relate to the judge's charge and in particular relate to how he dealt with the issue of recklessness and also with s. 9 of the Criminal Law (Rape) (Amendment) Act 1990, the section which provides that a failure or omission to offer resistance does not of itself constitute consent.

2. The case, it must be said, has some unusual features. First of all, this is a case of alleged marital rape. Secondly, there was the fact that both complainant and appellant had backgrounds in different small Christian fundamentalist communities or sects. This is mentioned as it may have influenced their approach to answering questions, more particularly so in the complainant's case when giving evidence at trial but also, though perhaps to a lesser extent, the appellant when answering questions in the course of Garda interviews.

3. The prosecution has observed in the course of written submissions that the complainant was an unusually quiet and withdrawn witness, commenting that this posed a difficulty for the prosecution. They suggest, however, that it made her evidence in relation to the rape and assault on her, and her knowledge of the fact that her husband knew she was not consenting after he had assaulted and terrorised her, all the more compelling and overwhelming. Her evidence, they say, was eloquent in its understatedness.

4. The complainant was a somewhat reluctant witness. In March 2015 she provided a further statement to investigating Gardaí, saying:

> "I previously made a statement to Garda J.P. O'Brien in relation to assault on me by my husband, M.C. I no longer wish to pursue this matter and I do not want it investigated. I am not under any duress or stress to withdraw this complaint. I feel M. would benefit from psychiatric help and I would like to give him a chance to so do."

Prompted by this statement, the defence contended that Ms. A.C. was not a compellable witness where there had been a plea to the assault count and there remained before the Court a single count of rape. The defence submitted that rape was a sexual offence, and that in the case of sexual offences that a spouse is compellable only when the offence is directed at a child. Despite the prosecution challenging this interpretation, the judge agreed with the defence submissions and proceeded to explain to the witness in the absence of the jury that there was no pressure on her either way to give evidence. The judge made clear to her that she was not compellable and that she did not have to give evidence in the case. It was, he told her, as simple as that. The issue of compellability has not, for understandable reasons, been raised before us and so we are not called on to adjudicate on whether the judge's ruling was correct but our failure to address the issue further should not be seen as an indication that we necessarily agree with the approach of the trial judge. The matter remains an argument for another day. In a conversation with the local rape crisis centre, the complainant had told them that she was not proceeding with the case and said that it was not her intention to send her husband to jail. Her reluctance or equivocation about proceeding with the case is mentioned as it may provide a context for the evidence that she subsequently gave at trial.

5. Before dealing with the individual grounds of appeal, it is necessary to say something about the background to the case and the evidence that was given at trial. In doing so, it has to be immediately acknowledged that this is a case, where to an unusual extent, both sides are in a position to point to particular answers to particular questions and to draw considerable comfort from them. Correspondingly, the task of providing an overview or summary of the case is more difficult than usual.

Background

6. The complainant and appellant married in 1994. They have three children, two boys and a girl, their youngest. The eldest boy was away at college at the time of the events in controversy. The family live in a remote rural location in the midlands. They experienced difficulties in their marriage for some time and had attended marriage counselling. The complainant saw the appellant as controlling. She instanced this by stating that she was restricted from driving the car, as the appellant felt that her driving style did not achieve optimum fuel consumption. The appellant worked in a mine, as an underground technician. There was an expectation that the mine would soon close and this increased the level of stress in the household.

7. The trial was concerned with events that occurred on the 8th / 9th January 2014. On the 8th, the appellant returned from work around 5/5.30pm. She gave evidence that the appellant had previously told her that he didn't want any material gifts for Christmas, he only wanted massages. After dinner, the appellant was lying on a reclining chair with his eyes closed, and the complainant proceeded to massage his feet. According to the complainant her husband said "I want kisses and I want rubs." N., their youngest child, aged approximately ten at the time was present. The complainant was knitting at the time and stated to the appellant "N is right here, like it's not really appropriate". At one stage the appellant was holding his hand out so that the complainant would hold his hand, causing the complainant to comment,"[b]egging is not attractive." There had been some discussion about watching a romantic comedy box-set and the appellant had said that he was an expert on romance. He also had said "I need affection from my wife".

8. At approximately 9.30pm the appellant went upstairs to bed. The complainant remained knitting until approximately 11pm, and at that stage she went upstairs, undressed and got into bed beside her husband. At first she thought her husband was asleep but then realised that he was, in fact, crying softly. She curled up against him at which stage he said "[d]on't you know that laying up on people is not very attractive". The complainant says that the next thing she remembers was the complainant being on top of her, punching her in the face and chest area. She started screaming for help calling for her son, who was sleeping in an attic bedroom at the far end of the house. She then started screaming "[h]elp me God" to which he responded "[n]o God is going to help you." He put his thumb down her throat, apparently to stop her making noise. The complainant said that she could not breathe. She was asked how she felt at this stage and responded,

> "I was terrified, I don't know where my legs were. I had no arms at this stage. I don't know what happened to my arms but they pinned [sic] I didn't have them. And I couldn't make noise and I couldn't breathe and he was very angry and he was shouting."

The complainant was asked what he was shouting and she said she was not sure but he was asking questions which she was supposed to answer but couldn't, because she couldn't make noise or breathe. She describes how when she could not answer, her husband would get angrier and keep punching her in the face harder and she says that the punches just kept coming. She says that she thought she was on the way out as she could not breathe but that then he realised, perhaps because she had made some movement with her eye, that she couldn't breathe, and he removed his thumb. She describes him saying things like "[t]hat will teach you not to disrespect me", "[w]ho's the boss?", and "[w]ho's in charge?"

9. According to the complainant he said "I want to hear you beg for mercy." She said that she did beg for mercy and said whatever things she had to say. At one stage, the appellant said "[n]ow I am going to rape you and I'm going to enjoy it." She says that at that stage a funny sort of thing happened. He was on top of her, he was moving up and down, making noise as if he was having sex and he commented "[y]ou don't know how good that feels." However, she said he had not penetrated her or indeed was not even near penetrating her, but he appeared to think that he was. She commented that at that stage she was sort of laughing in her head because she felt that God had deluded his mind into thinking that he was doing this to her but he was not, nothing was happening, she was fine. She said:

> "I suppose that, that maybe broke the fear a little bit when I started laughing in my head. And then I just thought that he looked really sad. I said he's completely lost his mind, he's completely delusional and he lost his mind and I actually felt sad for him. So then I started to tell him that I loved him, that I didn't mean to hurt him and that I was sorry for hurting him and I rubbed him on the back and I calmed him down and we had sex basically, I wasn't physically forced to have sex with him."

10. After an interruption for an overnight break, she resumed her evidence. At that stage she clarified that when she had said "we had sex," she meant that he had penetrated her. Asked by prosecution counsel how she was feeling at that stage, she responded "I don't know, I don't know, when I told him that I loved him, I did mean that and I did feel sorry for him and I was afraid as well." Counsel asked, "[y]ou were afraid?" to which he said "yes", and counsel asked "what were you afraid of?" She responded, "[w]ell, I was afraid because I still thought that I was very badly hurt. I though my face was very badly hurt. I didn't, I didn't know would he sort of attack me again as well." Counsel asked "I see. And was that in your mind when he penetrated you?" She responded, "[n]o. I think at that moment it wasn't at the forefront of my mind." Counsel asked "[b]ut was it there?" which precipitated a protest about leading questions. The complainant responded "[y]es, yes." The complainant then went on to say that the appellant had difficulty coming, so they tried a couple of positions but he was not able to, so he just went to sleep. She was asked what was in her mind at the end of all of that, giving rise to the following exchange:

> "A. I was afraid that he would see my face, I didn't want him to see what he had done to my face.
>
> Q. Why?
>
> A. Because my face was swollen and it was very sore and my teeth were a bit loose and bleeding. In my mind my face was very badly damaged and I didn't want him to see what he had done, because I was afraid that he would finish me or something, that he would react. So I didn't want him to see what he'd done to my face."

She explained that she stayed in bed for a couple of hours, after which she got up, looked at her face in the bathroom mirror and was surprised to see that it looked fairly normal, apart from swelling. She then went downstairs and looked up apartments to rent in the area. Asked what was on her mind in looking up apartment, she said:

> "[w]hat was in my mind was that I had nearly died and it just gave me a bit of a shock. So I said I'm getting out of here now, I'm not staying here any longer. And I was actually, I was very happy that I lived, but like it just sort of shocked me into saying, I'm getting out of here now."

She explained that she was not able to sleep but got up at the usual time. Her face looked fairly normal, one would have to look to see if it was swollen, her right hand was swollen, she was not able to make a fist with it, she could not open door handles, it was quite sore and she thought she had broken a bone in her hand. In fact, this was not the case and the swelling subsided. The complainant gave evidence of visiting her GP, of then visiting the A&E Department of the local hospital, then going to the Garda station and then being brought to a sexual assault treatment unit.

11. In response to further questions from counsel for the prosecution the complainant said that she and her husband had a fairly normal sex life, which did not include rape scenarios. It occasionally included "rough sex," by which she explained she meant that he would just be a little rougher than normal. She was then asked about her later statement in March, saying that she did not want to see her husband prosecuted. The complainant said that she was not saying that what she had said was untrue, but that she felt that she was exercising her right to withdraw it.

12. The final exchange with prosecution counsel was as follows:

> "Counsel: Now, you told the jury at the end of your evidence yesterday that you had sex with him, why did you have sex with him?
>
> Complainant: Well, he had threatened to rape me, so I had sex with him voluntarily, I had sex with him voluntarily because he had threatened to rape me.
>
> Counsel: I see. And was there anything else in your mind that might happen if you didn't have sex with him?
>
> Complainant: Well, yes, when he said, "No God is going to save you", I thought his intention was to kill me, so I was still quite afraid."

13. In cross-examination, counsel initially dealt with some preliminary or introductory matters. There was then the following exchange:

> "Q. So I just need to talk a little bit about the marriage, I suppose, and where it was at this time in 2015. I think it has been suggested that the marriage was falling apart, would it perhaps be fair to say that the marriage was troubled?
>
> A. Yes.
>
> Q. Would it be fair to say that in January of 2015, that notwithstanding those troubles there was still love?
>
> A. I would say so, yes."

14. Later, counsel asked:

> "Q. Okay, okay. And even though at the time that the marriage was troubled, and even though there would be rows and fights, that it didn't stop the sex life, would that be fair to say?
>
> A. Yes.
>
> Q. Okay, all right. Would there have been from time to time make up sex?
>
> A. I don't think so."

The witness was asked whether the first assault, the first one or two contacts by his hands was slapping and she responded: "[m]aybe."

15. Later, she was asked about the time when the appellant was moving up and down on her but was not penetrating her and she said:

> "[y]es, to me it was like I was being protected, so I just said yes, I found it funny."
>
> The witness clarified that when she spoke of laughing, that she was speaking of laughing in her mind, not laughing out loud. She commented:
>
> "[t]he laughter was that I called to God for help and I felt that I had been helped this way."

She confirmed that her attitude had changed to sadness for him and that she told him that she loved him. Asked "[a]nd you meant it at the time?" she said "[y]es." Counsel then turned to moments prior to penetration and the moment when penetration occurred. Given the issues that arise in the case it is necessary to set out this section of the transcript at some length:

> "Q. And then what we move on to is you rubbing his back; isn't that right?
>
> A. Yes.
>
> Q. Okay. And having rubbed his back and told him you loved him, I think it's the case that he was then in a position to have an erection; is that right?
>
> A. Yes.
>
> Q. Okay. So how did you rub his back, what was the movement and?
>
> A. I had my arms around him.
>
> Q. You had your arms around him?
>
> A. Yes.
>
> Q. Okay, all right. And was he clothed at this time?
>
> A. I doubt it.
>
> Q. Okay. And were you clothed at this time, do you remember?
>
> A. I would have at least had my shirt on anyway.
>
> Q. Okay. And how did your shirt come off?
>
> A. I don't know if it did come off.

Q. Okay?

A. I don't remember.

Q. Okay. Was it opened, do you recall or would you accept that it was opened at some point or pulled up perhaps?

A. I don't remember what shirt it was, so I'm not sure if it was a shirt that did open on the front.

Q. Okay, okay, okay. When you were rubbing him, you'd indicated to Mrs Walley that you don't recall how long it last for - lasted for, and you told him that you loved him and he at this point was on top of you, would that be fair to say?

A. Yes.

Q. Okay. And do you recall kissing?

A. Probably.

Q. Okay. And did you kiss him back?

A. I'd say so.

Q. Okay. Do you recall sucking his thumb?

A. I don't.

Q. Okay. Is there a possibility that could have happened?

A. It could have.

Q. Okay?

A. But I don't remember.

Q. Okay. Is there a possibility that you could have turned your head to suck his left thumb?

A. I may have.

Q. Okay. Is that something that would happen in the normal course?

A. Sometimes, yes.

Q. Okay, I think his thumb has an injury; isn't that right?

A. Yes.

. . .

Q. Okay, right. And so when you're kissing him, you accept that you were kissing back?

A. Yes.

Q. A possibility that you could have sucked his thumb during the course of this?

A. Might have, I have no memory of any of it, so ...

Q. Is there a possibility that he could have kissed your breast or sucked your nipple?

A. I don't remember any of it.

Q. Is there a possibility it could have happened?

A. Possibly.

Q. Okay. I'm just asking you - is it possible that sexual acts occurred between the two of you where both of you are involved in addition to the penetrative act?

A. Yes.

Q. Okay. And at the time of these sexual acts, you were responding to him in a positive way?

A. Yes.

Q. Okay. And this would be exactly like you normally have sex, responding in a positive way?

A. Yes.

Q. Okay. And in addition to that response in a positive way, the physical manifestation of it, such as kissing and sucking and allowing yourself to be sucked, is there a possibility you could have made noises that were consistent with sexual activity?

A. Maybe, I don't know.

Q. Okay?

A. I don't know.

Q. I am sorry about having to ask you this?

A. Yes, yes.

Q. But it is important that we understand what happened. Is there a possibility that you could have moaned during the sexual experience?

A. I don't know, I don't know.

Q. Okay, okay. Can I suggest to you that, that you did?

A. I have no idea.

Q. Okay. But - and is that because of lack of memory?

A. Yes, I don't remember.

Q. Okay?

A. I'm not sure if that's even something I would do, I don't know.

Q. Okay, okay. Is that something that would normally be done?

A. I don't think so.

Q. Okay?

A. But I'm not sure.

Q. Okay. But you cannot rule it out as a possibility that noises were made by yourself during the course of the events?

A. I would say no, but ...

Q. Okay, all right. But you can't rule it out?

A. Mmm.

Q. Okay. After he penetrated you in your vagina when he was on top of you, and can I just confirm that at this time there - you are not ruling out the fact of kissing, touching, sucking?

A. Yes.

Q. Yes. Normal sexual activities?

A. Yes.

Q. Okay. But while he was in a position to become erect, he wasn't in a position to ejaculate; isn't that right?

A. Yes.

Q. And while he was penetrating you, I think it's the case that there was no question of you saying "Stop"?

A. No, no.

Q. No, or pushing him away?

A. No.

Q. Okay, or saying you were in pain or anything like that?

A. No.

Q. And in fact you weren't; isn't that right?

A. No.

Q. And after that penetrative act, I think you both realised is that he wasn't going to ejaculate in that position; isn't that right?

A. Yes.

Q. Okay. So what position did you go into then next?

A. I don't remember.

Q. Okay. Would you accept, Mrs C., that you went into a doggy style position after that?

A. I think that was the last thing, yes.

Q. Okay. Could you have also tried a spooning position as well?

A. Probably."

16. Counsel asked:

"[s]o when you told him you loved him and you meant it, okay, could I suggest to you that he would have felt that?

Answer: Probably, yes."

As Counsel drew her cross-examination to a close, she asked a number of questions which are now heavily relied on in the context of this appeal and were relied on when seeking a direction at trial. She asked:

"[o]kay, okay. So would it be fair to say that when we think about all the actions that took place after you started rubbing him, that he in terms of your knowledge of him and background, that he would have been of the view that this was a fully voluntary consensual act?"

She answered:

"[a]bsolutely, yes."

She was asked about the fact that her GP in the note to the consultant had recorded that sexual assault was not alleged. She was asked:

"Q. And that's because that was your mind frame at the time, wasn't it? That there was a physical assault?

A. Yes."

She was then asked:

"Q. And would it be fair to say Mrs C., that as you've already accepted that during the course of these events, your husband would have believed that what was occurring was a consensual act?

A. Yes.

Q. Would it be also fair to say that you have told others that in fact it was a consensual act?

A. In my mind, yes.

Q. Yes. And in your mind it was a consensual act?

A. Yes.

Q. And in your mind not rape?

A. Sorry?

Q. In your mind not rape?

A. In my mind it was done to avoid rape.

Q. Okay. But a consensual act nonetheless?

A. Yes."

Junior counsel for the prosecution re-examined. He asked:

"Q. Mrs C., just before your cross examination concluded, Ms Biggs [senior counsel for the then accused] asked you a question and your reply to it was that you consensually participated in sex and it was done to avoid rape?

A. Yes.

Q. Can you explain or clarify to the jury precisely what you mean by that?"

She answered:

"[h]e threatened to rape me, so I thought that he intended to rape me and hurt me - but I sort of - I responded to him with love instead, like, instead - so instead of him having to hurt me, I sort of voluntarily - I calmed him down and told him I loved him, that there was no need for him to do that, basically."

Counsel asked:

"[h]ow free were you in the making of that decision, or what - what implications followed from - what implications do you believe followed if you decided not to consensually participate?"

She answered:

"[w]ell, he was in a very violent frame of mind, so I don't know what would have happened. But I do consider that I - you know, I made what decision I did, I take responsibility for my decision."

Counsel asked:

> "What was the alternative decision?"

And she answered:

> "Well, the alternative decision probably would have been to fight him."

17. As part of the prosecution case, the contents of a voluntary cautioned statement as well as three memoranda of interviews were put before the jury. In essence, he took the position that he had assaulted his wife, which he had regretted, but that thereafter the sexual intercourse that took place was consensual and that certainly it was his belief that his wife consented. Both sides point to certain portions of the statement and interviews, thus supporting their position. Again, it is necessary to refer to some extracts. In the course of the statement, the appellant said:

> "With that I flipped, I pinned her on the bed and I slapped her with an open hand on her face at least twice. She started to make noise so I pinned her down further by placing my knees on her hands/arms. I then placed my left thumb into her mouth and pushed her tongue to the side so she wouldn't make noise. Whatever I was doing was blocking her air because she gave me an indication that she couldn't breathe. She was pointing at her mouth. I held it in her mouth for approximately one minute. I did pull my thumb out some bit to leave her breathe but I didn't take it out completely. During this time she had a grasp on my thumb and I had bite marks on my thumb on my left hand. I am left handed as well. During this time that I had her held with my thumb I hit her five or six times with a closed fist. I wouldn't say I hit her with great force. I hit her into the side of the jaw on the right hand side with my right hand. I didn't draw blood. During this she was trying to resist but she isn't violent. The whole thing lasted no more than a minute and it stopped when I rolled off her. I got back up off her and I said to her, 'I want to have sex now'. Just before that I did get her to beg for mercy to allow me to get off her. She begged me to get off her and that's when I asked her for sex. She appeared okay to me and relieved. With that I lent over and took off her knickers. She lifted her bum for me to allow them to come off easier. I got on top of her then and I penetrated her. She seemed to be enjoying the sex. She left the t-shirt on and I lifted it once to suck her tit. The intercourse lasted two/three minutes. I couldn't come. When I was up in the missionary position she took my fingers in her mouth and started to suck my fingers which was normal practice. We then tried two other positions, one was spooning, the other was doggy style. I couldn't come so I wanked myself off in the bed. She had turned away from me and she probably placed a hand back on my leg. This would have been a normal thing to do. I came into a tissue. At no stage did I come inside her or on her body. At no stage did I hold her down during the sex. She said she loved me during the sex and I said it back to her. After sex I went to sleep and at approximately 2 am I heard A. getting up."

In the course of the first interview he was asked:

> "Q. What did you think when you heard about this whole issue?
>
> A. I was shocked because I heard - … because I heard from my brother. I didn't remember the night in negative terms, whether that's right or wrong. My recollection is that it was consensual sex. It wasn't a violent night. I don't think A. was afraid. I think she was in control all the time. It was a shock. I know A. is irrational but this is a different level.
>
> Q. What else do you recall of it?
>
> A. There is nothing much else there. There was frustration. I don't think I was angry as such. I don't think that she is afraid of me either. We often say things like that. She'd say, 'I'm leaving' and I'd say, 'Go', it'd be grand, she would never be angry with me and I would never be angry with her. When she would stop I would stop. Then we had sex. I said, 'I want to have sex' cause I was frustrated and sex is an outlet for frustration. Rape was not on my mind at the time even though now I realise that sign you want - that sign, you want sex after hitting someone, it's almost like rape. In my head it was normal to have a row and then to have sex."

The application for a direction

18. Following the close of the prosecution case, counsel for M.C. indicated that she was seeking a direction on Galbraith grounds. She said that fundamentally there was no evidence before the jury that Ms. A.C. did not consent and that if there was any evidence that it was so mixed with different propositions, different assertions and inconsistencies in many ways that it would be wrong to leave the matter to the jury. She pointed out that at no stage did the complainant say "I did not consent", nor did she say "I did not want to have sex" or "I did not acquiesce". She pointed out that despite all the horrible circumstances that there were present, the complainant had said "I responded to him with love […] I calmed him down […] No need for him to do that […] I do take responsibility for my decision". When the complainant was asked "[w]hat was the alternative?" she replied "[p]robably to fight." Counsel suggested that if there was any evidence that the sex was without consent, then it was evidence that was inherently weak or tenuous and there were considerable inconsistencies present. She said that to approach the case on the basis that where there is sex and violence, it must be rape, was far too simplistic. It did not take account of 22 years of marriage and the various emotional states that came about. Analysing what occurred, she said that there was a break, a separate event after the point at which her client was moving up and down without penetrating. She reminded the judge of the language used by the complainant "We had sex then" and then when asked about her emotions that the complainant had said that fear was not at the forefront of her mind. She addressed directly the response to the question "Why did you have sex?" to which the response was "He had threatened to rape me", and the complainant's next words were "I had sex with him voluntarily." Again, she said that the response to the question "was there anything in your mind if you didn't have sex" which was "He said no God was ever going to save me, so I though of his intention, I was afraid he was going to kill me."

19. Counsel referred to the evidence of kissing and the possibility of sucking the thumb and that when the question was asked directly "The sexual acts between the two of you were consensual?" the response was yes.

20. Counsel then turned to the issue of mens rea, pointing out that when Ms. C. was asked whether it was the case after 20 years of marriage her understanding of Mr. C. was that he would have felt that what was occurring was a voluntary consensual act, she had said "Yes", an answer which she repeated. Counsel pointed out that her client in his statement and interview, while accepting that he had assaulted his wife, maintained "I did not feel that she was raped" and "I didn't feel that I choked her". She summarised her

client's position as being that, from where he saw it, there were two separate incidents, involving first the assault, and then the sex. The appellant believed his wife was enjoying the sex and had stated that he was one hundred per cent certain that it was not rape.

21. Resisting the application for a direction, counsel for the prosecution submitted that one had to look at all the evidence in the case. She submitted that it was not a situation where the Court could separate the assault and say "Well, the assault is only to do with the assault and has nothing to do with the rape." What was in the mind of the complainant and what was in the mind of the accused are directly referable to the entire incident and not just part of the incident. She reviewed the evidence, pointing out that this was not a question of mere slaps, it was closed-fist punches, about fifteen in total. She said that in relation to that aspect the jury would be assisted by the medical evidence and also the photographs of the injuries. She referred to the evidence of thumbs or at least the thumb being put down the complainant's throat and the fact that the complainant was choking, had no air, could not breathe and had thought she was going to die, and said that everything that happened thereafter had to be seen through the prism of the complainant thinking she would not get out alive. She thought that she was going to die at the hands of her husband.

22. Counsel pointed to the re-examination when Ms. C. had said in answer to the question why did she have sex, she had stated that it was done to avoid rape. She contrasted this with a situation where someone might have said "I loved him and I wanted to show him how much I loved him and we had a row and we had made up and he had apologised and I realised that he was sorry and so in that scenario I forgave him and decided that we would have sex." She stresses that that was not the scenario that was present here, that here the situation was that the woman still believed that she was in danger of being killed by her husband. Counsel pointed to the evidence about the woman screaming for God because she thought she was about to meet her maker and asked rhetorically, "How could that be characterised on any notion as a free and voluntary consent?" Counsel referred to two statutory provisions, s. 2(2) of the 1981 Rape Act which provides:

"[i]t 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, the presence or absence of reasonable grounds for such a belief is a matter to which the jury can have regard to in conjunction with any other relevant matter."

And also to s. 9 of the Criminal Law (Rape) (Amendment) Act, 1990 which provides:

> "[i]t is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to the act."

23. Counsel pointed out that the accused had said directly "I am going to rape you and I am going to enjoy it." Counsel also dealt with the state of mind of the accused. She acknowledged that Ms. A.C. had said that the accused believed that she was consenting. Counsel said that this was said because she wanted him to believe that she was consenting, she wanted to get out of that room alive. Counsel stated that the jury had to look not only at what she had said but also what the accused said. Counsel said that she did not pretend that it was an easy case but that it was absolutely a case to be decided by the jury because it was complex and multi-layered, with different things having said at different times. Having heard counsel for the appellant in reply the judge then ruled as follows:

> "I accept Ms Walley's characterisation that this is not an easy case and it certainly isn't, there are complicating factors, and the great temptation is to step into the place of the jury. I believe that if the jury is properly charged and warned of the dangers involved, they would nevertheless be entitled to come to a view on all of the evidence that there was not consent in this case and that the accused was reckless as to whether there was or was not consent. As I say, there are a number of factors that may cause the jury doubt in the case. But I think it is peculiarly a matter of fact for them to decide. So I'm not withdrawing it."

Decision

24. This is undoubtedly an unusual case. The complainant stated the following: "I was sad for him. I told him I loved him, I was sorry for him and I calmed him down. I wasn't physically forced to have sex with him" or "I had sex with him voluntarily" and that she believed the appellant would have thought that what was occurring was a voluntary consensual act. The Court would agree with the trial judge and indeed with prosecution counsel that this was not an easy case. It is for that reason that the Court has found it necessary to refer to the evidence and quote from the transcripts in much greater detail than would be normal practice. We have done so in order to give a sense of the state of the evidence at the time that the direction application was made. It is undoubtedly the case that the complainant both in direct evidence and more particularly in cross examination said a number of things which were very welcome indeed from the defence perspective. However, in the view of the Court the fact that defence counsel on a number of occasions got the answers to questions that she was hoping for is not determinative of the application for a direction. The Court agrees that in considering the application, the trial judge was required to have regard to all the evidence in the case and not just to the answers that were given to particular questions, though these questions and answers of course formed part of the overall evidence in the case and it was of course necessary that they would be considered along with all the other evidence. In the Court's view, the judge would have been entitled to come to a conclusion that a properly charged jury might not accept that there were in effect two separate incidents, but might rather take the view that what occurred was a continuum which involved the appellant violently assaulting his wife, causing her to fear for her life, then stating specifically that he was going to rape her and that he would enjoy it, then erroneously believing that he had succeeded in penetrating his wife, had commented "you don't know how good that feels", that sex took place to which there was in fact no free or voluntary consent, but which was not resisted by the complainant and that she remained in fear that the assault would be resumed, perhaps with fatal consequences. Again, in the Court's view the judge would have been entitled to conclude that a properly charged jury might take the view that a man who had very seriously assaulted a woman, caused her to fear for her life and threatened to rape her must in fact have known that she was not consenting to sexual intercourse or must, at the very least, have believed that it was possible that she was not consenting. If regard is had to all the evidence in the case then in the view of the Court, notwithstanding elements of the complainant's evidence, it was indeed a proper case to be left to the jury.

25. The trial judge initially dealt with the ingredients of the offence in brief terms. At an early stage of his charge he read the statutory definition and also read the declaration at subs. (2) to the effect that if a jury has to consider whether a man believes 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, the judge adding the comment:

> "[s]o, it's his belief we're focused on, not the belief of the alleged victim in the case. And his belief, if it was his belief,

whether it was a reasonable belief."

Then, as he came towards the end of his remarks, he recapped what he had said earlier, commenting:

> "I read, without explanation, I read the definition of rape because there is not much controversy here about what's at issue. There was sexual intercourse, there was penetration, the whole question in this case is consent and whether or not there was consent or whether or not the accused person believed that Ms C. was consenting and the absence or the presence or absence of reasonable grounds for such a belief is entirely relevant in the case and I read the statutory provision in that respect, ladies and gentlemen."

26. The judge concluded his charge on Day 6, shortly before the jury was sent away to commence their deliberations but he deferred doing that until the following morning, providing counsel with an opportunity to make requisitions. Defence counsel asked that the judge would deal with the issue of recklessness, referring to what is said in relation to recklessness in The Judge's Charge (Coonan & Foley). In response to a specific query by the judge as to what she wanted him to tell the jury counsel said two things, that he must have foreseen the risk that his conduct would bring about the relevant result, and that the test is subjective. Counsel referred to various passages from the textbook but it is fair to say that the judge was unimpressed, commenting at one stage:

> "I frankly think that a group of lay people would have a much better grasp of recklessness than that."

To which counsel responded that the next sentence that she had been about to quote provided a greater bit of clarity, which was:

> "To be reckless, the accused must have consciously adverted to the risk and nevertheless disregarded it."

27. The judge addressed the jury once more. What he had to say is relevant, not just to this issue in relation to recklessness, but also in relation to the issue about s. 9 of the Criminal Law (Rape) (Amendment) Act, 1990. Accordingly, what he had to say merits quotation:

> "[t]hen I came to the definition of rape and a man commits rape, it's a statutory definition, 'If he has sexual intercourse with a woman who at the time of the intercourse does not consent to it. B) at the time he knows she doesn't consent to it or he is reckless as to whether she does or does not consent to it.' Now, the only issue that arises in this case, there was sexual intercourse, that's accepted, is whether or not – is the issue of consent. And in relation to that, to consent and recklessness, I've been asked to explain the concept of recklessness more carefully to you. And in this connection, I'm happy to quote to you from the Law Reform Commission, which said the following and it's all in quotations:
>
> '[o]n the question of recklessness, case law is that in rape and other sexual offences the defendant is reckless if he does not have a belief that the other person is consenting, in circumstances in which he either knows there is a risk she does not consent, or his attitude is one of indifference as to whether she consents or not. Thus it covers a situation where he knows that there is a risk that she does not consent and carries on regardless.
>
> It also appears to apply where a defendant has not specifically considered whether she consented, could not care less whether or not she is consenting or presses on regardless. To put it another way, if a jury is sure that the defendant was indifferent to the wishes and feelings of the victim aptly described as "couldn't care less", then in law he is reckless for the purpose of the sex offence.'
>
> The word "Consent", ladies and gentlemen, should be given its natural and ordinary meaning. It should stand to reason that facilitating the intercourse does not of itself amount to consent. And there is statutory case, if there's any doubt about the matter, there is statutory provision that says so as well. So if somebody is under threat, to take an extreme example, if somebody is holding a gun to your head and demands sex, then you completely cooperate, you're not consenting. It's as simple as that. So the question of consent is the central question to this case. The prosecution must prove its case beyond reasonable doubt, if you have any doubts about that, you must resolve them in favour of the accused. And as has been said to you, I don't mind saying that the accused behaviour in the assault in this case and other matters that we've heard about indicate that his behaviour was absolutely reprehensible and criminal. But that doesn't mean he is a rapist."

28. On the hearing of this appeal, counsel has argued that the failure of the judge to tell the jury clearly that recklessness required that an accused must consciously advert to the risk that the person was not consenting and nonetheless disregard that risk, rendered the trial judge's charge deficient to such an extent that the conviction should be quashed on that ground. She confirmed that she has no real problems with the first paragraph of the judge's remarks on the topic of recklessness but her problem is with the sentences:

> "[i]t also appears to apply where a defendant has not specifically considered whether she consented, could not care less whether or not she is consenting or presses on regardless. To put it another way, if a jury is sure that the defendant was indifferent to the wishes and feelings of the victim aptly described as "couldn't care less", then in law he is reckless for the purposes of sex offences."

She says that what the judge had to say was inconsistent with what Charleton J. said in the Supreme Court case of The People v. C.O'R. [2016] IESC 64 in which judgment was delivered on 11th November 2016, just a month after the charge in the present case was delivered. In the course of his judgment, at para. 45, Charleton J. observed:

> "[i]n this country, the model chosen in the Act of 1981, as amended, clearly adopts not what a reasonable man believed as to the presence of consent, but rather what the individual accused actually believed. The mental element of rape requires the accused to know that the woman does not consent to intercourse or for him to be reckless as to whether she does or does not consent. Recklessness is the taking of a serious and unjustified risk. That does not mean that a reasonable man would be aware that a woman may not be consenting; ascribing to the accused what a reasonable or ordinary person would have perceived. Rather, recklessness is advertent. As Hardiman J put it in The People (DPP) v Cagney and McGrath [2008] 2 IR 111 at 126: "an accused in Ireland must have foreseen the risk that his conduct would bring about the relevant result, but have elected to proceed with his conduct nonetheless." This has been the position since the decision in The People (DPP) v Murray [1977] IR 360. In cases of rape, recklessness means that the possibility that a woman was not consenting actually occurred in the mind of the accused. Where an accused decides to proceed with or continue with intercourse in spite of adverting to that risk; that is recklessness. Alternatively, it may be claimed by the accused at trial that the man genuinely believed that the victim was consenting, even where the basis for such a

belief is totally unreasonable."

29. Defence counsel in requesting that the judge tell the jury that to be reckless the accused must have consciously adverted to the risk and nevertheless disregarded this risk was technically correct. However, in the context of rape and sexual offences the distinction between what the Law Reform Commission had to say and what was being contended for was a very fine one indeed. Some might go so far as to say, it was a distinction without a difference.

30. The trial judge in this case of course charged the jury before the Supreme Court judgment in The People v. C.O'R. [2016] IESC 64 was delivered. It must be said though that the remarks by Charleton J. in C.O'R. in relation to recklessness were not central to the issues in that case and were in no sense controversial, nor were they seen as intended to change or develop the law in relation to recklessness. This is an area of the law where context is relevant. There is a significant difference between the situation of someone having sex with another person where there is some reason to doubt whether the other is consenting and for example the situation of a bank robber who is pursued from the bank by someone in civilian clothes and whether they advert to the possibility that the pursuer might be a member of An Garda Síochána and different also from the situation of the person throwing a single punch and whether that individual adverts to the possibility of the person punched falling to the ground, hitting his head and suffering serious or fatal injuries. One indication that the distinction between what counsel was contending for and what the Law Reform Commission had to say is a fine one is to be found in the fact that on at least two occasions Charleton J. writing non-judicially expressed sentiments that are similar in tone to the sentiments expressed by the Law Reform Commission. In his book Offences against the Person (1st Ed., Round Hall Press, 1992), at p. 276 he wrote:

> "[a]pplying the model penal code definition [a reference to the Model Penal Code drawn up by the American Law Institute] and the remarks of Griffin J. [a reference to the judgment of Griffin J. in the case of The People v. Murray] to the question of consent to sexual intercourse, it is clear that the accused has a responsibility towards the victim to cease his attentions, if he is aware that the victim may not be consenting, or at least to make an enquiry, and that if he continues with the act having this possibility in mind, he will be guilty of a high degree of culpability. For that reason, it is more correct in law to state that the accused is reckless on being aware of a possibility of the victim not consenting and that the prosecution need not prove any higher element of risk than that. Such risk can never be justifiable. In circumstances of intimacy, it is submitted that any risk of non-consent is substantial because a simple enquiry can, if it is unfounded, dispel it."

In his work on Criminal Law (Charleton, McDermott, Bolger, Criminal Law, 1st Ed., (Buttersworth Ireland Ltd, 1999)) he and his co-authors at para. 8.112, p. 624 which is headed "Recklessness in rape", commented as follows:

> "[r]ecklessness was discussed by the Supreme Court in The People v. Murray and relevant extracts are reproduced at para. 190. The Supreme Court made it clear that recklessness involves the accused taking a serious and unjustifiable risk, such a risk must be apparent to the accused. Awareness of the risk, coupled with the determination not to consider it further, can be the equivalent mental condition. There is no argument to be made, it is submitted, in favour of the proposition that the risk must be so high as to require the accused to consider that the victim is probably not consenting. Any question of doubt may be resolved, in these intimate circumstances, by a simple question. Therefore, it is submitted that a risk is a serious one and that the accused is thus reckless if he is aware of a possibility that the victim may not be consenting. The availability of an easy answer to this question means that a disregard of the risk is unjustifiable, involving as it does the possible violation of another person's mental and physical integrity."

In the Court's view, it is not in fact a misdirection to say that if someone decides to have sex with another person, and couldn't care less about whether the other person is consenting or not, or is indifferent to the wishes and feelings of the other, that person is reckless.

31. Even if it might have been preferable if the judge had acceded to the requisition and had told the jury in terms that recklessness involved advertence to risk and disregarding that risk, perhaps using a synonym for adverting, it is the case that recklessness had not figured to any large extent in the case. Indeed, counsel for the prosecution says with force that recklessness was never in the case and there is some substance in that. Nonetheless, it is the situation that when refusing the application for a direction the trial judge referred to recklessness and indeed did so without referring to the alternative mens rea of knowledge of non-consent. It is probable that the absence of a reference to knowledge was simply a slip on the part of the judge and that he was not consciously suggesting that it would be open to the jury to conclude that the accused had been reckless but not open to them on the evidence to conclude that he knew that there was no consent. The case has certain similarities with the case of The People v. T.V. [2016] IECA 370, a judgment of this Court delivered on 8th November, 2016 by Edwards J. There, the trial judge had dealt with the issue of consent in his charge, insofar as he dealt with it as all, as follows:

> "[a]nd 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."

At para. 68 of his judgment Edwards J. commented:

> "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."

32. Those remarks are apposite. Even if the treatment of the issue of recklessness could be categorised as suboptimal in a situation where we do not believe there has been a positive misstatement, we are not prepared to uphold this ground of appeal.

33. Another issue raised on the appeal relates to s. 9 of the Criminal Law (Rape) (Amendment) Act, 1990. The first mention of the section was by the prosecution when responding to the application for a direction at the close of the prosecution case. When the section was referred to, the judge intervened to say that the wording of the section was self-evident. The judge's comments in that regard are in accord with what the Law Reform Commission paper said. When charging the jury, the judge did not refer specifically to s. 9 nor did he obviously allude to it. As we have seen, the judge made an implied reference to the section and if there is any doubt

about the matter, there is statutory provision that says so as well. In written submissions the appellant has contended that it would have been more appropriate and fairer for the judge to simply recite the words from s. 9 of the Criminal Law (Rape) (Amendment) Act, 1990, rather than paraphrase and simplify the language. It is also submitted that the use of the word "facilitating" rather than omission to resist was an error. It must be said that reference to s. 9, while perhaps designed to address confusion or misunderstanding, was in fact declaratory of what had always been the law. The judge's charge and his recharge did not detract from that core message.

34. Overall, the Court does not feel that the judge's charge failed to put the issues in the case before the jury. On the contrary, unusual as the case was in some respects, we have little doubt but that the jury must have been fully aware of what the issues in the case were and the jury was in a position to resolve those issues. In these circumstances the Court is not prepared to uphold any ground of appeal and so the appeal is dismissed.