THE COURT OF APPEAL

Record No: CCA 61/2014

Birmingham J.
Sheehan J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

- V -

T.E.

Appellant

Judgment of the Court delivered on the 30th day of July, 2015 by Mr. Justice Edwards

Introduction
1. In this case, on the 22nd May, 2013 the appellant was convicted on a count of rape, contrary to s.2 of the Criminal Law (Rape) Act 1981 (hereinafter the Act of 1981) as amended by s. 37 of the Sex Offenders Act 2001, by the unanimous verdict of a jury at his trial before the Central Criminal Court. He had earlier been acquitted by direction of the trial judge of a second count on the indictment that had charged him with sexual assault.

2. On the 17th February, 2014 the appellant was sentenced to seven years and six months imprisonment, with the final three years and six months of the said sentence suspended upon conditions, the sentence to date from the 17th February, 2014.

3. The appellant appeals against his conviction only.

The evidence before the jury
4. The case was concerned with events alleged to have taken place on the 5th July, 2010. The complainant in the case was a Ms. F.M., a Brazilian national who had come to Ireland a month and eight days earlier and was working as a nanny/au pair for a family in Co. Galway. The complainant has limited English but told the jury that one of her reasons for coming to Ireland was to improve her English. She had been doing a degree in education in Brazil with a view to training as a teacher, but had temporarily dropped out for the purpose of improving her English and had travelled to Ireland with that in mind. She came to Co. Galway in circumstances where she knew another Brazilian person then living there, a Mr V.S.S., who became her fiancée for a time.

5. The complainant told the jury that from about 9.30am on the day in question she had been cleaning at the private house of her employer, and having finished that task, was driven into the town in Co. Galway in which she was residing by the said employer and, at her own request, was dropped off by him opposite the Catholic church, which was a short distance from where she lived.

6. Her evidence was that as she was proceeding towards her house, she passed a fast food premises. As she was passing it, a man who was outside of a nearby bar called out to her and spoke to her in English.

7. The appellant has at all stages accepted that he was that man.

8. The complainant told the jury that she stopped and the man enquired if she did cleaning, and she responded that she didn't understand. She then started walking again and informed the man that she was going home, that she did not understand him, and that she had to go because it was late and she was tired. She then proceeded in the direction of her home. Before she had quite got there the man caught up with her in a car. The man persisted in trying to talk to her. The complainant said the only word she could understand was "clean". This caused her to initially think that he was offering a cleaning service but then she realised that he wanted her to do cleaning, and as she heard "one, two, three" being mentioned, with gesturing by the man, she got the impression that he wanted her to do a cleaning at 3 o'clock.. At this point it was approximately 1.30pm. The complainant said she thought it would be worth it to do it, and she decided to do the cleaning.

9. The complainant got into the man's car and he then drove off. She was initially calm but as time passed she began to get concerned and asked him twice "Is it going to take long?" to which he responded "Yes, yes, we are getting there." She said that after 20, or maybe 30 minutes, the car stopped at a house and they went inside.

10. The complainant said that she was offered some cleaning products by the man but they were not enough, and he had no suitable gloves to give her. The man then showed the complainant the places she was expected to clean, and she started work.

11. The complainant began to realise that the man did not really want a cleaning service. She arrived at this realisation when he touched her hand at one point and said she was very beautiful, and he started rubbing her hair. She then asked for a Coca Cola and while he was gone to get it she attempted to leave. She tried opening a door but found it was locked. She then tried another door, the front door, opposite which there was another house in which she had seen a woman occupant, but found it was also locked.

12. At this point the man returned with the Coca Cola. The complainant stated that she made no further attempt to leave as she was afraid. The complainant stated that after receiving the drink she then engaged in cleaning a window. The man then told her "No no, it's not like that", and purported to explain to her how to clean, and then held the complainant's hand. He then asked her to go to another room. They left the room they were in and the complainant then asked the man at what time would he bring her back, in response to which he said nothing but gave the complainant €50. The complainant stated that she thought at that point that she was going home, but the man held her hand and they went upstairs. When the complainant went to clean a window in one of the upstairs rooms the man started touching her on the hand and asked her about her family, about whether or not she had children, and whether or not she was married.

13. The complainant stated that the man then held her hands and brought her to yet another room. He then kissed the complainant on the neck following which he took off her blouse/shirt and then removed his own clothes. The complainant told the jury that he then kissed her on the mouth and she added "When he kissed me, I imagined that I that he was to do sex, to have sex." The

complainant stated that having removed his own clothes "he came to take the rest off. I didn't want him to touch me, and then I said I take my I myself take my clothes off."

14. Under cross examination the complainant added that at this point the man had touched her breasts, had unbuttoned and removed her trousers, and had kissed her vagina. She accepted that she had removed the rest of her clothes with the exception of her bra which she was unsure about. When asked in cross-examination why she removed the rest of her clothing she stated:-

> "A. Simply, like, I was in front of a man that wanted sex
>
> Q. Yes?
>
> A. I didn't know what he would do, I wouldn't do his reaction, and you wanted that I say, "No, no, no, I'm not going to take it." With one punch he would pass me out, knock me down, and then I took
>
> INTERPRETER: Sorry, can I repeat the last sentence, please?
>
> Q. MR GREHAN: Yes?
>
> A. So with one punch he would knock me down; this is why I took them, the clothes off."

15. The complainant was asked in examination in chief if she did anything after removing her clothes and she said that she told him "No". When asked by prosecuting counsel why she had said that, she replied "Because I did not want". When then asked "What did you not want?" she replied "I went there to clean, not to have sex."

16. The complainant gave evidence that the man then grabbed her arm and asked her to be over him. The complainant then stated to the jury, "And then I said that I didn't want, that's it, and then he pulled my arm". The complainant said that she was naked at this stage, and the man had trousers up to his knees. She described being on top of him, and then gave the following evidence:-

> "Q. And what happened?
>
> A. He put -- he put his penis in my vagina, and then after that he pushed me.
>
> Q. Did you agree to that?
>
> A. No.
>
> Q. When his penis was inside your vagina, what happened, what did you do?
>
> A. Nothing ... I was on top of him, and he did everything.
>
> Q. And how long did that last for?
>
> A. It was really, really fast, he put it and then
>
> Q. And why did you allow that to happen? I'm sorry for the question?
>
> A. I live in Brazil, a country of ... they always say to us that a woman can't react; regardless of the fact, we shouldn't react ... he's way stronger than me, so it was a role that that there was no one, no ... I didn't know what was his reaction. I didn't react, simply I wanted -- I wanted to leave alive. That would be enough.
>
> Q. How long did this go on for?
>
> A. Five minutes. It was really fast.
>
> Q. And what ?
>
> A. So
>
> Q. And did he do anything afterwards
>
> Interjection
>
> A. So within five minutes, more or less, and then he pushed me, and then after that, he come.
>
> Q. After that, what?
>
> A. He come.
>
> Q. What do you mean by 'he come'?
>
> A. He ejaculated."

17. It was put to the complainant in cross examination that the sexual intercourse she had described was consensual, and she denied that. It was further put to her that she had never expressed unwillingness to have sex with the appellant, and she would not accept that. It was further put to her that the only time she had uttered the word "No" was when she was sitting on top of the appellant before going down on top of him for intercourse. It was suggested that she had said "No, no come", so as to convey to him that he should not ejaculate inside her as she did not want to get pregnant. The complainant would not accept that what had occurred should be construed in the manner suggested, and the following exchanges with counsel for the appellant ensued:-

> "A. I said he pulled my arm, and I think that he have have said to me that I should be on top of him, so a naked man

Q. First ?

A. and then he got, and then he told me with gesture, with gesture saying to me to be on top of him, and said to him, "no, no, no", as if I didn't want -- at least not get me pregnant, just

Q. Ms M., do you agree you said this to the gardaí: "He lied on the floor", yes?

A. Yes.

Q. "And said for me to come over to him and then I said to him I did not want to get pregnant. I said 'no, no', because he wasn't wearing any condom"?

A. Yes."

Q. Oh yes. So you did say something to him about not ejaculating inside you because you did not want to get pregnant?

A. How could I speak to someone who just speak -- just speaks English.

Q. Okay. We'll just move on. You sat on top of him?

A. I did not t sit on top of him, he pulled me. I told that.

Q. Well, what you told the gardaí was, "First, he said for me to come over him"?

A. Yes, he said, he pulled me.

Q. No, no, he just said it?

A. How come, does he speak Portuguese?"

[Interjection by prosecution counsel]

"Q. After you noted, you said he wasn't wearing any condom, you said he said something, "I did not understand, and then he pulled me over him"?

A. I didn't, I didn't understand what he said, I he was saying in English.

Q. And you said then, "I did not agree with anything. I just let myself go and have sex with him because I was afraid"?

A. Yes.

Q. Is that right, you just let yourself go?

A. Yes, I didn't let me go. I had fear, I was afraid.

Q. I see?

A. I just didn't have reaction."

18. The complainant stated that after the man had fulfilled his desire, as she put it, his phone rang and he went to answer the phone. While he was gone the complainant stood up and put her clothes on. When he returned he put his clothes on as well.

19. In response to a question asked of her in cross-examination, the complainant stated that she did not know if the man had ejaculated inside her, but that he did ejaculate. She said:-

> "I know that he did come, yes, he did come, because, like, he almost threw me up to the wall."

The complainant added:-

> "He just did really, really strong. He wasn't -- he wasn't polite to say, "excuse me" or something like that, he just -- he just pushed me. I wasn't doing anything, I was just stay still, and then I let him do anything, everything that he wanted, and it was when he pushed me. And then, thanks God, his phone rang. It was the moment that I just run, and just put my clothes on.

20. It was then put to the complainant that the appellant had pushed her off so that he would not ejaculate inside her, because she did not want that, and that she had seen him ejaculate outside of her. She answered "Probably, I saw. He used a glove". The reference to a glove was not probed. She then agreed with counsel that she had asked him not to come inside her.

21. The following exchange then occurred:-

> "Q. You see, Mr E., he is interviewed by the gardaí about this. He agrees you have sex, and you touch him in the car going back, but he said you agreed to everything and you never gave any indication that you didn't agree. You were smiling; afterwards, you were giddy, in good humour, and there were no signs whatsoever that you were unwilling, and that if you had showed any signs, he would not have tried anything with you. You never showed him any fear, do you agree, you never showed any fear? You agree or not?
>
> A. No.
>
> Q. How did you show fear?"

[Interjection by interpreter]…

"A. Yes, I showed some signs of fear. At the time that he brought me into the room, I was so nervous, how couldn't I have indicate any sign of it? He just took advantage of the moment.

Q. But this is what I'm saying, you have not told me any signs that he could have known that you are not going along with this?

A. Yes, I gave signs, I said, "no" so many times.

Q. Well ?

A. If some man comes to kiss a woman, and the woman says, "no", it's no, it means no. So the right thing is to take me and bring me back.

Q. I agree completely, but you did not say -- you didn't not tell the gardaí you said, "no". You said you let this happen: "I let myself go and have sex with him", that's what you said. The only time

A. I said, like, that I let it go by the fact that I was afraid. I didn't say that I was doing what I wanted. Never I wanted, never I said that. I just said that I let it happen because I was so afraid."

22. The complainant agreed that the appellant had never hit her, nor had he threatened to hit her, nor threatened her in any way. She further agreed that she had not cried out. She insisted that she had been angry, and that her anger would have been manifest when she had told him "No, no, no". She agreed that she had not cried tears.

23. The complainant testified that after they got dressed the appellant drove her back to the town in which she was residing in Co. Galway. She contended that he attempted to force her to give him oral sex in the car while he was driving and that when she refused he had masturbated himself to ejaculation, all the while still driving the car. When it was put to the complainant that she had willingly initiated sexual stimulation of the appellant's penis during this car journey and that when she took her hand away he had finished himself, the complainant responded "if you say so, I do not agree". This episode had formed the basis of the charge of sexual assault on which the appellant was granted a direction at trial.

24. The complainant testified that when the car arrived back in the town in which she was residing in Co. Galway, she insisted that the appellant should drop her off some distance from her home. She initially stated in her evidence in chief that she requested this so that the appellant would not see where she lived. However, under cross examination she accepted that the appellant had seen where she lived earlier in the day, and at that point she contended that she didn't want him dropping her off close to the house because there were kids in her house. It was put to her that the real reason was that she did not want anyone to see her getting out of a male stranger's car, because she was afraid of what people in her community might think. The complainant rejected that as being her motivation.

25. It was then put to the complainant that she had decided to allege rape in the following circumstances. After returning to the town in which she was residing in Co. Galway, she had encountered another Brazilian man who was known to her, a man by the name of A.S.C., who informed her that he had earlier seen her getting into the appellant's car. It was suggested that when Mr. C. said that, and further advised the complainant that she should not get into a car with a strange man and that she should be more careful, the complainant had in effect panicked that she faced odium within her community, and therefore decided to allege rape notwithstanding that everything that had occurred with the appellant had been consensual. While accepting that she had encountered Mr. C., and that Mr. C. had said those things to her, the complainant rejected any suggestion that this was her motivation for alleging rape, contending that it was "absurd". She also contended that a deceit such as that suggested would have been pointless because, although she was not particularly religious, she was in the church and while a person could hide from man they could not hide from God.

26. The jury also heard brief evidence from Mr. C. who confirmed that he had seen the complainant getting into a man's car in the middle of the day in question, and he had indeed encountered her on two occasions later that day. The first was at about seven o'clock, when he called to her home to visit another occupant, at which time she was sitting on a couch and appeared to him to be a little bit stressed and nervous. The second occasion was later on that evening when he met her at a shop, at which time he told her that he had earlier seen her getting into a jeep being driven by a stranger he had briefly met earlier in the day, and advised her that she shouldn't get into a stranger's car.

27. The jury also heard brief evidence from a Mr. V.S.S. who said that he called to the home of the complainant at about 9.30pm on the evening in question and that she was in tears. He further stated that he brought her to a local doctor the following morning.

28. The other evidence in the case consisted of Garda evidence concerning the receipt of a complaint of rape, the interviewing of the complainant, accompanying the complainant during a search for the house in which the alleged rape was said to have occurred, the identification of a particular house as being the scene of the alleged crime, the bringing of the complainant to a doctor for a forensic medical examination, the arrest of the appellant on the 7th July, 2010 on suspicion of rape, the appellant's detention at Killaloe Garda station under s. 4 of the Criminal Justice Act 1984, and the interviewing of the appellant while he was in detention.

29. In the course of being interviewed while in detention the appellant gave the account that had been put to the complainant by his counsel. He admitted having sexual intercourse with the complainant at the house in question but contended that it was consensual. Towards the end of the first interview with the appellant which commenced at 10.00pm on the 7th July, 2010, the following exchanges, *inter alia*, took place:-

Q. "She says you never asked her for sex?"

A. "I didn't ask her for sex, but she showed it all ... " sorry: "... she showed it in"?

A. "She showed it in", yes.

Q. If you'd just read it out, yes, go on?

A. "She showed it in all her actions."

Q. "Thank you. She said she was in fear of her life because she was in a strange place alone with a strange man who made advances on her when she didn't want it, and she was in a room that was at the back of the house, that's why she didn't stop you; can you understand that?"

A. "There was no remorse in her face; if she wanted to she could have run down the stairs. The door was open, she could have left."

Q. "Did you know she was consenting?"

A. "That was the message I got, I wouldn't have laid a finger on her otherwise. Once we left the house on the way home, the girl was full flight and full of humour, she touched me up five or six times."

[Brief Interruption by member in charge to check on welfare of the prisoner]

A. "Under no circumstances this girl didn't give signs that she was unwilling in any way."

30. In the course of a further interview with the appellant on the following morning, the 8th July, 2010, commencing at 9.08am, the following further exchanges, *inter alia*, took place:-

Q. "She says she took her top off as she was afraid, and you took her bra off?"

A. "She took off her own clothes."

Q. "You said last night that she didn't want to get pregnant; how did you know that?"

A. "I picked it up from the sign language, she said something like 'no come'."

Q. "In your sign language to us, you waved your hand from side to side, indicating 'no, no'; is that correct?"

A. "Yeah, I said 'no come'."

Q. "Could that not have meant in her very poor English, 'no come over to you'. In other words, 'I don't want this'?"

A. "She came over to me, she advanced over to me, and sat down on my penis, and she tried to erect it as she went up and down with her hand."

Q. "She said 'no come' to you, she was afraid of you, as you can understand, a young woman in a foreign country in a foreign town having no English, having no idea where she was, she would be afraid, do you understand that?"

A. "Yes, this girl advanced over to me with plenty of joy and laughter in her face, she was sending a clear message to me not to come inside her so when I finished she was laughing and smiling."

Q. "Why do you think she reported this to the guards, the gardaí if it was such fun?"

A. "Ah sure Jesus, I don't know, like, I don't really know. At any time in any way that girl could have left the house, ran down, gone next door, anything."

Q. "Can you accept that this young lady didn't know where she was. On arrival she didn't see any neighbours, she was intimidated, not necessarily openly fearful, but based on her age, location, language barrier, and being in the process ..." "... in the presence of a man who openly admits to making the first moves on her, that she would be afraid?"

A. "At any time that the girl entered the house, she showed no fear, she was always outgoing and jolly."

Q. "Can you accept that she was nervous and fearful, but just didn't show it?"

A. "I don't know, she didn't look to be."

Q. "You have a daughter her age, did it not dawn on you to think that she may have been in fear?"

A. "Based on those circumstances, at that age, it didn't dawn on me."

Q. "The fear element of it didn't dawn on you?"

A. "Well, the girl didn't show it."

Q. "If it was a situation that she was in fear inwardly at moment that you kissed her, which progressed onto groping under the clothing, and she says that she pushed you away and that you now getting sexually aroused that you were not aware of her fear and her rejection, or because of the excitement that you were reckless as to whether she was showing fear or unwillingness to continue having pushed you away, is that a fair assumption?"

A. "The girl showed no fear in anyhow, inwardly or outwardly, in her humour, in her actions, in any way. If she did in her actions, I would have stopped immediately, and I in no way want to distress this girl in any way or in anyhow."

31. There was also a third interview to which it is not necessary to refer for the purposes of this judgment, and then a fourth interview which commenced at 5:34pm on the 8th July, 2010. In the course of that fourth interview there were the following exchanges, inter alia:-

Q. "You approached her because she was a stunning looking lady, yes?"

A. "Ah she was nice, yeah. I didn't hassle her in any way when I spoke to her, I talked to her."

Q. "You followed her down the street and pulled in by the church to speak with her again. You targeted her as being someone you wanted to be with?"

A. "Okay, John, she passed the jeep again, I put a bit of talk to her, and she talked to me."

Q. "She's alleging that you took advantage of her, you raped her in that she did not consent to having sex and you were reckless as to whether she could or would consent because of her language, et cetera. This you cannot deny?"

A "I did not take advantage of this woman. I did not harass her in any way or force her to do anything she want to do. I did not rip her clothes off, and I did not think she did anything against her will that she did not want to do. She took off her own clothes, I did not tear a stitch and she did not have a mark in any way or such on her."

Q. "Was she upset leaving the house?"

A. "She did not show me that she was upset leaving the house."

Q. "What did you say when you finished having intercourse?"

A. "I got her off, I came on myself, I cleaned myself. She was laughing. She did not show pity on herself when I pushed her off, she had a smile on her face."

32. In addition, the jury received evidence by written statement from three witnesses, using the procedure under s.21 of the Criminal Justice Act 1984. These were the local doctor the complainant attended the following day, and his medical receptionist, and another doctor who later conducted a forensic medical examination of the complainant at a regional hospital at the request of the gardaí. The medical receptionist's evidence was that the complainant had tears rolling down her face as she waited to see the doctor and she appeared to be frightened and shocked. The local doctor's evidence was that he prescribed her a medication, Frisium, for anxiety but did not perform a gynaecological examination. The second doctor, the forensic medical examiner, indicated that while he did conduct such an examination there were no findings of physical trauma to her body or genital area. However, he stated, this did not preclude the possibility of unconsented to sexual intercourse.

The grounds of appeal

33. The Notice of Appeal filed on behalf of the appellant advances five grounds of appeal. However, only two of the grounds pleaded, i.e., grounds of appeal nos. 1 and 4, respectively, were ultimately relied upon. These were formulated and pleaded as follows:

"That the Learned Trial Judge erred in law and / or in fact at the trial of the Applicant in:

1. Not withdrawing the case from the jury and directing a verdict of not guilty at the close of the prosecution case on the basis of the complainant's evidence.

4. Failing to adequately charge the jury in relation to matters of law as they pertained to the defence case, in particular;

(i) The issue of recklessness as to whether or not the complainant was consenting to sexual intercourse; and

(ii) The issue of knowledge as to whether or not the complainant was consenting to sexual intercourse."

34. In addition, although not included in the Notice of Appeal filed, the appellant has sought in written and oral submissions to argue an additional ground of appeal based upon the trial judge's instruction to the jury, in giving them a corroboration warning in the exercise of his discretion, that "A distressed state is capable of amounting to corroboration, but it is considered by the courts to be weak corroboration." It was contended by the appellant that this instruction, in the circumstances and context in which it was given, and coupled with a failure to specifically instruct the jury that the evidence of Mr. V.S.S. could not amount to corroborative evidence of distress because it lacked the required quality of independence, amounted to a misdirection.

35. No objection was raised to this additional ground being argued, and in the circumstances the Court is disposed to engage with it.

36. For convenience the additional ground will hereinafter be referred to as ground of appeal no. 6.

Ground of Appeal No. 1

37. It was submitted on behalf of the appellant that the evidence of the complainant was of such a tenuous nature and was itself contradictory to such an extent that the trial judge had erred in not acceding to an application by counsel for the appellant to withdraw the case from the jury. In support of this counsel has argued before this Court, and had similarly argued before the court of trial, that the preponderance of evidence was that the complainant had not communicated that she did not consent or was objecting to what had occurred. While the complainant had in evidence stated that she had said 'no', it was pointed out that this was at odds with her statements made to Gardaí.

38. Counsel for the appellant outlined to the court a number of alleged inconsistencies in the complainant's various accounts, for example that the complainant had stated in her evidence in chief that she had asked to be dropped some distance away from her house so that the accused would not learn where she lived, whereas in her statement to the Gardai she stated that she had earlier pointed out her house to the accused. Moreover, she had accepted under cross examination that she had in fact done so. He further highlighted the fact that the complainant did not make any complaint in the immediate aftermath of the incident despite having the opportunity to do so.

39. Counsel argued that in this case where there was no assault, no violence alleged nor any threat of violence, where the complainant had stated that she "let herself go and have sex with him", and where there were significant inconsistencies in her testimony, it was unsafe to have allowed the matter to go to a jury. It should be pointed out in fairness that the complainant did not in fact state that "she let herself go and have sex with him". Rather, while it was put to her that that was the case, she would not accept that. While her evidence was that she didn't resist, and had indeed co-operated to the extent of removing some of her clothes, she stated that she had done so because she was in fear.

40. It is clear that the application for a direction was purportedly based upon the second limb of Lord Lane's celebrated statements of

principle in *R v. Galbraith* (1981) 73 Cr App R 124 ; [1981] 1 W.L.R. 1039. In this Court's recent judgment in *The People (Director of Public Prosecutions v. J.R.M.* [2015] IECA 65, (unreported, Court of Appeal, 27th of March 2015) this Court sought to address a commonly held misconception that the second limb of Lord Lane's statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. The Court stated:-

> "47. …. This Court wishes to emphasise that it is not authority for that proposition.
>
> 48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.
>
> 49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

41. The Court considers that in the present case it could not be said that the state of the evidence was so infirm that no jury, properly directed, could convict upon it. While there were weaknesses in the prosecution's case, and it is true that in some respects the complainant's evidence was arguably vague, and that it contained inconsistencies, these were quintessentially matters for a jury to grapple with and resolve.

42. The decision to refuse a direction was within the trial judge's legitimate range of discretion, and was a correct decision in this Court's view. Accordingly, the Court is not disposed to uphold this ground of appeal.

Ground of Appeal No. 4

43. It was submitted on behalf of the appellant that the trial judge erred in law in misdirecting the jury on the issue of recklessness. On this issue the trial judge directed the jury as follows:-

> "You perhaps will have no difficulty with the concept of knowledge and knowing whether she was consenting, but it isn't sufficient that he knew. He could also be reckless as to whether she consented or not. And what is recklessness? Recklessness, ladies and gentlemen, occurs if a person, before he or she does the particular act, either fails to give any thought to the possibility of there being any risk to what they were doing, or if, having recognised that there was such a risk, proceeded nevertheless to do it. So that's what recklessness is. The law, ladies and gentlemen, in the 1981 Act, further provides that not alone are these matters that the jury must obviously consider whether or not the necessary constituents or ingredients of the offence are there, but the Act goes on to provide that where a man believes that a woman is consenting and that's obviously an issue for you in this case it provides that the presence or absence of circumstances that would give rise to such a belief on the part of the man are matters to which the jury must have regard. And I'll come back to that, ladies and gentlemen, when I deal with the facts of this case. But it has to be borne in mind, as I say, that not alone do you have the definition as to what constitutes rape, there is also the consideration by the Oireachtas of the position of a man who believes that a woman is consenting and what matters the jury should have regard to in considering that. And again, ladies and gentlemen, they are matters that must be considered in the light of the fact that the onus of proof rests upon the prosecution and not that the onus of proof is switching to the man in relation to that aspect of matters."

44. The appellant contends that the trial judge's direction to the jury was incorrect and that it could only have served to confuse the jury on the issue of recklessness. The direction given to the jury invites the jury to find recklessness as having been proved in two instances:

> (a) if the accused failed to give any thought to the possibility of there being any risk in what he was doing, or
>
> (b) if, having recognised that there was such a risk, he proceeded nevertheless to do it.

It was submitted by counsel for the appellant that this direction does not accord with the law and suggests to the jury that they can convict the accused simply because he did not advert to the risk that the accused was not consenting. It was contended that this direction is particularly dangerous where on the facts of the case before the court there were very few, if any, objective indicators speaking to a lack of consent.

45. The law on the issue of recklessness in this jurisdiction is set out in *People (DPP) v. Murray* [1977] I.R. 360, wherein Henchy J. cited with approval the following definition as contained in the English Model Penal Code:-

> "A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of a high degree."

46. Accordingly, it is settled law that for an accused to have acted recklessly he must have adverted to the particular substantial and unjustified risk, and have carried on regardless, consciously disregarding that risk. That this is so is beyond any doubt and is reflected in the remarks of Hardiman J. in *The People (Director of Public Prosecutions) v. Cagney and McGrath* [2007] IESC 46, where he stated (at p. 27 of his judgment):-

> "As a result of the judgment in *Murray*, 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"

47. Counsel for the appellant submits that the case law establishes that a subjective test is to be applied. An accused cannot be convicted if he has not recognised the possibility that the complainant was not consenting.

48. The Court was also referred to s.2(2) of the Act of 1981 which is in the following terms:-

> "It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman

was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

49. While acknowledging that the trial judge charged the jury correctly with respect to s.(2)(2) of the Act of 1981, counsel for the appellant submits that this provision does not water down the requirement in order to establish recklessness that the accused must have consciously adverted to the risk that consent was not forthcoming, and have opted to proceed regardless. The section simply acts as guidance to the jury that in assessing an accused's claim that he believed that the complainant was consenting, they should have regard to the presence or absence of reasonable grounds for such a belief, and this is "in conjunction with any other relevant matters". It was submitted that this section does not alter the test to be applied, which is subjective in nature, and it should not be viewed as making any inroad into the requirement for conscious advertence.

50. It was further submitted that the trial judge, in charging the jury as he did, failed to direct the jury as to the interaction between the subjective test of recklessness and the provisions contained in section 2(2) of the Act of 1981. It was contended that the failure to do so may have engendered substantial confusion amongst jurors as to whether an objective or a subjective test was to be applied.

51. Counsel for the appellant acknowledges that no complaint was made about the correctness or adequacy of the judge's charge at the time, and no requisition was raised with regard to it. However, he contends that notwithstanding that that is so, his client ought not to be precluded from criticising the judge's charge as to recklessness on appeal in circumstances where to so preclude him could give rise to a fundamental injustice.

52. It is clear beyond peradventure that the trial judge was incorrect in charging the jury that recklessness can arise where there is a failure by an accused "to give any thought to the possibility of there being any risk" in what he is doing, and that his charge in that regard represented a misdirection.

53. Counsel for the respondent does not dispute that there was a misdirection, but contends that it was not a material misdirection, or one that could have led to any injustice, in the circumstances of the case.

54. The first point he makes in that regard is the fact that neither side raised any requisition in relation to the judge's charge on recklessness. He contends that this was because the charge on recklessness did not give rise to any concern or controversy at the time because failure to advert to the risk that the complainant was not consenting really did not arise for serious consideration on the run of the case. Rather, the central clash in the case concerned whether the accused, as he was expressly contending, believed the complainant was consenting to intercourse. In that regard the trial judge had properly informed the jury about s. 2(2) of the Act of 1981, and had also informed the jury that it was reckless to proceed to do something notwithstanding conscious advertence of a risk associated with doing so. While there was no mention of the risk having to be "substantial and unjustified" no complaint is made in respect of that omission.

55. In circumstances where no requisition was raised by the appellant, counsel for the respondent contends that he is now precluded from raising the point, and in that regard the respondent relies on *The People (Director of Public Prosecutions) v. Cronin* (No 2) [2006] 4 I.R. 329.

56. In addition, counsel for the respondent, while not disputing the applicability of the definition of recklessness set out in the *Murray* case cited above, makes the point that neither the *Murray* case nor the *Cagney* and *McGrath* case were rape cases. Unlike the situations in those cases which were concerned with recklessness as to a potential outcome of the conduct engaged in, what arises for consideration in the context of a rape case is possible recklessness, not as to a particular outcome, but as to the existence of a particular circumstance at the point that intercourse took place i.e., the absence of consent to intercourse by the other party. Accordingly, it was submitted that while the respondent fully accepted that the test was a subjective one, any critique of the learned trial judge's charge must be carried out in the full context of the case and in particular the matters advanced on behalf of the appellant at trial.

57. Counsel for the respondent submitted that the entire case had proceeded from beginning to end on the assertion by the defence, most loudly given voice to by counsel for the appellant, that the appellant had most certainly adverted to the issue of consent, in that he had been given positive comfort and encouragement by the acts and demeanour of the complainant, and believed her to be consenting. In short, his case was that intercourse took place, that it took place with the apparent consent of the complainant and that she had positively created the impression in the mind of the appellant that she was in fact consenting.

58. It was submitted that counsel for the appellant had been absolutely clear as to the defence position: that the complainant had communicated her consent through her reactions, her positive participation and her demeanour. He said, *inter alia*:-

> "You know, it isn't as if in sexual relations that we ask a direct question, "Do you want to do X?" People start things, ladies and gentlemen, and people communicate their acceptance, which might be a better word, of what is happening, in different ways. Sometimes it might be expressed in language. I would suggest to you very, very rarely. It's often expressed by the way in which you react, whether you participate; whether, for example, you take off your clothes or not; whether you smile or whether you kiss or allow yourself to be kissed, that you don't turn your head away or something of that nature, ladies and gentlemen. And in this particular instance, of course, none of the normal ways of indicating that you did not consent or not agree with what was going on occurred in this case. None of them. And, if anything, even on the account given by Ms. M., the smiling, the taking off the clothes, I would suggest to you, green lights, not red lights, not even amber lights or certainly not red lights, not even amber lights, but green lights in terms of what is required."

59. Counsel for the respondent contends that in the final moments of the same closing address to the jury, counsel for the appellant had again summarised the defence position with clarity and precision:-

> "And in those circumstances there is not a case where you can simply visit on the accused, I would suggest to you, a conviction for rape when, even on the account she has given, every signal that was sent was one indicating - she says because she was in fear - that she was agreeable to what was to happen and not a single, as it were, as I say, red light flashed, whether by way of shouting out or tears or something a bit more dramatic at any stage, that would have afforded him the opportunity to back off. And that is not, I would suggest to you, the crime of rape, ladies and gentlemen. The crime of rape has to be where somebody overbears what is in front of them, ignores deliberately or simply knows that somebody is not in agreement but carries on nonetheless."

60. The respondent contends that the appellant, having run his defence from beginning to end on the basis that he had firmly believed the complainant to be consenting to sex, and having at every turn pointed to what he says were the positive contributions made by the complainant to that belief, now seeks to complain that the jury were not fully advised of the possibility that he had never considered the issue of consent at all. Alternatively and, the respondent says, even less tenably, he seeks to complain that, while the jury were certainly told over and over again by his own counsel that he believed the complainant to be consenting, they were not warned as to the possibility that while he had considered consent, he had not considered the lack of it. The respondent submitted that if his argument is the former then it flies directly in the face of his own case as put fully, and repeatedly, throughout the trial. If it is the latter, then the appellant seeks to go through the looking glass in suggesting that the issue of the presence of consent is a matter distinct from and unrelated to the issue of a lack of consent, rather than being the two sides of one conceptual coin. Counsel for the respondent submitted that such a submission was unstateable and illogical.

61. Finally, counsel for the respondent has drawn the Court's attention to the English case of *R v. Satnam and Kewall* (1983) 78 Cr App. R. 149, in which it was held that a person who could not care less whether a woman consented or not is reckless within the meaning of the [English] statute. The Court of Appeal, Criminal Division, stated:-

> "If [the jury] came to the conclusion that he could not care less whether she wanted to or not, but pressed on regardless, then he would have been reckless and could not have believed that she wanted to, and they would find him guilty of reckless rape."

62. This Court finds itself in agreement with the respondent that the appellant must be regarded at this stage as being precluded from raising criticisms of the trial judge's charge with respect to recklessness, in circumstances where no complaint was made at the time and the trial judge was not requisitioned either as to the correctness or adequacy of his charge, having regard to what is stated in *The People (Director of Public Prosecutions) v. Cronin* (No 2) [2006] 4 I.R. 329.

63. While the *Cronin (No 2)* case does not completely close the door to points being raised at an appeal that were not raised in the court below, it sets preconditions to any possible relaxation of the general rule in that regard in a particular case. Giving judgment for the Court of Criminal of Criminal Appeal, Hardiman J. stated:-

> "We would wish to reiterate the jurisprudence of the court which has been in place for many years that there is an obligation on counsel on both sides, the prosecution and the defence, to bring to the attention of the trial judge any inadequacies they perceive in his directions to the jury. If an appeal is brought before this court on a point that has not been canvassed at the trial this court will regard any person making such a new point as having an obligation to explain why it is sought to be made on appeal when not made at the trial. That is not to say but that if the essential justice of the case calls for intervention we have an obligation so to intervene."

64. The Supreme Court subsequently upheld the judgment of the Court of Criminal Appeal, and agreed with the view expressed by Hardiman J. Geoghegan J. stated that, in circumstances where the applicant had been defended with skill and competence at the trial:-

> "It would be wrong now to set aside the conviction on foot of matters which were deliberately never raised in requisitions unless this court were of the view that a fundamental injustice had been caused."

65. Accordingly, an appellant who seeks a relaxation of the general rule that he is precluded from arguing on appeal points that were not raised before the court of trial must provide an explanation if he can as to why the point now sought to be raised was not raised at the trial, and satisfy the appellate court that the essential justice of the case obliges it to intervene. While in a number of cases subsequent to *Cronin (No 2)* these requirements have been referred to as though they were conjunctive requirements, *e.g., The People (Director of Public Prosecutions) v. McGovern* [2010] IECCA 79, the actual quotation from Hardiman J. suggests that they are not, and the better view seems to be that even where an explanation is not forthcoming the Court will still be obliged to intervene if the essential justice of the case calls for it. Support for the latter view is to be found in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Shazhad Hussain* [2014] IECCA 26 where Clarke J. said:-

> "5.7 On the basis of the authorities earlier cited it is clear that the Court should only entertain a point concerning a judge's charge, which was not made or persisted with at trial, if the Court is concerned that "a fundamental injustice" is at risk (as per Cronin No. 2) or "the essential justice of the case so requires" (as per McGovern)."

66. It is noteworthy that at an earlier stage of the same judgment, Clarke J. had remarked:-

> "A failure to correctly charge the jury on that central issue creates a much greater risk of injustice than an error in respect of a peripheral aspect of the case."

67. The relevance of the obligation to provide an explanation where possible for not raising a point in the court below is that an appellate court should not lightly contemplate a relaxation of the general rule in an individual case if there is reason to believe that the point at issue was, or may have been, deliberately not raised for tactical or strategic reasons.

68. In the present case no explanation has been offered on behalf of the appellant for why the points now sought to be relied upon were not raised in the Circuit Court. In the absence of any such explanation, the Court cannot foreclose on the possibility that there may have been a strategic decision not to do so, in circumstances where the case may have been perceived as going well following a rigorous and forensic cross-examination and testing of the complainant's account that had yielded up significant inconsistencies / *non-sequiturs* that arguably went to her credibility and reliability.

69. In addition, despite a submission from counsel for the appellant to the effect that the essential justice of the case requires that he be allowed to rely on the points at issue that were not raised at the trial, and that he is at risk of suffering a fundamental injustice if he is not allowed to do so, this Court is not persuaded that that is so.

70. This Court considers that, while the judge did misdirect the jury with respect to recklessness, in suggesting to them that recklessness could arise even where a risk was not adverted to, it was a misdirection as to a hypothetical state of affairs that simply would not have arisen for their consideration on the run of the case; a theoretical possibility, yes, but one that flew in the face of the evidence before the jury. The defence had not contended at any stage that there had been a failure by the appellant to advert to the issue as to whether the complainant was or was not consenting when the appellant had sexual intercourse with her. On the contrary, at all stages the defence case was premised on the appellant being of the firm subjective belief that the complainant was in fact consenting on the basis that the complainant had induced that belief in him by her reactions, demeanour and conduct. It was

never suggested for a second that the appellant had given no thought to the issue of whether or not she was consenting. In the circumstances the Court does not consider that the misdirection created any appreciable risk of an injustice being done.

71. As to the suggestion that the trial judge did not explain in terms the interaction between the subjective test of recklessness and the provisions contained in section 2(2) of the Act of 1981, and that in those circumstances the jury might have been confused as to whether an objective or a subjective test was to be applied, the Court is also not persuaded that there is a legitimate basis for any such concern in the particular circumstances of this case.

72. Before considering what the judge actually said in that regard, it bears commenting that in the Court's view the jury could have been under no illusions from all that they had been told, and from the run of the case, that the central issue in the case was whether the prosecution had proven beyond reasonable doubt that the appellant did not believe that the appellant was consenting, in circumstances where he was asserting a positive belief in that regard. It was obviously important that the jury should understand that if, taking into account the guidance provided by s. 2(2) of the Act of 1981, they had a reasonable doubt on that issue and considered therefore that there was at least a possibility that he might have so believed, the appellant was entitled to be acquitted. Conversely, if the prosecution were successful in proving to the jury beyond reasonable doubt that the appellant actually knew that the complainant was not consenting, then the jury's obligation would be to convict him. Recklessness would only come into the picture for consideration if the prosecution, having vaulted the first hurdle by proving beyond reasonable doubt that the appellant did not believe that the complainant was consenting, could not then vault the second hurdle of proving beyond reasonable doubt that the appellant actually knew that the complainant was not consenting. In that eventuality, before the jury would be entitled to convict the appellant they would need to be satisfied beyond reasonable doubt that he had acted recklessly, i.e., that the appellant, having adverted to the possibility that the complainant might not be consenting, pressed on regardless in having sexual intercourse with her.

73. In seeking to convey all of that to the jury, the trial judge had charged them as follows:-

> "The accused man, ladies and gentlemen, is alleged to have committed the offence of rape, and a man commits rape when he has sexual intercourse with a woman who does not consent to that act of intercourse, and the man knows that she is not consenting or is reckless as to whether she consents or not. So, the ingredients necessary for the recipe, so to speak, are, one, that there is an act of intercourse as between the complainant in this case, Ms M and the accused man, Mr E.. I don't decide the facts of the case but I don't think you will have any difficulty in deciding that act occurred. Both the prosecution and the defence agreed that it occurred. So that's the first thing that the State must prove, and it would seem to me that they proved it, but that's a matter for you. Now, the next matter that they must prove is that the complainant did not consent to the act and that is a matter, ladies and gentlemen, that you will have to consider on the evidence that is before you. And if the State overcome that hurdle, ladies and gentlemen, if they satisfy you that an act of intercourse took place and that the complainant was not consenting to it, that isn't sufficient. They still must go further. They must prove that the accused man knew that she was not consenting or was reckless as to whether she consented or not. You perhaps will have no difficulty with the concept of knowledge and knowing whether she was consenting, but it isn't sufficient that he knew. He could also be reckless as to whether she consented or not. And what is recklessness? Recklessness, ladies and gentlemen, occurs if a person, before he or she does the particular act, either fails to give any thought to the possibility of there being any risk to what they were doing, or if, having recognised that there was such a risk, proceeded nevertheless to do it. So that's what recklessness is. The law, ladies and gentlemen, in the 1981 Act, further provides that not alone are these matters that the jury must obviously consider whether or not the necessary constituents or ingredients of the offence are there, but the Act goes on to provide that where a man believes that a woman is consenting and that's obviously an issue for you in this case it provides that the presence or absence of circumstances that would give rise to such a belief on the part of the man are matters to which the jury must have regard. And I'll come back to that, ladies and gentlemen, when I deal with the facts of this case. But it has to be borne in mind, as I say, that not alone do you have the definition as to what constitutes rape, there is also the consideration by the Oireachtas of the position of a man who believes that a woman is consenting and what matters the jury should have regard to in considering that. And again, ladies and gentlemen, they are matters that must be considered in the light of the fact that the onus of proof rests upon the prosecution and not that the onus of proof is switching to the man in relation to that aspect of matters."

74. While this instruction was unsatisfactory in as much as it contained the already acknowledged misdirection as to what can constitute recklessness, the Court considers that it did in fact endeavour to explain the interaction between recklessness and the provisions of s.2(2) of the Act of 1981, and that the level of explanation provided was adequate. The trial judge did not refer to either subjective belief or objective belief, but merely spoke in terms of "a man who believes that a woman is consenting". Accordingly, the Court considers that there is no basis for concern about the possibility of confusion having been created in the minds of the jury.

75. In circumstances where there has been no explanation as to why the points that are now sought to be relied upon were not raised at the trial, and in any event the Court is not persuaded that the essential justice of the case requires that the appellant be allowed to rely on the points at issue that were not raised at the trial, this Court is not disposed to disapply the general rule as set forth in *The People (Director of Public Prosecutions) v. Cronin (No 2)* [2006] 4 I.R. 329.

76. Accordingly, the respondent's objection based *on Cronin (No 2)* is upheld and the Court dismisses ground of appeal no. 4 on that basis.

Ground of Appeal No. 6

77. The trial judge agreed with a submission received from counsel for the appellant that this was an appropriate case in which to give both a corroboration warning and a delay warning.

78. In giving a corroboration warning, the trial judge instructed the jury as follows:-

> "Now this, ladies and gentlemen, is a case of a sexual nature. And at this stage, I propose to warn you that it is dangerous to convict in the case of a sexual nature in the absence of corroboration. That doesn't mean that you cannot convict, ladies and gentlemen, but it means that you must have regard to the fact that there are dangers of convicting in cases where there is no corroboration. In relation to corroboration, ladies and gentlemen, corroboration can come in a number of ways. Corroboration is independent testimony that tends to show not alone that the offence was committed, but that it was committed by the particular individual who's before the Court. Mr Grehan has already referred to the fact that in relation to this case there's no suggestion that any of the clothing of the complainant was damaged and, if you had, ladies and gentlemen, circumstances in which you had a torn blouse, missing buttons off blouses, torn underwear,

> matters of that nature, that could afford -- it's capable of amounting to corroboration. If there had been medical evidence of injury or trauma to the complainant, again that's the type of evidence that is capable of amounting to corroboration, and there's none of that evidence in this case. A distressed state, ladies and gentlemen, is capable of amounting to corroboration, but it is considered by the Courts to be weak corroboration. And in this case, ladies and gentlemen, it's obviously going to be a matter for you to consider and it is a matter that I will come back to again in the course of reviewing the facts of this case. You undoubtedly have evidence from certain individuals to suggest that the complainant was in a distressed state, but that is evidence that arises after a particular stage of the day or time in the day, and it would be a matter for you to consider the quality of that distressed state and whether or not it might be genuine or whether or not it might be what I might describe as the Abbey actress in the form of perhaps Siobhan McKenna or somebody of that stature. But I do, as I say, advise you, ladies and gentlemen, and I warn you, that it is dangerous to convict in the absence of corroboration in the case of a sexual nature. And the reason, ladies and gentlemen, the Courts consider - and it's not a universal situation which in every case juries are warned, it's a matter of discretion for the judge as to whether or not he believes or she believes that it is merited or appropriate in the case in hand - but the reason, ladies and gentlemen, that the Courts come to the conclusion in relation to matters of this nature is that an allegation of a sexual nature is very easy to make, but how do you negative the negative? All an accused man can say is, "No it didn't happen", and there have been experiences in our courts where there have been wrongful convictions in cases of a sexual nature and that is why, ladies and gentlemen, as I say, warnings are given to juries in cases from time to time. It is a decision the judge has to make for himself, an assessment he has to make on the evidence that is before the Court as to whether or not a warning is appropriate and, as I say, in this case I have considered it is appropriate and you must as I say bear in mind that it is dangerous, but as I say, that is not a bar to your convicting. You're entitled to have regard to the warning and still be satisfied beyond reasonable doubt, and that, ladies and gentlemen, as I say, is a matter for you."

79. Counsel for the appellant submits that it was a misdirection to tell the jury in the abstract that a distressed state is capable of amounting to corroboration, but it is considered by the courts to be weak corroboration, without specifically telling the jury that the evidence of Mr. V.S.S., who described seeing the complainant in tears at about 9.30pm on the evening of the alleged rape, should not, in the circumstances of the case, be treated as capable of amounting to corroboration, or even weak corroboration, as it lacked the necessary quality of being independent from the complainant's own evidence.

80. The Court's attention was drawn to the case of *The People (Director of Public Prosecutions) v. Cradden* [1955] IR 130, where the failure to convey to the jury that corroborative evidence must be independent of the evidence to be corroborated resulted in a quashing of the conviction.

81. While conceding that it has been held that evidence of a distressed condition may in certain circumstances amount to corroboration, counsel for the appellant submitted that in the case of *The People (Director of Public Prosecutions) v. Reid* [1993] 2 I.R. 1, where this was held to be the case, the evidence of distress occurred in the immediate aftermath of the incident and was accompanied by other evidence that was clearly corroborative of the alleged rape. The appellant contends that in the present case the observation of the complainant in a state of ostensible distress was very much less proximate.

82. The appellant further relies upon *The People (Director of Public Prosecutions) v. Foley* [2013] IECCA 90, a case in which the trial judge had directed the jury that the distressed state of the complainant who was 'out of it' in the immediate aftermath of an alleged sexual assault and who had begun yelling at Gardai and ambulance staff when they had arrived to assist her, could amount to corroboration. The Court highlighted the fact that the complainant was only semi-conscious at the time and described the reaction as spontaneous. It was considered that these factors considerably reduced any possibility of concoction or fabrication. The Court held *(inter alia)*:-

> "33. An essential element of corroborating evidence is that it is independent of the complainant's own evidence. Whether an item of evidence can be treated as independent of that of the complainant may depend on the particular circumstances of the case and, if it may be so treated, the weight to be attached to it. Thus evidence of a complainant concerning the interior details of a room in an accused's house where an assault was alleged to have taken place would be corroborative if the jury were satisfied that the complainant had never otherwise been in that room. (see Levison above). An essential element of evidence concerning evidence of a complainant being in a distressed condition or state following an alleged assault is that it is capable of being treated as a spontaneous rather than false, contrived or self-serving reaction by a complainant. There may be evidence of distress of a complainant in circumstances where a trial judge might well rule that it should not be treated as being capable of amounting to corroboration. This may be due to remoteness from the time and circumstances of the alleged assault or other particular circumstances. Otherwise, where the trial judge rules that evidence is capable of being treated as corroborative, it is then a matter for the jury to consider whether evidence should, in fact, be so treated and if so, the weight to be attached to it."

83. Counsel for the respondent has sought to respond to his opponent's complaints in the following way. He submitted that while the appellant rightly points out that the distress observed in *The People (Director of Public Prosecutions) v. Reid [1993]* 2 I.R. 1 was more proximate in time to the alleged rape than the distress of the complainant in this case observed by Mr. V.S.S., the fact that in the present case the complainant was not observed to be distressed until after she had spoken to Mr. C. , and accordingly there was some delay, was something to which the trial judge in the present case alluded in remarks to the jury. This arose in the context of a protest voiced by counsel for the DPP at the requisitions stage that the trial judge's reference to "the Abbey actress" had been unjustified. Responding to this criticism in further remarks to the jury, the trial judge said:-

> "In the first instance, ladies and gentlemen, the prosecution did not like my referring to Siobhan McKenna, the Abbey actress, and, they say, effectively categorising the complainant in the same mould. I wasn't seeking to compare her, what I was seeking to do, ladies and gentlemen, was to explain to you that the courts have considered a distressed state as being weak corroboration because people can in fact turn on the waterworks or turn on the taps; that it isn't necessarily a genuine manifestation of distress but rather that it is something that can be manufactured. And what I was explaining to you, ladies and gentlemen, was that this manifestation was something that did not appear until after the complainant had spoken to Mr. C. or J. where he'd given her advice about getting into a car."

84. The trial judge had further made specific reference to the passage of time and had asked the jury to consider "whether or not it might be genuine" in pointed language implying that the jury might well consider this evidence to have been "manufactured" or an example of someone having "turned on the waterworks".

85. Counsel for the respondent further contended that the trial judge was correct in characterising corroborative evidence of distress as being "weak" in any event.

86. The Court is satisfied that the jury were told in terms that corroborative evidence had to be independent. While it was the judge's function to tell the jury what evidence was capable of amounting to corroboration, it was for the jury to determine whether any such evidence was in fact corroborative. Moreover, the jury was properly charged concerning the fact that evidence of distress is capable of constituting corroboration. It was also correct to add that even if particular evidence of distress is assessed to be corroborative it will frequently be regarded as providing only weak corroboration. Contrary to what the appellant has submitted, the trial judge would not have been correct in determining that the evidence of Mr. V.S.S. was incapable of amounting to corroboration. That was not the case. The issue as to whether it had the necessary quality of independence was not one for the judge, but one for the jury.

87. While the trial judge did not refer with specificity to the evidence of Mr. V.S.S., he was correct in telling the jury that evidence of distress is capable of constituting corroboration. While as a matter of best practice it would have been preferable if the trial judge had specifically identified the testimony of Mr. V.S.S. as possibly providing evidence of distress capable of amounting to corroboration, the failure to do so was not significant in circumstances where that witness's testimony was the only possible evidence in the case that might have qualified as potentially corroborative evidence of distress. The evidence of the medical receptionist concerning the complainant's distress on the following day could never have been regarded as having been sufficiently proximate so as to qualify.

88. In all the circumstances of the case, the Court is satisfied that the jury was adequately directed on the issue of evidence of distress as potential corroboration, and the Court is not disposed to uphold this ground of appeal.

Conclusion

89. In circumstances where the Court has not seen fit to uphold any of the grounds of appeal relied upon, or sought to be relied upon, the appeal against conviction is dismissed.