APPROVED **REDACTED**

THE COURT OF APPEAL

[2023] IECA 338
Court of Appeal Record No. 22/2023

Birmingham P
Edwards J
McCarthy J

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/RESPONDENT

-AND-

B.Z

ACCUSED/APPELLANT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 28th day of July 2023

1. On the 20th of July 2022 the appellant was convicted of four counts of rape and one count of sexual assault. The offences occurred on the 8th of May 2020 at an address in the West of Ireland. The appellant was sentenced to a term of 10 years imprisonment on each of the rape counts and one year imprisonment on that of sexual assault, all sentences to run concurrently.

2. Communication was established between the appellant and the victim via social media and at a given stage it was agreed between them that they would meet. The appellant at that stage was using a false name. They met at a house near her home, by arrangement. She had made it clear to the appellant that no sexual activity was to take place between them even though she was to stay the night. She was dropped off at the premises by her mother and had

an overnight bag. After some consensual kissing in a living room, she and the appellant went to his bedroom where there was further engagement in such consensual kissing – her evidence was that she merely wanted to see where the appellant was sleeping. The appellant asked her if she wished to engage in sexual intercourse but she said no. Despite this assertion, however, the appellant proceeded to remove her clothing and sought to engage in intimate physical contact. She tried to stop him and repeatedly told him to stop but he did not, and ultimately, he used force to have sexual intercourse with her on four occasions. She made an excuse to leave, although the appellant pressed her to stay. She telephoned her mother who collected her and her mother thereafter contacted the Gardaí.

3. The Gardaí attended at the premises shortly afterwards and saw that the appellant was seeking to leave by car, and, indeed, sought to avoid them. A search of the vehicle driven by him was indicative of the fact that he had sought to clean up the property and remove rubbish. He was arrested, detained and interviewed. Ultimately, during the course of some six interviews (five of which might be described as of a substantive nature) he asserted that consensual sexual intercourse had occurred on one occasion. It would appear on any view of the evidence that he told many lies in and about his engagement in the matter and its background. Considerable emphasis was placed upon these lies – which were not ultimately in dispute as such. This emphasis can be seen from prosecuting counsel's closing speech, although we cannot set it out here *in extenso*.

4. Evidence was adduced of the fact that the victim was in a state of dishevelment and distressed when her mother picked her up. She was crying, both then and in the course of the journey to her home. Ultimately when her mother asked her whether or not she had been raped she confirmed that she had so been, thus giving rise to garda involvement. No objection was taken to this evidence.

5. A Garda Bríd Fitzgerald gave evidence of the fact that she had spoken to the victim alone at her home and received information as to what had occurred and, thereafter, did so in the company of a number of colleagues. She did not dispute the fact that questions were asked either by herself or colleagues about what had occurred. The garda evidence was to the effect that these had been asked for the purpose of clarification. That evidence was adduced in virtue of the exception to the rule against narrative arising in sexual offence cases to show consistency. Objection was taken to the receipt of this evidence but the judge ruled against the appellant.

6. It was sought also on behalf of the appellant to cross-examine the appellant as to her prior sexual history and in particular with respect to the fact that she had had sexual intercourse some time previously with two individuals. It is hard to see how there was any rational basis for this, as such a thing is so commonplace, absent some demonstrable nexus with the incident, the subject matter of the indictment. In addition, the appellant stated that the victim had brought condoms to the meeting but that they had not been used; condoms were found in the appellant's pocket. The complainant rejected the proposition that she had so brought them. It was sought to cross-examine her about the fact that some months before she had apparently conducted an internet search about the acquisition of condoms. Rightly, again, the judge rejected the proposition that that could be relevant to whether or not she had brought condoms on the night in question or to the question of credibility in that regard.

7. As indicated above, counsel for the prosecution laid heavy emphasis on the lies told by the appellant during the course of a number of interviews with the Gardaí. The prosecution in effect contended that the fact that such lies were so told was not merely indicative of guilt (in themselves) but went to the root of the appellant's credibility when he asserted that the sexual activity was consensual.

8. In the course of charging the jury, the judge in a very full manner dealt with all of the general principles applicable to criminal trials. She referred to the presumption of innocence, the onus and burden of proof and the fact that when dealing with any individual piece of evidence the necessity for the prosecution to prove the case beyond a reasonable doubt meant that, before it could be relied upon, the prosecution had to prove the fact in issue beyond a reasonable doubt. The judge also pointed out that if more than one view on any given piece of evidence was reasonably possible the prosecution view could be accepted only if that view was proved beyond a reasonable doubt. She emphasised the fact that if any reasonable doubt existed, either on the totality of the evidence or in respect of any given or individual piece of evidence, the benefit of the doubt must be given to the accused. She contrasted the civil and criminal standards of proof.

9. In the light of the fact that the prosecution was placing reliance upon the fact that lies were of evidential value in support of the prosecution case she also gave what is commonly known as a "*Lucas warning*" as contemplated by *R v Lucas* [1981] 3 WLR 120, and as approved in this jurisdiction in *People (DPP) v Solowiow* [2018] 2 IR 280. On the latter authority it will ordinarily be necessary [the rule is not however an absolute one], where lies told out of court are relied upon by the prosecution as part of their case, that a warning should be given to the jury, to put the matter shortly, that individuals may tell lies for many different reasons, and that the telling of lies is not necessarily indicative of guilt for that reason. The jury should be told that unless they are satisfied beyond reasonable doubt that the lie was indicative of guilt, it should be disregarded or should not be relied upon (the Supreme Court in *Solowiow* has not been prescriptive as to the form of words to be used when a warning is given nor are we).

10. We think it helpful to set out the passages of the charge dealing with this issue: -

> "*Now as you are aware the evidence is that the accused man lied giving a version of events that was not true during his interviews. He conceded that he had told lies about*

how and when he travelled to the house... and who was with him when he travelled and at the house. The mere fact that a defendant tells a lie is not of itself evidence of guilt. You must consider in a case where you are satisfied that a defendant has lied why he has lied. Defendants in criminal cases may have lied for many reasons, for example, to bolster a true defence. They may feel that they are wrongly implicated and although innocent that no one will believe them and so they lie just to conceal matters which look bad but which in truth are not bad. They may lie to protect someone else. They may lie out of panic or confusion, all sorts of reasons.

In the case of this defendant, if you think that there is or maybe an innocent explanation for his lies, then you take no notice of the lies. ***But if you're not sure that there is an innocent explanation, then his lies can support the prosecution case****. As in all matters the burden of proof lies with the prosecution and where two possible interpretations are available on the evidence, you must adopt the one more favourable to the accused.*"

[Our emphasis]

11. Subsequent to the charge, in the ordinary course, counsel for the appellant by way of requisition submitted that the form of words used by the judge in relation to the question of lies was erroneous and tended to confuse the jury. A debate took place between the judge and counsel as to the appropriate form of words but the judge declined to recharge the jury on the point. We do not precisely follow the course which that debate took but the ultimate conclusion is clear. Prosecuting counsel did not make any submission on the point in question.

Grounds of Appeal

12. In his notice of appeal, the appellant advanced four grounds which are as follows: -

1. *The learned trial Judge erred in law in refusing the defence application pursuant to section 3 of the Criminal Law (Rape) Act 1981;*

2. *The learned trial judge erred in law and in fact in admitting evidence of recent complaint by Garda Brid Fitzgerald;*
3. *The learned trial judge erred in law in acceding to the prosecution application to amend the indictment;*
4. *The learned trial Judge erred in law in the manner in which the jury was charged in relation to lies of the accused;*

13. Our understanding is that the appellant indicated at the hearing that Grounds 1 & 3 were not being pursued. We do not think it necessary in the circumstances to deal with Ground 2 but merely with the issue which arises on the charge (Ground 4).

14. We have referred above to the heavy emphasis placed by prosecuting counsel on the appellant's lies as tending to undermine his credibility and support the prosecution's case. Many of these lies may not have been of the first importance in themselves, but prosecuting counsel was concerned with the mendacious approach adopted by the appellant, as evidenced by sequential lies and changes of position, during the time he was under interview by the Gardaí. This is a perfectly proper approach by counsel.

15. Counsel for the appellant relied, and rightly, on the straightforward proposition that what the judge made was a bald error, which it is. In this instance it is said that the form of words used conveyed the proposition, as they do, viewed on their own, that lies could be relied upon if the jury was not sure that there was an innocent explanation whereas they can be relied upon only if the jury are sure that there is no innocent explanation, and to the criminal standard of proof.

16. We have referred to certain passages from the charge above. A charge is not a wish list, so to speak, of what either party may regard as desirable. A charge must be taken as a whole, and it is wrong to trawl it for supposed errors or infirmities which are of no consequence and, indeed, even if errors of purported significance, taken on their own, are identified, it may well

be that seen in context they do not affect the overall fairness of the charge or cast any doubt upon the jury's understanding.

17. The requisition was well-founded and the judge ought to have acceded to it. The error could have been remedied and if that had been done there would be no basis for an appeal on this ground. Whilst the matter is not straightforward, since the error must be seen in context as aforesaid, we have a concern that the jury may not have fully understood how they should approach the question of lies. The latter factor itself means that one must scrutinise the form of words used in their context with exceptional care; we accept that the remainder of the charge is beyond criticism but we do not think that the error here on such a crucial question can be ignored. Even though it was "*bookended*" as aforesaid, to use prosecuting counsel's phrase, with the sentence: "*In the case of this defendant, if you think that there is or maybe an innocent explanation for his lies, then you take no notice of the lies*" (before it), and with the sentence: "*As in all matters the burden of proof lies with the prosecution and where two possible interpretations are available on the evidence, you must adopt the one more favourable to the accused*" (after it); our concerns are not allayed.

18. We think accordingly that the trial was unsatisfactory and the verdict unsafe. We accordingly quash it and direct a retrial.