



THE COURT OF APPEAL

[73/20]

[71/20]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

BOAKYE OSEI

APPELLANT

AND

KELVIN OPOKU

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 14th day of March 2022 by Birmingham P.

1. On 6th November 2019, following a trial in the Central Criminal Court which lasted twenty days, both appellants were convicted of the offence of rape contrary to common law. Both appellants have appealed against their conviction on a number of grounds.

Background

2. The offence relates to events that occurred in the early hours of 18th February 2015 at the home of Mr. Opoku in a town in the north-west of the country. The complainant in the case ("A") was a student at the time. On the occasion in question, she had decided to go out with a friend ("C"). At trial, the prosecution case was that both young women consumed a significant quantity of alcohol and were heavily intoxicated. The complainant had consumed alcohol at her home before going out to socialise at a local nightclub, including consuming alcohol that she had won as a prize in a table quiz. As they walked home from a nightclub, they met the two accused who were in a car. The young women had never met either man previously, however they ended up in the car with the two men and went to the home of Mr. Opoku. There was evidence that the complainant consumed more vodka at this location. The prosecution case was that, at Mr. Opoku's house, she was very drunk. Two video clips from her phone, which had been recorded by C, were played to the jury. In one clip, the complainant is seen with a glass in her hand, near her mouth, and Mr. Opoku had his hand on the glass. In the other clip, she is seen staggering and falling onto the bathroom floor before being lifted by both appellants, who then carried her into the bedroom and placed her on the bed.

3. The jury heard that Mr. Opoku engaged in sexual intercourse with the complainant, who did not consent to the intercourse, and indeed, was incapable of consenting due to her level of intoxication. Mr. Osei engaged in a degree of sexual activity with C, but she did not permit him

to have intercourse with her. At one point, Mr. Opoku left the bedroom, having had sex with the complainant, and then Mr. Osei got on top of the victim and had sex with her when she was (at best) semi-conscious. When interviewed, originally by Gardaí and again at trial, Mr. Opoku admitted to having sex with A, but said that it was consensual. In contrast, Mr. Osei, when interviewed by Gardaí, denied having sex with the complainant, and that position was maintained at trial. The evidence against him came principally from DNA evidence found on a condom, which was discarded in a bin in the apartment, and on the complainant's underwear. Semen was found on the interior gusset area of the complainant's underwear, and there were trace elements on the inside of the condom. A DNA profile from the semen matched that of appellant Mr. Osei. The complainant's DNA was found on the outside of the condom.

4. In addition, the jury heard from C who gave evidence of Mr. Osei moving over to the victim and having sex with her when Mr. Opoku had left the bedroom. The complainant's recall of events was limited, but she gave evidence of having been penetrated by two men, though she was unable to be certain whether this was penile or digital penetration. The evidence relied on by the prosecution against Mr. Osei also included his denials of sexual activity with the complainant.

5. The complainant and C woke up the following morning and both gave evidence of still feeling drunk at that stage. They played video clips in the morning in the presence of both accused, and Mr. Osei tried to persuade the complainant to delete them. She pretended that she had done so, but later handed the phone to Gardaí and watched the videos again in the presence of members of An Garda Síochána. At that point, both young women returned to the flat of the complainant, but having spoken to the complainant's flatmate, they then attended with the college nurse ("Nurse G") and the Gardaí were contacted. The complainant attended at a Sexual Assault Treatment Unit ("SATU") where she was examined, swabs were taken, and she handed over her underwear.

6. In summary, the evidence against Mr. Opoku at trial consisted of the evidence of the complainant that she did not consent, his admissions to having had sex, the evidence of the level of the intoxication of the complainant (which included the evidence of C), and the video clips from the phone. The evidence at trial against Mr. Osei comprised the evidence of the complainant (which was limited), the evidence of C, and the forensic evidence, alongside his denials in interview of having had sex with her.

Grounds of Appeal

7. There is considerable overlap in the grounds of appeal advanced by both appellants. The grounds are summarised as follows:

- a) both appellants raise issues as to the use of live video link for the complainant's evidence;
- b) there is an issue as to the non-disclosure of certain XRY evidence raised by both appellants;
- c) Mr. Osei takes issue with the admission into evidence of the video clips from the complainant's phone;
- d) both appellants raise issue as to a certain exchange between the trial judge and witness Nurse G during the trial, while Mr. Opoku also takes issue with what is termed as "excessive judicial intervention" generally;
- e) the admission of both appellants' memoranda of interview raised issues;
- f) Mr. Osei takes issue with the refusal to exclude certain DNA evidence;
- g) Mr. Osei also takes issue with the refusal of the trial judge to give a corroboration warning; and,

- h) both appellants take issue with certain aspects of the judge's charge.

Video Link Evidence

8. The first ground (on which both appellants rely) relates to the fact that the complainant was permitted to give evidence by video link. The position is that after the incident, the complainant moved to Australia having qualified in her chosen profession. In advance of the scheduled trial, a successful application was made to the court to have the evidence of the complainant taken by live video link from Australia; at that stage, the second appellant, Mr. Opoku, was not before the Court, having absconded to England. At a later stage, he was returned to this jurisdiction on foot of a European Arrest Warrant and an order was made, without opposition, that both appellants be tried together. A second application to have the complainant's testimony taken by live video link followed and that was also acceded to. Section 13(1) of the Criminal Evidence Act 1992 permits the giving of evidence by live video link in certain circumstances. It provides:

“(1) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967) for a relevant offence, a person other than the accused may give evidence, whether from within or outside the State, through a live television link—

(a) if the person is under 18 years of age, unless the court sees good reason to the contrary,

(b) in any other case, with the leave of the court.”

9. In this case, it was not in dispute either that the accused men were facing trial for a relevant offence (being a sexual offence), or that the injured party was over the age of eighteen. As such, the position was that she could only give evidence by video link with the leave of the trial court. Therefore, the question that arises for consideration is whether the trial court acted inappropriately in permitting the complainant to give her evidence from Australia by video link.

10. The appellants place particular reliance on the decision of O'Neill J. in *D v. O'D* [2010] 2 IR 605. This Court has recently had occasion to consider that decision. In the course of our judgment in the case of *DPP v. O'Driscoll* [2022] IECA 4, we pointed out that the judgment in question was delivered in the context of a judicial review, where the relief sought was an order of certiorari quashing a decision directing the use of video link facilities. In *O'D*, the applicant was facing trial in respect of five offences alleged to have been committed by him contrary to s. 5 of the Criminal Justice (Sexual Offences) Act 1993, which provides for the offence of having sexual intercourse with mentally impaired persons. There were two complainants: one aged 42 and one aged 46. The judgment of O'Neill J., as we pointed out in *O'Driscoll*, referred to the fact that the applicant at trial intended to contest the fact that the complainants suffered from a mental impairment. The trial judge quoted counsel for the applicant as objecting to the prosecution's application for the complainants to give evidence by video link on the grounds that it would create an inference that the complainants were vulnerable persons and persons who suffered from a mental impairment if the application was acceded to. O'Neill J. said that, in essence, counsel was arguing that the issue of their mental impairment would be pre-determined and would, as a result, impinge on his client's right to a fair trial.

11. We commented in *O'Driscoll* that, in our view, the decision of O'Neill J., even if correctly decided – and we added that there was certainly a case for saying that it was a decision of its time and had been overtaken by events as video technology became more commonplace – did not have any real relevance to the present case. We pointed out that in *O'D*, the offence charged involved having sexual intercourse with persons who were mentally impaired; thus, proving that the complainants were mentally impaired was an essential prosecution proof. Part of the defence in that case involved contending that the complainants were not mentally impaired. In those circumstances, we said it was understandable that the view might be taken that if a special accommodation was provided for the complainants, this could only have been because they were in need of such assistance as persons who were mentally impaired; no such consideration applies in the present case.

12. The application to allow the complainant in the instant case to give evidence by video link was based on the contents of an email sent by her on 10th April 2018. The email explained that the complainant was now living in Australia, and that a return to Ireland and entering the courtroom would have an emotionally negative effect on her. She found the thought of coming face-to-face with the defendants in a courtroom unbearable, and indeed, even found the thought of the video link terrifying, and she did not want her first time returning to Ireland to be miserable. The complainant also explained that she was required to do 88 days of regional-specified work in Australia in order to obtain a second year visa and that "[r]eturning to Ireland could have a detrimental effect on her ability to find and complete the remainder of this work and to obtain a visa for a second year in Australia". The email was sent in support of an application in the case of Mr. Osei. On behalf of Mr. Opoku, it is said that by the time the email came to be considered in the context of his trial, it was significantly out of date. There was no updating of the position in relation to the complainant's need to carry out particular work and its implications for a visa.

13. The appellants say that the fact that a court has a discretion under statute to grant leave for evidence to be given from outside the courtroom by video link does not mean that exceptions should be made lightly or as a matter of course.

14. In the early years of the video link regime, a number of constitutional challenges were brought in cases such as *White v. Ireland* [1995] 2 IR 268, and *Donnelly v. Ireland* [1998] 1 IR 321. Since those early days, we have all become much more familiar with the technology and its use. When it is used, accused persons are not inhibited in any way from cross-examining the witness. In this case, the witness in question, the complainant, was cross-examined at some length by senior counsel on behalf of each accused. The jury could see her as she gave her evidence, and jurors, as well as the accused and their legal teams, were in a position to assess her demeanour as she gave her evidence.

15. We do not believe that either accused was in any way prejudiced by reason of the fact that the complainant gave evidence by video link, and in the circumstances, we are satisfied that the judge to whom the application for the video link was made exercised his discretion in a proper manner. We reject this ground of appeal.

Non-disclosure of XRY Analysis

16. Both appellants advance a ground of appeal which relates to the non-disclosure of XRY analysis from the complainant's mobile phone. The complainant handed her phone to Gardai on the morning that she and her friend made their complaint. An XRY analysis was undertaken of the material on the complainant's phone and the downloaded content comprised some 13,000 pages. The entire contents were viewed by the prosecution, and, by letter of 21st June 2018, certain material was disclosed. All material on the phone for one week prior to the date of the incident was disclosed, which included Snapchats, photographs, screenshots, text messages, call records, and WhatsApp messages. Also disclosed were Tinder messages for one month prior to the incident, all photographs taken on 17th and 18th February 2018, other messages on the phone deemed to have any potential relevance to the case, along with a summary of the contents of the phone.

17. In considering what could reasonably be expected, we must not lose sight of the fact that the court of trial was concerned with the events of a single night. Different considerations might apply if offences were alleged to have occurred in the course of a lengthy relationship.

18. In the course of our judgment in *DPP v. Keogh* [2017] IECA 232, we commented:

"Simply because a person makes a complaint that they have been a victim of crime does not mean that they abandon their right to privacy or that they lose that right."

We regard the suggestion of a complainant having to hand over 13,000 pages of private material to those she says raped her as lacking in reality.

19. The judge ruled on the matter in these terms:

". . . [I]n my view, the prosecution have made the proper disclosure in this case. The prosecution have a very definite responsibility in all of these cases to examine material that comes into their possession to ensure that full disclosure is made of any material which is of relevance in accordance with the test in *DPP v. The Special Criminal Court* [[1999] 1 IR 60]. It is not the position that the defence is entitled to

look at all material, relevant and irrelevant, and then make a decision relating to relevance. It is the obligation of the prosecution to make that particular decision and Senior Counsel for the prosecution tells me in relation to matters that they have done so. And with regard to these particular matters of sexual history, predilections and attitudes, it is clear from the submissions made by the prosecution and the assurances made by the prosecution that their junior counsel has reviewed all 13,000 pages or so of this material, which is an enormous amount of material. The defence have been given, if you like, a picture in relation to the communications that were taking place on this particular telephone, in my view, for a reasonable period prior to this incident. It does not appear, in relation to the concerns raised by [Senior Counsel for KO], that there is anything in relation to this material which would in any way assist the defence in relation to suggestions that there might be something about predilections to particular sexual kinks or attitudes, so on that basis, it seems to me that the disclosure made by the prosecution is adequate and I am not directing any further disclosure on matters.

I would re-emphasise that the obligation to disclose, just as the obligation is in discovery in civil cases, obviously it is a stricter obligation in criminal cases, its only an obligation to disclose material which is relevance and that places on the prosecution authorities the responsibility to go through the material. It may be, in the course of cases, that, and indeed in my experience, vast amounts of irrelevant material are provided as part of disclosure routinely in criminal cases, because there are not the resources to weed them out. In relation to telephones, matters are somewhat different. We all know in relation to telephone use that telephone use engages the right of privacy of the person using the telephone, and that means in relation to matters that the prosecution cannot take the step of simply handing over everything in a case and I do not think [Senior Counsel for BO] would be advocating that at all, as he indicated, look you're not concerned with items which could have no possible relevance. What the prosecution must do is to have a look at relevance, make a decision and make disclosure on that basis. They tell me they have done so, so that's the end of the matter."

20. In our view, the approach taken in the first instance by the prosecution, and then later by the trial judge, in relation to this issue of disclosure was a responsible one. Phones are likely to contain records of very private material. In this case, it appears that 13,000 pages of material spilled over approximately one year. The prosecution approach of providing all material for a week prior to the incident and Tinder messages for one month prior to the incident was a very realistic one. Indeed, in a situation where nobody was suggesting that there had ever been any prior contact between the two accused and the two young women, it might be said that, if anything, the prosecution was erring on the side of over-disclosure. Again, it appears that issues which were identified as potentially being of interest to the defence, such as attitudes and approaches to sex, references to ethnicity of individuals, and so on, were isolated and disclosed. We have no doubt that the judge's rulings on this issue of disclosure were considered and proper, and we dismiss this ground of appeal.

The Video Clips from C's Phone

21. This ground was expressly not pursued in written submissions by Mr. Opoku, but was maintained by Mr. Osei. Essentially, it is a chain of evidence point. C recorded some videos on the night in question in the home of Mr. Opoku. The complainant gave evidence that they had watched the footage from both videos with both accused when they got up the next morning.

The complainant gave evidence that Mr. Osei told her to delete the footage and that she pretended that she had done so. She then handed the phone over to Gardaí and watched the footage in the presence of Gardaí. She identified the two clips on the video as being those that she had first watched with the two accused on the morning after the incident, and which she had viewed a second time in the presence of members of An Garda Síochána.

22. At a later stage in the trial, C gave evidence that she had taken both videos on the complainant's phone and she identified the two as those taken by her. In those circumstances, we are in absolutely no doubt about the provenance and authenticity of both video clips. We therefore reject the ground of appeal as maintained by the first appellant, Mr. Osei.

The Judge's Exchange with Nurse G

23. A question put to Nurse G by the trial judge formed the basis of an application for the discharge of the jury at trial, and now forms the basis of a ground of appeal pursued by both appellants. The background to this issue is to be found in the fact that the complainant and C made their way from the complainant's flat to the college nurse the morning after the night in question. Nurse G's evidence was that two girls, first year students in the same discipline, presented themselves to her at the walk-in service at the college health centre. She described them as being very upset, that they appeared to be in a state of shock, and were crying. The complainant was more vocal and spoke more than C, but was really "just rabbiting on", while C was very quiet and seemed to be in a complete state of shock. Nurse G offered the two girls the opportunity to contact family members and the complainant accepted, but C did not. The complainant rang her mother, she thinks around 12.00pm. While the complainant was on the phone to her mother, she was very tearful, but then calmed down a bit; Nurse G considered that her mother must have reassured her.

24. Nurse G's direct evidence was brief and there was only very limited cross-examination. As she concluded her evidence, the judge asked: "[d]id any – either of the girls have any evidence of what I would describe as drink at that stage? Any sign of intoxication, or did you notice?" The nurse replied, "[w]ell, I suppose, not as a professional, but as a mother, and used to working with students, they still appeared drunk." She continued, "[t]hey still appeared drunk at that stage". The judge queried, "[t]hey still appeared drunk at that stage?" The nurse replied, "[y]es".

25. There followed an immediate application by counsel for Mr. Opoku, supported by counsel for the co-accused, for the discharge of the jury. In exchanges with counsel, the judge pointed out that the question might have been answered that they did not appear drunk. In this Court's view, the question asked was not an impermissible one. The question of intoxication was relevant, and a professional who encountered the two women at or around midday could potentially have offered assistance. The question was asked in a neutral and open manner and could have been answered either way. We reject this ground of appeal.

Memoranda of Interview

26. Both appellants have challenged the fact that memoranda of interview conducted with them while they were detained were admitted into evidence. It is necessary to consider in turn the arguments advanced in relation to each appellant.

Mr. Osei's interviews

27. So far as the appellant Mr. Osei is concerned, it will be recalled that his position at interview was to deny having sex with the complainant, and the evidence against him at trial principally came from forensic evidence, as well as the evidence of C. This appellant's challenge is advanced on two grounds:

- (i) he contends that the extension of his detention, which was authorised, was invalid and unlawful, in that it was based in misinformation, specifically, a belief that part of the initial period of detention had been taken up with consultation with the appellant's solicitor; and,
- (ii) he says that there were a number of breaches of certain custody regulations by the member in charge and the effect of this was to render his detention unlawful.

28. It is argued that the member in charge cannot be said to be independent of the investigation. In that regard, the appellant points to the fact that the member in charge had spoken of the complainant as the "injured party", and had consulted with the investigation team before allowing the appellant to phone his wife. The member in charge is criticised for failing to reach an independent determination as to whether the appellant was fit for further questioning and is criticised for insufficiently frequent visits.

29. Following a *voir dire*, the judge ruled on the issue on 29th October 2019 in these terms:

"Well, on the first issue in relation to the authority of the member in charge [senior counsel on behalf of the appellant had contended that the fact that Garda Carter was actually the member in charge was something that required to be proved in accordance with the best evidence rule], in my view the evidence of the member in charge, that he was designated by the Superintendent as the member in charge is sufficient for that purpose. And in point of fact in relation to any authorised officer, for instance if it is an authorised officer of the Minister for Agriculture, if he gives evidence that he is an authorised officer for the purposes of the legislation then he is an authorised officer. I think there was a decision of the High Court years ago by Mr Justice Lynch and [sic] Minister for Agriculture v. Cleary [(1988) ILRM 294], which disposes of that point.

In relation to the second aspect of matters that I am going to touch upon[,] [i]t seems to me in relation to [...] the regulations that I'm of the view that [senior counsel for Mr. Osei] is correct in relation to regulation 12(7) [S.I. No. 119/1987 – Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987]. And that is that it is an obligation on the member-in-charge, even if a person has not adhered to the question of suspending of questioning at 12 o'clock, the member-in-charge has to pay attention to that and make a decision one way or the other as to whether further questioning will in fact be allowed after 12 o'clock, because the member-in-charge [...] is responsible under the regulations for the well-being of the person. And I don't think it's correct that it can be inferred that the member-in-charge took such a decision from the mere fact that he went into an interview room or was present in an interview room and that an interview continued. That's a matter which the member-in-charge must actually make a decision upon.

Now, that does not of course [...] mean as a result of that that anything as a result of the interview goes out as a result of that legality because it's necessary, in my view, if that matter is pursued to have a look at the interview and see in relation to the interview as to whether that person has in fact been prejudiced as a result of the interview going on for longer than 12 o'clock, or indeed in relation to other matters whether the person has in fact been prejudiced as a result of the member-in-charge failing to go into the interview regularly and ask the question, 'are you alright?'

So it seems to me that while there was a breach in relation to that, it doesn't necessarily follow that the [...] interview goes out as a result of that. If there was an interview one would have to have a look at the interview to make a determination on that sort of matter. The only thing that I can say now is that in

my view, the member in charge should have considered that particular aspect of matters.

Now, as regards the delay, well I considered that carefully and one of the things that strikes me about the points made in relation to the getting of the doctor is that the scheme of the legislation[,] as I understand the [Criminal Justice (Forensic Evidence and DNA Database System) Act 2014] envisages that where a consent is given which involves what I would describe as intimate body samples, the [G]ardaí have to go at that particular stage. And there's no point in getting the doctor until such time as the accused has himself had all of the statutory procedures read out, because the accused is entitled to know that he doesn't have to consent. And he is entitled to know in relation to these matters that inferences may be drawn and so forth and so to speak make an informed decision. And it's clear that there was at least in relation to the intimate body samples in this case, that there were two authorisations, one for Mr Opoku and one for Mr Osei. And it was going to take time in any event in relation to them to deal with those statutory procedures, go through all of those matters. And that good sense would dictate that the doctor wouldn't be asked to come until such time as all of those issues had been dealt with

I agree in relation to matters that it appears that the Superintendent was misinformed in relation to the fact that or any suggestion that was made to him that Mr. Osei's position was taken up with seeing a solicitor. There's no evidence and no indication in fact that Mr. Osei did see a solicitor. But what I'm concerned with in relation to the extension of detention is to ensure that there's no, so to speak, mala fides in relation to the initial detention. And that things are happening during that detention in relation to the investigation obviously. And also that in the words of the section [...] the further detention is necessary for the proper investigation of the offence. And on any view of it, the Superintendent and indeed the Chief Superintendent had information which was correct information in relation to those particular decisions.

That interviews were being carried out or had been carried out, they weren't quite clear as to whether they had been finished or not with the people who were asserting that they were the injured parties in relation to matters. And that those injured party's [sic] accounts had yet to be put to Mr Osei, and this applied I think also to Mr Opoku.

That there was a question in relation to matters, I think that the Superintendent averted to that the -- if I might describe it, the forensic examination of the scene had not yet been completed and that there might be matters as a result of that which would have to be put to Mr Osei. And that there was also the question which he stated hadn't been put yet, and that was the content of some class of a video, I think the video presumably off the telephone. All of those matters clearly had to be attended to, and it seems to me that there was reasonable and that there was plenty of evidence on which he acted, and that he properly acted in continuing the

detention to enable those matters to be pursued with Mr Osei. And that there is sufficient evidence to satisfy me that he was bona fide satisfied in relation to those matters. I'm of the same view in relation to the Chief Superintendent."

30. Once the ruling had been delivered, matters were adjourned to the following morning so that the question of the trial court viewing the tapes of the interview in order to ascertain whether or not the breach found had an impact could be considered. However, the following morning, the trial court was informed that the defence did not require the tapes of the interview to be shown. Counsel for Mr. Osei told the trial court that he was standing on the application that he made and that he was not pursuing the matter at that stage. Accordingly, the judge ruled the interviews admissible.

31. In this appeal, it is contended that the trial judge's ruling was incorrect for a number of reasons. First, it is said it was incorrect because the decision to extend the detention by Superintendent Finan was invalid and unlawful, based, as it was, on misinformation. Moreover, it is argued that the breaches of the 1987 regulations were substantial. It is said that the evidence in the case raised serious doubts about whether it could be said that the Garda acting as member in charge, Garda Carter, was in fact independent of the investigation. Reliance is placed on the fact that the notes taken by the member in charge of what he was told, in the context of the application to him to detain, referred to "IP (injured party)" rather than "alleged injured party" or "complainant". It is said that the doubts were heightened by the member in charge's actions in seeking to consult with the investigators before acceding to Mr. Osei's request to phone his wife. A phone call was subsequently permitted, but counsel made it clear that his concern was not with the fact of the phone call, but what the way in which this was dealt with says about the member in charge's view of the suspect and his view of the investigation. It was accepted by the trial judge that the member in charge had failed to reach an independent determination as to whether or not Mr. Osei was fit for further questioning, and there was the fact that between the two hours and 22 minutes that Mr. Osei was in the interview room, the member in charge attended on only one occasion.

32. It is this Court's view that there was a more than adequate basis for the trial judge to conclude that at the time the Superintendent made his decision to extend the detention, further detention was necessary for the proper investigation of the offence. We are not impressed by the challenge to the independence of the member in charge. We regard the criticism of him by reason of the fact that he used the phrase "IP (injured party)" as lacking substance. Insofar as the judge did identify a single breach of the 1987 regulations, in that there was a failure to independently assess whether interviewing should continue after the accused had declined to consent to a suspension of questioning, there was nothing to indicate that this had a material impact.

33. As noted previously in this judgment, matters were adjourned to the following day after the trial judge had delivered his ruling so that he could view the tapes of interview if there was a suggestion that the conduct of the interview had been materially impacted by the identified breach. However, the defence did not in the end ask him to view the tapes, and in those circumstances, we believe that the trial judge was justified in admitting the interviews with Mr. Osei.

Mr. Opoku's interviews

34. So far as Mr. Opoku's interviews are concerned, he was interviewed on four occasions. In relation to interview one, it was accepted that nothing of evidential value emerged and the prosecution did not seek to put it in evidence. Interview two focused on what the arresting Garda had recorded in his notebook from the time of arrest. However, the judge ruled the note inadmissible on the basis that it had been taken in breach of the judges' rules, and in consequence, the interactions in relation to it between Gardaí and appellant were also inadmissible. As a result, the jury was informed that an interview took place from which nothing of evidential significance arose.

35. At trial, the appellant contended that the memos of the third and fourth interviews were inadmissible because of the cumulative effect of the following:

- (i) that he was prejudiced by the absence of an interpreter;
- (ii) that the conditions necessary for the extension of his detention were not fulfilled;

- (iii) that the interviewing members engaged in prejudicial commentary on various pieces of real evidence;
- (iv) that some of the questioning was oppressive, abusive, or unfair.

36. The trial judge ruled against the appellant in respect of each of these issues. On this appeal, it is argued that he was in error in relation to issues (i), (ii), and (iii). However, the proposition that Gardaí engaged in oppressive, abusive or unfair questioning was not pursued on appeal. It is now conceded that the conduct of the Gardaí, while still the subject of criticism, fell short of the degree of oppression that would be required in order for the interviews to be ruled inadmissible. However, it is said that the repetition of questions and the fact that voices were raised at times remains relevant as it reflects the frustration of Gardaí with communication difficulties that they experienced with the appellant. Issues (i), (ii), and (iii) will now be addressed in turn.

37. In relation to the issue about an interpreter, the position is that the appellant is Ghanaian and his first language is Twi. It was accepted that the appellant had an understanding of the English language and was able to converse about everyday subjects without apparent difficulties. However, it is said that he lacked the confidence and fluency in English necessary for him to participate effectively in custodial interviews and it is said that he struggled when complex propositions and/or technical or legal language or jargon was used. After the accused was brought to the Garda station and introduced to the member in charge, details were taken from him. The member in charge, having conversed with him, formed the view that an interpreter was not required and ticked the relevant box in the custody record. Thereafter, neither the appellant nor his solicitor sought an interpreter.

38. On behalf of the appellant, it is said that while the fact that he was able to engage with the member in charge may have led to the view that an interpreter was not necessary, his subsequent performance in the interview room should have raised red flags. The judge viewed the interviews, and having done so, rejected the appellant's arguments in relation to the need for an interpreter. The judge was of the view that the appellant clearly understood the caution and the allegations that were being made against him and was able to give a very full account of his version of events.

39. Following on from the the voir dire on 23rd October 2019, the trial judge ruled on this issue. In relation to interpreters, he had this to say:

"[I]n relation to interpreters obviously because the issue has been raised, and what I am concerned with is the fairness of the trial process and while I agree that there may have been some deficiencies in perhaps the way that the matter of an interpreter was dealt with initially by the [G]ardaí, clearly I think that there might have been some further questions raised at that particular time and answers noted and so forth, I don't agree that it had any actual impact on the interview process in this particular case or the fairness, if you like, of the question and answer sessions or in the least impeded Mr Opoku in either the exercise of his right to silence or in giving full explanations or in understanding the points which the [G]ardaí put to him

. . .

Everything, in my view, in relation to the interviewing of Mr Opoku was fair and he understood what was going on, what was being asked of him. He understood, and there's no indication that he didn't, the cautions that were given to him. At the beginning of the second interview he gave a detailed account of consensual, and indeed enthusiastic, participation by this young lady in the sex. He was then accosted with the video.

. . .

[I]ncidentally, I should say, the views of Ms Justice Donnelly accord quite perfectly with my views in relation to the obligation to provide interpreters where interpreters are necessary. I just don't consider, having looked at the interviews in this case, that this was a case where that was so."

The reference to Donnelly J. in this regard is a reference to her judgment in the High Court in the case of DPP v. Savickis [2019] IEHC 557.

40. In this Court's view, the judge's approach of viewing the videos so as to form an assessment on whether the absence of an interpreter gave rise to any unfairness was a proper and pragmatic one. We see no reason to disagree with his views.

41. Mr. Opoku was arrested at 6.59pm on 18th February 2015. He was brought to the Garda station and detained, and his detention was extended by six hours at 00.44am on 19th February 2015, and by a further six hours at 6.41am. The initial extension of detention was authorised by Superintendent Finan, and the second was authorised by Chief Superintendent McGinn.

42. The appellant contends that on neither occasion when his detention was extended were the statutory conditions for extension fulfilled, and that neither officer had reasonable grounds for believing that the extension was necessary for the proper investigation of the offence. At trial, the appellant contended that the extensions were unlawful because both officers ought to have included as part of their assessment of the necessity for a further period of detention, an assessment as to whether or not the investigation had been conducted expeditiously up to that point, and whether it was reasonable that matters outstanding should have been attended to during the detention up to that point. It is said that both officers should have made enquiries as to whether it was likely that material to be put to the appellant would become available during the next six or twelve hours as relevant.

43. It is said that relevant to these arguments is the fact that during the initial six hours of the detention, the investigation moved very slowly indeed. It is pointed out that it took Gardaí some time to secure the attendance of a solicitor, but it is said that when contact was made and an interview with a solicitor took place, that a further three and a half hours passed before the start of the first interview; indeed, the first interview only commenced minutes before the extension of the detention was requested. It is said that, while taking detailed statements from the complainant and C took some considerable time, both had given an initial account in the early afternoon of 18th February, and those initial accounts could have been put to the appellant at a much earlier point in time without unnecessarily prolonging his detention.

44. The trial judge dealt with the question of detentions on 23rd October 2019, in these terms:

"Now, in relation to the next point, and the next point seems to me, I am going to deal with it now, relates to the extensions of the detentions. I am fully satisfied that there was material both before the superintendent and the chief superintendent which justified their decisions which they made that the extension of these detentions were necessary for the proper investigation of the offence. The superintendent was aware that the parties, for instance, who are making the allegations had been interviewed and that the statements had not yet been put to Mr Opoku. They would have been aware of when Mr Opoku was arrested and even on that ground alone it was clearly necessary to take those statements and the [G]ardaí were entitled to detain Mr Opoku while all of that was going on and while various samples were taken for the proper investigation of the offence.

We then have the evidence of the chief superintendent. Again she made clear that video recordings, and these were obviously the ones on the telephone, had to be played to Mr Opoku, that he had only one interview. So, it was perfectly obvious, and there could be no doubt about it, that this investigation, if you like, was at an early stage at that stage. It was clear that there had been an interview, as far as Superintendent Finan was concerned, that literally just started after 12 o'clock. I don't accept that there's any serious evidence in this case of delay in relation to matters. It is of course the case that a garda could have been got earlier to take samples but, be that as it may, it seems to me that the detention up to that time was perfectly proper and the detention afterwards was perfectly proper. As Superintendent McGinn made clear there was still some forensic aspect to be dealt with in the house. I think she mentioned that as well at the time of her investigation."

45. We agree with the trial judge's assessment of the situation. This was a complex, multifaceted investigation, and was still at an early stage at the time of the extensions. It is the case that the complainant was taken (and in our view, properly so) to the SATU before her full statement of complaint was taken. DNA samples were going to have to be taken from the accused. A forensic examination of the location of the incident was required and it was necessary to examine both the complainant's and the accused's phones. All of these aspects took time. We are quite satisfied that on each occasion when the accused's detention was extended, that there were ample grounds for doing so. In summary, our view is that the detention of this accused was lawful at all times, and the interviews with him were properly admitted.

46. In the course of the interview conducted with Mr. Opoku, Gardaí showed him video clips and photographs from the previous night. They offered their perception of what was happening in the videos and asked him to comment. The appellant contends that insofar as the questions posed consisted of a commentary or "gloss" by the interviewing Gardaí on the video clips and photographs, that it was highly prejudicial and had the potential to influence the jury as to what inferences to draw from the video clips. The appellant says that these questions should have been ruled inadmissible.

47. The prosecution says that Gardaí are entitled to put the Garda case to the accused in interview and give him an opportunity to respond if he so wishes. In this case, he did respond and it was then a matter for the jury, who had the video, to assess that response and to draw its own conclusions. The prosecution says that the questions put were not impermissible, were properly put, and were not prejudicial.

48. We have not been persuaded that the Gardaí went beyond the balance of what was proper. Investigators had a view as to what was shown on the video clips and there was nothing improper in confronting the accused with that.

Refusal to Exclude DNA Evidence Relating to Mr. Osei

49. On day 16 of the trial (30th October 2019), there was a voir dire in relation evidence to be given by Dr. David Casey of Forensic Science Ireland. The background to this is that Mr. Osei in interview had categorically denied having sex with the complainant. He admitted to wearing a condom and discarding it in the bin in the apartment, but he said that he put this on when he was with C, and that all sexual contact with her was consensual. A condom was located in the bin and was sent to Forensic Science Ireland for examination, as was the underwear worn by the complainant.

50. In the course of a voir dire, Dr. Casey gave evidence that he had located semen on the gusset of the complainant's underwear. A mixed DNA profile consisting of DNA from more than one source was obtained, and there was a major male DNA contributor which matched the DNA profile of Mr. Osei. Dr. Casey found a trace of semen on the inside of the condom. There was a major male DNA contributor which matched the profile of Mr. Osei. Swabs were taken from the outside of the condom and a high concentration of DNA was found on the outside of this condom. This DNA profile obtained matched that of the complainant. Dr. Casey's evidence was that these findings were what he would expect to find if the condom had come into direct

contact with a rich source of the complainant's DNA, for example, as a result of vaginal sexual intercourse.

51. Two issues were raised with Dr. Casey which, it was suggested: (i) provided a basis for excluding the evidence, and (ii) meant that the evidence being tendered was more prejudicial than probative. The first issue raised focused on the fact that Dr. Casey had not been informed that the nurse who had conducted the examination of the complainant at the SATU had noted a non-odorous vaginal discharge from the complainant. The second issue was that there was a possibility of digital penetration, and certainly that possibility was not excluded. It was suggested to him that the DNA attributable to the complainant on the condom could be there as a result of seepage of the vaginal discharge and as a result of digital penetration and then the handling of the condom afterwards. His response to this was to say:

"I could not rule that out. But I must emphasise to the Court that the high concentration of DNA would be what I'd expect if vaginal intercourse took place while this condom was being worn."

52. The judge ruled on the matter as follows:

"...it seems to me that the evidence which the prosecution [...] propose to lead is relevant to and goes towards the issue of whether or not Mr Osei did in fact have sex with [the complainant], and it can be received for that purpose. Obviously, the jury will have to consider the evidence at the end of the day and decide whether or not having regard to what is stated by Dr Casey and having regard to the other evidence, whether they are satisfied that there was sexual intercourse as is stated. But that's a matter I think for the jury. It seems to me that the evidence, as I say, is relevant to that particular issue."

53. At that stage, defence counsel interjected to say:

"That still leaves, Judge, the issue as to whether or not its [...] prejudicial effect outweighs its probative value."

54. To which the judge responded:

"No, I was conscious of that and I think that its probative value outweighs its prejudicial effect in this circumstance. It's not a case that the evidence proves very little, or is capable of proving very little compared with what prejudice might be afforded. It depends on what view the jury take in relation to it. And it would be rare in relation to relevant evidence in my view, that relevant evidence should be excluded on the basis that prejudicial effect excludes probative value, because in essence, it would invite the judge to step into the shoes of the jury and make those sort of decisions. This is definitely not such as case [...] in my view."

55. In our view, the approach taken by the trial judge was a perfectly proper one. The fact that the defence had criticism to make of the proposed evidence did not serve to render it inadmissible. Neither did the fact that there was some basis for challenge or some basis for comment seeking to diminish its significance mean that its probative value was less than its prejudicial effect. We agree with the trial judge that this was evidence that was properly admitted and was properly available to be considered by the jury.

Refusal to give a Corroboration Warning

56. This ground is advanced by Mr. Osei only. The trial judge in this case invited submissions from counsel in relation to the issue of a corroboration warning. Prosecution counsel indicated that he felt there was "nothing in particular that cried out for a warning". Counsel for Mr. Osei argued that a corroboration warning was appropriate, referencing the

evidence of the complainant and her friend, C, as good reason why it should be given in this case. There was uncertainty as to whether penile penetration or digital penetration had occurred, and the complainant was not in a position to say whether one person or two people had sex with her. There was also the element of drink, and the question of whether the complainant had said "harder" at one point, but was not in a position to offer the nurse an explanation as to why she had said it.

57. After hearing from counsel, the judge decided against giving a corroboration warning. He observed that the complainant could say very little about who precisely had sexual intercourse with her. The main evidence and the thrust of it came from admissions, forensic evidence, the evidence of C, and from the various pieces of silent witnesses, i.e. video footage and photos taken. He said he did not think that this was a case where a corroboration warning was appropriate.

58. For upwards of thirty years now, the mandatory requirement for a corroboration warning has been abolished. In this Court's view, there was nothing in this case that mandated the giving of a warning, and nothing that meant that the discretion whether to give a warning or not could be exercised only one way. On the contrary, we are satisfied that there was an ample basis for the trial judge exercising his discretion in the way that he did, and so we dismiss this ground.

The Judge's Charge

59. Both appellants criticise aspects of the judge's charge. It is necessary to consider the criticisms in turn. So far as Mr. Osei is concerned, he took the view that the judge's charge was deficient and unbalanced in several respects. His counsel requisitioned and the judge dealt with a number of the issues raised by way of requisition.

Drinking Beer through a Straw

60. Of the items remaining, the first is what the judge had to say about drinking beer through a straw. This arises from the judge's review of the evidence of C. Dealing with her evidence, the judge said:

"They met friends and they had a Jolly Rancher cocktails and I think the evidence was three of them bought it was [sic] a three for two experience that you could get three for the price of two and I think their evidence was that the two of them drank the three of them between them. So they'd one and a half each as I understand it. She also had a Bulmers at that point and was drinking some sips of a boy's Paulaner beer using a straw which she had for her cocktail. She was quite staggered at that point and you'll note again just in relation to that, that she is using a straw drinking beer at that and again that's something that you're entitled to assess in relation to the effect of a straw when one is drinking alcohol."

61. The appellant maintains the position that the judge was wrong to refer to this which was not a matter in evidence. No evidence had been put forward to suggest that drinking through a straw makes someone more intoxicated or otherwise affects their awareness. This Court does not see what the judge had to say as being of great consequence. At most, it was an aside when dealing with the evidence of C. The trial judge did not direct them that the effect of drinking beer through a straw was to make a person more intoxicated, though counsel may have been under the misapprehension that the judge had done this as his requisition was based on that premise.

Lesser Weight to Denials as Evidence

62. In the course of his charge, the trial judge had said the following:

"In looking at answers in [G]arda interviews or any other evidence common sense may tell you and this is an observation by me which you may take on board or drop if you feel that I'm not talking common sense, I'm simply talking nonsense. Common sense may tell you that inculpatory comments which tend to establish that

the guilt of the maker or that the maker has in some way participated in an activity or an offence and make concessions may be more likely to be reliable than denials and explanations. It's the natural human tendency to explain away discreditable conduct. Why admit to something which is unfavourable unless it's true?"

63. Following requisition and in the course of exchanges with counsel, the judge made reference to the decision of the Court of Criminal Appeal in the case of DPP v. Clarke [1994] 3 IR 289. It is contended on behalf of the appellant that the judge misdirected himself and, by extension, the jury, because of the reliance he placed on this case. It is said that Clarke is authority for the proposition that once memos of interview are entered into evidence, both inculpatory and exculpatory matters are treated as evidence.

64. At the outset, we should make clear that there is no question of the judge having suggested to the jury that what was exculpatory was not in evidence. His heavily qualified remarks, with a reminder to the jury that they were free to reject what he had to say, accorded with common sense. Generally speaking, if somebody admits to wrongdoing or misconduct, it is because they have engaged in wrongdoing or misconduct. We do not see the judge as having gone any further than that, and certainly we do not see that what the judge had to say rendered the trial unfair.

Reasonable and Honest Belief

65. So far as Mr. Opoku is concerned, this appellant contends that the charge was defective in a material way insofar as the trial judge failed to charge the jury adequately and properly on the defence of reasonable and honest belief. The appellant acknowledges that the circumstances would be rare when a genuine issue could arise that, even though a woman was not consenting, the man nonetheless believed that she was consenting. However, it is said that while that may be rare, this was one such case. The appellant draws attention to the fact that there was evidence of the complainant moaning and that at one stage she said the word "harder".

66. The appellant says that the test of knowledge and belief is subjective. The appellant accepts, as he must, that s. 2(2) of the Criminal Law (Rape) Act 1981 requires a jury to consider the presence or absence of reasonable grounds for such a belief, in conjunction with any other relevant matters when considering whether an accused so believed. On behalf of the appellant, it is submitted that the emphasis placed by the trial judge on s. 2(2) presented a distorted picture to the jury.

67. The judge dealt with this issue in the course of his remarks on 5th November 2019 in these terms:

"I've already said that what you look at is the subjective state of mind of an accused. Was his appreciation as to whether there was consent, that of a knave who knew that there was no consent or that of a fool who misinterpreted matters and honestly believed that there was consent? If it is proved that an accused knew that there was no consent, for example where it is established from the evidence that the only tenable inference which should be drawn is that his state of mind was that he knew that the woman was too drunk to have sex, then obviously he's a knave and there was no consent. But what about the situation where it may be less clear and the evidence may establish recklessness? What about the case of an accused who misinterprets the signs?

What I'd suggest to you or say to you about that is that there comes a point at which foolishness and knavery becomes one and the same thing. If a person is aware of matters which put him on clear enquiry and fails to make those enquiries which he knows that he should, that is recklessness. The defence of honest belief in consent is not given to those who deceive themselves."

68. At that point, the judge quoted s. 2(2) of the Criminal Law (Rape) Act 1981 and then continued his remarks:

"What does that mean? That means that if you think there might be a real issue on whether AB genuinely believed that CD was consenting to sexual intercourse, I'm using AB and CD, obviously away from the facts of this case. AB being the accused and CD being the person who is it is alleged that he had sexual intercourse with. So I'll come back to it. This means that if you think that there's a real issue on whether AB genuinely believed that CD was consenting to sexual intercourse, you must look at whether a reasonable person put in his position and armed with his knowledge at the time so a reasonable person put in his position and armed with his knowledge at the time would make of the situation and take that into account as part of the mix along with any relevant evidence in coming to your conclusions.

If there are no reasonable grounds for supposing that a person in the position of AB held a belief that there was consent, it must follow that it is less likely that there is a reasonable possibility that AB did in fact so believe. But of course, you have regard to everything. You must look at the state of facts proved as to what AB knew. So what is proved to your satisfaction as to what AB knew at that particular time? Is there something proved to your satisfaction which establishes that AB knew that there was no consent or that he knew that he was taking a risk that the woman was not consenting?

Now, I'm going to read that statutory provision again so that you get it once more. [...] so, that's the Oireachtas telling the people of Ireland, including yourselves[,] what the legal position is, 'that if a trial for a rape offence,' [...] 'the jury has to consider whether a man believed that a woman was consenting to sexual intercourse', and that's the issue, belief, belief obviously is a subjective thing, and belief involves, well what did I believe, did I know that the person was not consenting, was I reckless as to whether the person was not consenting? '... the absence or presence of reasonable grounds for such a belief is a matter [to] which the jury is to have regard.'

So that means that the people of Ireland, the Oireachtas have told you in relation to this that you must have regard to this, you've no option but to apply this provision in relation to your consideration. You must have regard to it in conjunction with other relevant matters in considering whether he believed. And other relevant matters in relation to that is of course, any other evidence coming from any area of the case which has a bearing on the state of mind of either Mr Osei when you consider Mr Osei or of Mr Opoku, when you consider Mr Opoku. So the Oireachtas has stated that you must have regard to each of these matters.

What evidence do you accept in relation to the state of knowledge of either of them of her drunkenness? What evidence or is there any evidence of any sort of manipulation or anything like that in relation to it that would cast light on that? Was there evidence of her condition that you can rely on? Was there evidence on touching her and her capacity or lack of capacity for coordinated movement?

Independent decision making or anything of that sort when they were in the apartment? And again in relation to that particular matter, you must consider carefully the evidence which consists of the interviews of Mr Osei and Mr Opoku. Were there reasonable grounds for either of them supposing that she was capable of consenting to sex?

What is your view in relation to the ultimate issue and it's the ultimate issue that you have to have regard to. Have the prosecution established beyond reasonable doubt that they knew that she wasn't consenting or were reckless in relation to that, or is [it] the position that the prosecution have established that each of them was what I might describe as consciously indifferent. In other words, had an attitude of indifference to whether [the complainant] was capable of consenting or not. Have the prosecution at a minimum proved that this was their attitude in relation to what was happening[?]"

69. The judge's remarks were the subject of requisitions, which involved a complaint that the judge had never in terms told the jury that an honest, though unreasonable belief that there was consent was a defence to rape. In these circumstances, the judge recharged as follows:

"... it was drawn to my attention by [senior counsel for Mr. Opoku] that I may not have stated matters fully in relation to the question of what I would describe as belief and honest belief. I said that honest belief obviously, if a person has an honest belief in relation, [sic] that someone else is consenting, well then obviously the position there is that one does not know that they are not consenting [...]
there's not a question then of recklessness. So it is the case in relation to matters that it's not a rape where a person has an honest but unreasonable belief that a person is consenting. And what the Oireachtas says in relation to that is that honest belief obviously is honest belief. And one can honestly believe unreasonable things. But when assessing that, what the Oireachtas requires you to do as I say is to look at all of the evidence in the case. And it also requires you to perform the exercise of looking at what I might describe as a reasonable person in the position of an accused. And have the knowledge of the accused would make of that. And again, you consider that and you bring that into the equation in the way that I have already described to you."

70. The appellant says that the trial judge's charge on this issue was, on the whole, confusing and unclear, and that there is a very real risk that the jury was left bewildered and with the impression that the defence of honest belief had to be judged by an objective rather than a subjective standard.

71. The prosecution points out that in a section of the charge immediately preceding the passage quoted, the judge had dealt with each of the ingredients of the offence, and so far as the state of mind of the accused had commented:

"The next element which the prosecution must prove is the state of mind of the accused. And I want to say about this that the state of mind of the accused in a case is as much a fact as any other fact that can be ascertained by evidence, including inference that is you draw from the evidence. [...]"

In the case of [Mr. Opoku], it must be proved that Mr Opoku knew [the complainant] was not consenting to the intercourse, if you accept that he had it with her, at the time or that he was reckless as to whether she was consenting or not. [...]

Has the prosecution [...] proved that Mr. Opoku knew that [the complainant] was not consenting to the sex with [him] or has it proved at minimum that he was reckless on this? Has the prosecution proved that [Mr. Osei] knew that [the complainant] was not consenting to the sex or has it proved at minimum that he was reckless? State of mind in this context as has been emphasised to you is a subjective thing. It's what was in the mind of an accused and not what an objective person would make of the situation if he or she was put in the place of the accused. This state of mind which must be proved by the prosecution relates to what I might describe as what was going on in the heads of Mr Opoku and Mr Osei at the time that they had sex with [the complainant].

In looking at the issue of absence of consent, you consider the evidence. Again, your enquires are an evidence based enquiry, is there evidence which establishes to your satisfaction that AB who is alleged to have raped CD knew that she was not consenting?"

72. This Court is in no doubt that if the charge is considered as a whole, the trial judge made it absolutely clear to the jury that the state of mind it was concerned with was the subjective state of mind of the individual accused, and that the jury could have been left in no doubt about the fact that an unreasonable belief could still be an honest belief, and that if an accused honestly, though unreasonably believed that there was consent, then his actions did not amount to rape.

73. We reject this ground of appeal.

Excessive Judicial Intervention

74. This was an issue raised by Mr. Osei. The issue is raised as overlapping with and encompassing the ground in relation to the trial judge's exchange with Nurse G. It is said that in addition to the interjection during the course of the evidence of Nurse G, there were also interventions in respect of other key civilian witnesses, including the complainant, C, and the flatmate of the complainant. It is accepted that some of the interventions were by any standards innocuous, such as asking the complainant what age she was, and others were merely to ensure that the witness understood a question, but it is said that a significant number of the interventions were designed to elicit information on key issues which had not been elicited by the prosecution or the defence. In particular, it is said that questions of civilian witnesses addressed to the quantity of alcohol consumed and the state of intoxication of the complainant on the night in question were inappropriate.

75. Having read the transcript of the evidence of the three witnesses to whom there has been reference, we do not believe that this ground has been made out.

Decision

76. In summary, we have not been persuaded that the trial was unfair or that the verdicts were unsafe.

77. Accordingly, we dismiss the appeals against conviction.