THE COURT OF APPEAL

[202/17]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DMcD

APPELLANT

JUDGMENT of the Court delivered on the 16th day of July 2019 by Birmingham P.

1. On 30th June, 2017, the appellant was convicted in the Central Criminal Court on two counts of rape and was subsequently sentenced to a term of nine years imprisonment with the final year suspended. He has appealed against conviction and sentence. This judgment deals with the conviction aspect only.

2. By way of background, it should be explained that the complainant in the case is the niece of the appellant. He was charged with and convicted of raping her on two distinct occasions between 1st February 2012 and 1st April 2013. The complainant was aged fourteen years at the time of the alleged offences.

3. A number of Grounds of Appeal have been advanced in written and oral submissions. These might be summarised as follows:

> (i) That there should have been a directed verdict of not guilty because there was no sufficient evidence of identification;
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> (ii) That the trial Judge's charge on the identification issue was inadequate;
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> (iii) That the appellant was improperly restricted in cross-examination and calling evidence touching on the complainant's prior sexual history;
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> (iv) That there should have been a directed verdict of not guilty by reference to the second limb of R v. Galbraith [1981] 1 WLR 1039 because of the extent of the inconsistencies in the case and the fact that the evidence was inconsequential, weak, and tenuous;
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> (v) That the trial Judge misdirected the jury in relation to the burden of proof and the nature of reasonable doubt.
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> (vi) The trial Judge erred in failing to contextualise a corroboration warning.

4. By way of background, it should be explained that in 2012, the complainant moved from her parents' home to the nearby home of her cousin, D. It was about a fifteen-minute walk from one house to the other. D was living there with her two young sons who were aged between a year and a half and two years and about four years. At the time, D was about twenty-two or twenty-three years of age and the complainant was aged fourteen years. A few months after the complainant moved in with her cousin, the appellant, DMcD, father of D and uncle of the complainant, moved into the house.

5. At trial, the complainant gave evidence about a particular night when she was fourteen years old when her cousin was out socialising, the children had gone to bed, and she was sitting downstairs on the couch with the appellant watching a programme on television. The only people in the house that evening were herself, the appellant, and the two very young children. The complainant dozed off during the TV programme and she woke to find the appellant pulling the front of the bellbottoms that she was wearing. According to the witness, the appellant started feeling up the back of her leg, addressed her by by her nickname and told her to go on up to bed. The complainant said she went straight up to D's bedroom, the bedroom she was occupying, and dived under the blanket. She heard the appellant walking up the stairs after closing the doors and turning everything off and heard him slowly walking in with steel-toe boots. The shoes, with steel toes, came off. She heard the opening of a belt. He removed her bellbottoms and her underwear came off with them. He then raped her. She could see that the person who had come into the bedroom had black jeans on, denim jeans with white splashes of paint on that she could see from the street light. She could hear groaning, moaning, and what she described as "out of breath pattering". She could smell smoke, stale alcohol, and oil. The witness noted that her uncle was a smoker, smoking John Player Blue cigarettes, and explained that the oil referred to the fact that the appellant was a mechanic.

6. The complainant described a second incident, about three or four months after the first incident. On this occasion, she was in D's bedroom, she had fallen asleep early that night. She said she woke up and was in pain and then there was the appellant on top of her. In evidence, she referred to the appellant by his first name. She had no clothes on. When she had gone to bed, she had dressed in pyjamas. Asked could she smell anything, she said "it just smelt like, DMcD, like, I could see his hair and I could smell him and he

had a very fishy smell". Asked by prosecution counsel if she knew where the fishy smell was coming from, she answered "[DMcD]". She said she could not see him because she used to use and wear a lot of mascara and so her eyes used to get stuck together with sleep.

7. The defence case was that the allegations were untrue, that the complainant had not been raped, or if she was raped, then it was not the appellant who raped her. The issue of identification evidence, or lack thereof, arose in the context of the complainant not being in a position to say and not saying, at any stage, "I saw the person who was raping me and it was DMcD".

8. At the close of the prosecution case, the appellant sought a directed verdict of not guilty. The Judge, ruling on the application for a direction relating to the identification evidence, said that he had considered the evidence given by the complainant in the case and that it was apparent to him, on a consideration of the evidence, that she had identified clearly the person she regarded as the culprit for the alleged rapes in the case; her uncle, DMcD. The Judge referred to issues raised with him in cross-examination, but said that he was satisfied that the evidence as it stood was such as to identify her uncle as the person she believes responsible for the rapes.

9. On the hearing of the appeal, counsel on behalf of the appellant has criticised the Judge for this formulation and says that the Judge was content with a situation where the appellant was the person the complainant believed was responsible as distinct from identifying the person responsible. The Court sees no substance whatever in this criticism of the trial Judge. The Judge was obviously anxious to avoid entering the arena and anxious to avoid putting himself in a situation where he appeared to be endorsing the correctness of what the complainant had to say. It is clear that the complainant was not expressing any doubt about the identity of the rapist. Instead she was stating as a fact that she was raped on two occasions by her uncle.

Identification: Refusal of a Directed Verdict

10. The Court feels obliged to say that the arguments advanced in relation to identification were not, in our view, at all grounded in reality. The complainant was quite clear that the only occupants of the house were her cousin, D, her uncle, DMcD, and the two young children. The first rape that she described was a continuum, in the sense that it began with herself and her uncle watching a television programme together on the sofa, with her falling asleep, her waking to find her uncle interfering with her clothing, being told to go on up to bed by her uncle and being followed up by her uncle. There is no room for argument or dispute but that the complainant was saying, clearly and unequivocally, that she was being raped by her uncle, the appellant, with whom, at the time, she was sharing a house.

11. It has to be acknowledged that the point is made on behalf of the accused/appellant that the notes taken by Detective Garda Jennings on 21st October 2014 suggested a degree of confusion as between the two incidents. The notes taken by Detective Garda Jennings, apparently with reference to the second incident, included "[w]atch CSI on sofa. Fell asleep, felt tugging on clothes, woke up to go to bed, went to bed, fell asleep, woke up to sound of belt coming off jeans. It happened then". However, the significance of the notes taken by the Detective Garda have to be seen in the context that he felt he was not in a position to take a statement from the complainant because she was a child at the time and it would be necessary to involve a child specialist interviewer. Moreover, the Detective Garda commented that his notes were all over the place because both parties i.e. the complainant and her mother were extremely upset. While it was open to the accused, now appellant, to explore any uncertainty in relation to sequencing, it is beyond question that the complainant's evidence at trial was as set out above. Her evidence at trial was that the first incident occurred in the circumstances described and in describing the second incident, she did so by referring to the rapist by name.

12. The application for a direction had to be considered against the evidence at trial. There can be no doubt but that a properly directed jury could, if they were satisfied that the complainant had in fact been raped on two occasions, be satisfied beyond reasonable doubt that the rapist was the only adult male occupant of the house. If the jury was satisfied in relation to the first incident, and the first incident was a question of belief or disbelief by the jury, there was no scope for suggestions of honest mistake on the part of the complainant, then any suggestion that the second rape was committed by somebody else, unknown, who gained entry to the house and who shared so many features in common with the accused that he could be mistaken for him, was so extraordinarily unlikely that it was likely to be quickly rejected. In fairness to the appellant's legal team, they seemed to recognise that because they suggest that the Judge's charge needed to address the first incident, and how it could be made use of when considering the question of the identity of the rapist in the second incident. The Court will be addressing the question of the charge, but at this stage, we cannot see how any particular form of charge on that topic was demanded. The complainant was saying that she was raped twice. She was saying that she was raped, first, on an occasion where there was no difficulty whatever about making an identification, and she was saying that she was raped a second time, some months later, by the same person.

13. It must be said that insofar as there were two limbs to the defence case, the allegations were false and the rapes never happened, and if they did happen, the accused was not the rapist, the manner in which the complainant gave her evidence about how she was in a position to identify the rapist must have been very significant indeed when assessing her credibility on the issue of whether the incidents actually happened. If the first proposition put on behalf of the appellant was correct, that the incidents never happened, then it must follow that the complainant had falsely, indeed, wickedly, made up serious allegations. If someone had decided to make up false allegations, it is hard to see what, if any, purpose would be served by introducing any element or difficulty in relation to identification/recognition into the narrative.

Identification: The Judge's Charge

14. On behalf of the complainant, it is said that this was a case where the identification evidence was so weak that the case should have been withdrawn from the jury, but if contrary to the defence view, the jury was to be permitted to consider the case, then a very strong warning indeed was called for and the Judge's charge was seriously deficient.

15. The Judge dealt with the issue of identification/recognition at some length. He did so in these terms:

> "[t]he third element in relation to this case, which must be also considered concerning the type of evidence given, is what is referred to from time to time as identification evidence. Now, this enters the case in the following way. You have heard the evidence of the complainant in relation to her description of the two occasions of rape that she alleges. She identified by name her uncle as the culprit, the person who perpetrated these rapes upon her. On the second occasion, in particular, but equally if you consider it appropriate in terms of the first occasion, that there is an issue in relation to this, bear in mind this advice in relation to it and caution, she maintains and gave evidence that she was raped twice by a

person who she says is her uncle. It's a question there of being raped by somebody she knows on her evidence. So, it's a case of recognition, not a question of identifying a stranger. Nevertheless, what you have to consider in relation to that is that on occasions in the past, there have been errors made in identification evidence, and in this instance, I have to say it seems to me to arise in circumstances where whatever act is committed against the complainant is committed by somebody, but have the prosecution proved beyond reasonable doubt that the somebody is her uncle? That's the issue that this particular advice/caution is given in relation to, and the courts in this country have decided that where a verdict depends substantially on the correction (sic) of the recognition or identification evidence, your attention must be called in general terms to the fact that in a number of instances in the past, identification, and indeed recognition, has proved erroneous. There are possibilities of mistake, and in that sense, you have to be cautious about identification/recognition evidence. It can arise in circumstances in a robbery, where three young men run in and are running out of a shop and they have robbed the till and they might have disguises on, or half disguises, or they might not be disguised, and if some civilian is brought along to an identification parade later and is given the opportunity to see if they see the person that committed the robbery on an identification parade, for example, and if they do so or they don't, but if they do, and they come to Court, this caution will be given because there have been convictions in the past which have been mistaken on the basis of identification, and indeed recognition, and that can apply, not only where one witness is involved, but two witnesses can do the same thing. But in this case, we are concerned, obviously, with one witness alone who has made, what she says, is a positive recognition of her uncle in relation to – as the person who perpetrated these rapes.

Now, in the first instance, she indicates that he was the only person in the house at the time, apart from the two children. In the second instance, the issue arises clearly on the basis that she has not said she saw the face of the perpetrator and she has indicated that – so the features of the perpetrator were not seen. You have to consider, in considering this aspect of the case, the distance away from the person who was seen, the lighting that was available in the circumstances to enable the witness to see the features of the person as identified, what features were identified, and you heard about the smell. That was said really to go back to the previous occasion. So, some of that may – the fishy smell I think is confined to the second, but there was what I took to be the mechanic, the work clothes smell, I think that's what it was, which would seem to be common to both. There's a fishy smell in the second one as well. The state of mind of the person who is making the recognition and whether the person was, what position or disposition or what was the other person doing and how long and what was the opportunity to come to the conclusion reached in relation to the perpetrator. So, you must consider all of the circumstances in which this happened because this is a case in which it is said there is an issue in relation to identification, and that if it's an issue in relation to identification, it would seem to arise in circumstances where you have reached a conclusion where something has happened of the type which has been alleged by the complainant and you are seeking to understand how she got the identification of the person who did it right or wrong and is there a mistake, or possibility of a mistake? So, the verdict depends wholly or substantially on the correctness of this recognition, you should be especially cautious before accepting the evidence of recognition as correct, but if, having examined carefully the evidence which is laid before you in the light of all the circumstances and cross-examination as well, with due regard to all of the evidence in this case, if you are satisfied beyond reasonable doubt of the correctness of the recognition, then you are free and at liberty to act upon that evidence. That is the special warning that applies at law in relation to recognition identification evidence and applies in this case. So, that's the third caution or warning you have in relation to the matter. [The others related to delay and corroboration]. And these are matters which you can see, to a large extent, are based on, not only legal principle, but there's an element of common sense in it as well, given the experience of the courts in the past in relation to these matters."

16. The Judge's charge was the subject of requisition. In the course of responding to the requisition on behalf of the defence, counsel for the prosecution commented:

> "[i]f any further warning is to be given, as to the second incident, the jury might consider the extraordinary coincidence that she is raped in the first instance by her uncle and in the second instance by a man who is very like him and in his house, but that she does not actually see him, and he smell the same, incidentally. So I just think that is almost farcical."

17. On behalf of the appellant, it is said that the treatment of the issue by the trial Judge fell short of what was required by the case of Attorney General v. Casey (No. 2) [1963] IR 33. It is said that this was a case which demanded a stronger than usual Casey warning because the opportunities for identification/recognition were "indifferent". It is said that instead of giving a stronger than normal warning, which was what was required, that the Casey direction was a "warning light" and that the manner of treatment served to normalise what was in issue by reference to the robbers running in and out of the shop.

18. In the context of addressing the arguments that the issues raised in relation to identification/recognition should have resulted in a directed verdict of not guilty, the Court has observed that it seems to it that those submissions were not grounded on reality.

In the Court's view, what the Judge had to say in relation to identification/recognition was, in the particular circumstances of this case, more than ample. The jury was advised to consider the possibility of mistaken identity, even if satisfied that the complainant had in fact been raped. The jury was told of the need for caution, told that there had been difficulties in the past and that mistakes had been made in relation to identification and even recognition. For the Judge to have gone any further would likely have had a damning effect on his credibility with the jury. The Court is not prepared to uphold this ground of appeal.

Refusal of A Directed Verdict of Not Guilty by Reference to the Second Leg of Galbraith

19. Following the close of the prosecution case, counsel on behalf of the appellant applied for a directed verdict of not guilty on three grounds:

> (i) The identification/recognition issue we have already discussed.
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> (ii) The second was by reference to what he described as the Galbraith principles.
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> (iii) The third was by reference to the jurisdiction of the trial Court to direct a verdict of not guilty in order to ensure a fair trial in the context of both delay and missing evidence.

20. In relation to the suggestion that the trial should be halted because a fair trial was impossible, counsel submitted that the complainant in this case did not make any report of rape until after she had sexual intercourse with somebody else. He said that, obviously, if she had made a complaint in a very timely manner, it might have been possible for a medical examination to be carried

out which might have resulted in DNA evidence, or permitted the conducting of other tests which might in fact have wholly exculpated his client. Counsel acknowledged that, on one view, this argument would mean that in every case of a delayed reported rape, that the trial would have to be stopped, but he said he was not making that argument. Instead his point was rooted in the particular circumstances of the present case where the complainant was purporting to identify the assailant by reference to the smell and outline of body in the second incident and in the first incident, depending on a view of the evidence, based on a sequence of events. This ground of appeal also surfaced in the written submissions, but unsurprisingly, do not feature to any extent in the oral submissions. The Court regards the argument as quite misplaced and can only express some surprise that it would ever have been advanced.

21. At trial, counsel then turned to what might be described as the Galbraith direction and he instanced what he said were lies and inconsistencies. He referred, in particular, to what he said were lies told by the complainant as to the timeline in which she began to self-harm. The complainant had initially stated that the self-harming started following the alleged offence but under cross-examination accepted that it might have begun beforehand. Counsel submitted that there were numerous instances of the complainant telling lies and contradicting herself when confronted with various propositions and with contradictory comments made on other occasions, including on the DVD, from St. Louise's Unit in Crumlin. In response, counsel for the prosecution submitted that the defence was unable to point to any particular factor which was so damaging as to render the whole case so infirm that it had to be withdrawn from the jury. She said that defence counsel had a particular interpretation of certain parts of the evidence, characterising them as lies, but it would be for the jury as to whether those were lies or mistakes or inconsistencies, or whether they were such as to render the complainant's evidence about the two rapes incredible, or to raise a reasonable doubt about the reliability of her account. In reply, counsel on behalf of the appellant referred to what might be described as the loss of virginity issue, to which reference has been made in the context of the restrictions on the scope of cross-examination.

22. In ruling on the matter, the Judge referred to the Galbraith decision and quoted from it, and also to the decision in DPP v. M (IECCA, 15th February 2001) and another decision of DPP v. M [2015] IECA 65. He dealt with the loss of virginity issue. He reviewed the evidence on that aspect in some detail, referring to cross-examination and re-examination. He then said:

> "[t]he question I have to ask is whether the state of the evidence is so infirm that no jury, properly directed, could convict. This is a case in which there is an absence, well, subject to hearing counsel later on this matter, but it seems to me there is an absence of corroboration in the case, and it also seems to me that it is essentially a case in which one person is giving evidence, this is the complainant in the case, and that the allegations made are denied and the incidents are alleged to have occurred in circumstances in which only the two, the complainant and the accused, are alleged to have been involved and participated. It is a case in which I propose to give a warning in relation to the issue of corroboration and it is a case also in which the various matters in terms of inconsistency I said have been pointed out, and indeed it is alleged there are lies told. The characteristics of the infirmities suggested to be in the complainant's testimony are, to my mind, in this case, inherently matters for the jury. As noted by the Court of Appeal, Galbraith is not authority for the proposition that a case must be withdrawn if the prosecution's evidence contains weaknesses or vagueness or sometimes significant inconsistencies. That is not what the case is authority for, as set out at para. 47 of the judgment. So, I turn then to what it is about and it's based on the primacy of the jury in a criminal trial as the sole arbiter of issues of fact as stated by the Court of Appeal and even if the prosecution evidence, even if it were accepted that it contained inherent weakness or is vague or contains significant inconsistencies, it is ultimately for the jury to assess that evidence and consider, in the context of all the circumstances of the case, the submissions made by counsel, the charge given by the Judge and ultimately, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it, the matter should proceed, and my determination is that it should proceed and will proceed in accordance with the usual principles that apply in relation to the setting out legal principles – which set the parameters within which the jury must approach their work in considering their verdict. So, I am refusing the application."

23. The Court is firm in its view that the trial Judge was perfectly correct to refuse the application. In the circumstances of the case, it would have been unthinkable if the Judge had decided to withdraw the case from the jury. In this area of jurisprudence in the past, there has been talk of "taking plums and leaving duff", but the application for a direction amounted to an invitation to ignore the whole plum pudding. In recent times, applications stated to be based on Galbraith grounds have become commonplace, and indeed, often one has the sense that what is involved is little more than going through the motions. Be that as it may, the Court is in absolutely no doubt that this was an application which was properly rejected.

Failing to Contextualise the Corroboration Warning

24. As we have seen, the trial Judge, when dealing with the application for a direction, indicated that he would be giving a corroboration warning. He did so, telling the jury:

"[o]ne of the difficulties in a case of this kind is that fact that when an allegation is made of a sexual offence, it is often made in circumstances of intimacy or closeness or situations in which third parties are not present to give evidence about what has happened or supportive of one side or the other. It is done in privacy or in secrecy and it is not open to third party evidence, another person looking in on the situation and saying, that's not what happened, I saw what happened, much the same as an onlooker to an accident might provide a third view as to how things happened and who might be liable in the accident for its cause. That, of course, is not available in this case and there is something I want to say as a matter of law in relation to this and it goes again to something you heard in the submissions. The courts are not unaware of mistakes that have happened in the past and they are not unaware that there have been fabricated complaints in the past, and for that reason, where there is a situation, and it is not a reflection and it is not to say that all sexual complaints are to be suspect, but where there is a situation such as presents itself in this case, where there are two offences alleged against the accused which occurred out of the sight of anybody else and in private, so to speak, well then you must be wary of the dangers of acting on the corroborated evidence of a complainant in such circumstances because of that fact, because of that history, if you like. Now, what is corroboration? Corroboration is what I have literally referred to, I am now going to more precisely refer to it as – it is this. It is evidence independent of the complainant that does not come from her, that is outside of her testimony and evidence to you that confirms in material particulars that the offence occurred and that the accused committed it. Now, the warning applies in relation to the dangers of acting on such evidence in the absence of corroboration and that is a warning I give you in relation to this case because it is such a case and it requires the warning.

Now, I want also to add to that, also a matter of law, that if, notwithstanding what I have just said, you are, having analysed the evidence, satisfied beyond reasonable doubt that the accused committed the offences in the circumstances and in the way outlined by the complainant, you are still entitled to convict him. In other words, if you are satisfied beyond a reasonable doubt, notwithstanding the warning that has been given, you are entitled to proceed to conviction. You must bear in mind the warning. You

must take it into account appropriately. You must apply it in the circumstances of the case. In this case, there is no corroboration outside the evidence given by the complainant. That, as a matter of law, is something I am telling you. In other circumstances, I might give you an understanding as to what corroboration to look for, but I am satisfied as a matter of law in this case, that there is no such corroboration."

25. The appellant complains that this warning was not sufficiently contextualised. In particular, it was submitted that the Judge should have put the corroboration warning clearly and firmly in the context of concerns about the unreliability of the complainant, referencing the inconsistencies and what they say were lies. Reference has been made to the case of DPP v. Gentleman [2003] 4 IR 22, where the trial Judge had given a warning, but the warning was regarded as inadequate by the Court of Criminal Appeal. DPP v. Gentleman is a slightly unusual case in that it involved alleged sexual assaults on schoolboys perpetrated by a teacher in the classroom. The headnote in that case is instructive; at paras. 4 and 5, it states:

"4. That, as this was a case where it was appropriate to give a warning, the jury's attention should have been drawn to the fact that there was no corroboration of the complainant's story, that it had occurred 22 years ago and that no complaint had been made at the time.

5. That the trial judge ought to have indicated to the jury why the law considers it dangerous or had, in his experience, found that it could be dangerous to convict on the uncorroborated evidence of a complainant in relation to a matter of sexual assault."

26. In that case, the trial Judge had directed the jury as follows:

"I am now going to alert you to the fact that in cases of sexual assault, great care should be taken before you convict an accused person on the uncorroborated evidence of the victim alone and that you should weigh the evidence and exercise care in your approach in considering it before you do convict."

As Keane CJ said:

"[t]hat is the extent of the warning given by the trial judge in this case and it had to be pointed out that while he undoubtedly indicated to the jury that they would have to exercise care before convicting on the basis of the uncorroborated evidence of the complainant, that is as much as he says. He does not indicate in any way to the jury why the law considers it dangerous or has, in its experience, found that it may be dangerous to convict on the uncorroborated evidence of the complainant in relation to a matter of sexual assault. He does not draw to the jury's attention the fact that the reason the law has always exercised caution in this area is because it is so much a case of one person's word against the other and the jury therefore has to exercise an especial care in deciding whether it believes the complainant or whether it is not satisfied beyond reasonable doubt of the truth of the complainant's allegation, bearing in mind that this is a case in which the accused also gave evidence."

In this case, the Judge made the point to the jury that alleged sexual offences are usually committed in circumstances of intimacy or closeness or situations in which third parties are not present. He referred to the fact that the Courts were aware of mistakes that had happened in the past, aware that there had been fabricated complaints in the past and that, therefore, juries had to be wary of the dangers of acting on the uncorroborated evidence of a complainant because of that history. He made clear that what he was doing was delivering a warning as to the danger of acting on the evidence of a complainant in the absence of a corroboration. He made clear, and repeated, that there was no corroboration in the case outside the evidence that had been given by the complainant.

27. In the Court's view, the trial Judge's charge in relation to corroboration was, in the circumstances of the case, adequately contextualised and the warning was, in the particular circumstances of the case, more than adequate.

28. The Court is also conscious of the provisions of s. 7(2) of the Criminal Law (Rape)(Amendment) Act 1990 which provides:

"[i]f a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."

It seems that having regard to the terms of that section, an appellate court should be careful to avoid being unduly prescriptive as to the form of a warning. In any event, as the Court has already said, in the circumstances of this case, it is satisfied that the warning actually given was more than adequate.

The Judge's Charge: Reasonable Doubt

29. Essentially, two criticisms are advanced of the trial Judge in this regard. First, it is said that he erred in law in directing on the burden of proof by conveying to the jury that a reasonable doubt should be of sufficient weight so as to be decisive on a matter of importance in the affairs of a member of a jury, as opposed to being of sufficient weight so as to cause a delay or hesitation in making a decision on such a matter on the available evidence, and that the Judge further erred in directing a jury to the effect that the possibility of disaster or a wrongful conviction should not inhibit the jury from acting. It is said that in so doing, the Judge undermined the defence case, the presentation of the law as to the burden of proof, and the corroboration warning. It is necessary to look at what the Judge actually had to say. The Judge dealt with the issue as follows:

"[n]ow, the issue of proof beyond reasonable doubt is something that is not defined anywhere, what a reasonable doubt is, but sometimes it is helpful to look and consider other occasions which might help you to understand how it's to be applied. First of all, it's not mathematical certainty. We don't have a system in relation to the administration of justice that is a computerised system that you feed in the information and it produces the result at the other end. It simply does not work that way, as you can imagine. So, in terms of proof beyond reasonable doubt, there are other standards that apply in proofs in law and it can be helpfully contrasted with what would happen in the civil case that I was referring to earlier. In a civil case, the standard of proof is different. It is a somewhat higher standard of proof, proof on the balance of probabilities, something is more likely to have happened than not, and that applies in a civil case, such as a road traffic accident, that I mentioned. Who was negligent? How did the car crash happen? Has the plaintiff proved it happened in the way they said it happened on the balance of probabilities? That it's more likely than not that it happened that way and the judge decides it on that basis. That is not sufficient for a criminal trial. The standard is higher in a criminal case. So 50% plus is not good enough. You must take it beyond that and you must take it to a stage where there is no reasonable possibility, no possibility based on reason that could lead you to any reasonable possibility consistent with innocence has been excluded from the picture. So, the question of what the standard of proof is then? Essentially, if you are satisfied, and only if you are satisfied, beyond a reasonable doubt that the case, as established by the prosecution to that level of proof, can you convict, and if they do not reach

that standard, or if they have not excluded any reasonable possibility consistent with innocence, you must acquit, and those are not options, these are obligations. So, if the standard of proof beyond reasonable doubt is reached, you must convict. If the standard of proof beyond reasonable doubt is not reached, you must acquit. If you think the accused is probably guilty, but you are not satisfied beyond reasonable doubt, you must acquit. If you think that there is a possibility he is guilty, you must acquit. Actually, you must consider these matters from that very high standard of proof, it is the highest standard of proof we have in law, proof beyond reasonable doubt" (Day 6, page 15)

30. Later remarks made by the Judge are the subject of criticism from the appellant. At p. 18 of his charge, he commented:

"[m]ention has been made of mistakes made or miscarriages of justice in other cases. Undoubtedly, that has happened in the past. That is not to hold you in terror of doing your duty in relation to the facts of this case. The facts of this case are not the facts of another case. The facts of this case, and in this case alone, and it is the evidence of this case alone that you consider. So, questions of where you might hypothetically, five years down the road, looking back, be shocked or surprised by some hypothetical development are not really relevant to this issue. It is a distraction. What is of relevance is the evidence in this case. What is of relevance is the satisfaction level of proof that has been reached by the prosecution in this case when measured against the legal standard appropriate to the case as it emerges on the facts. So, there are many things that in life, if one took the possibility of disaster into account, one might not do and one might not engage in. One might not cross the road. One might not, if one were a surgeon, engage in a difficult piece of surgery because we might make a mistake. That is not the standard of proof in this case. The standard of proof is in relation to the facts adduced in evidence and whether the evidence put forward establishes the case to a level of proof beyond a reasonable doubt. It must be analysed clinically and carefully."

31. Of note is the fact that the Judge returned to this issue when dealing with requisition. The Judge brought the jury back so that he could charge them further in relation to corroboration, essentially for the purpose of explaining that the complaint could not, under any circumstances, be regarded as corroboration. His final remarks to the jury were as follows:

"[i]n relation to the warning that I have given you, you must consider that warning as a solemn warning and take it into account and you consider all of the matters which have been put before you and as part of the context of that warning, including the nature of the case and the contradictions and alleged lies in the case, if you so find them. The warning has been given and you must bear it in mind. If you are satisfied, notwithstanding the warning in respect of corroboration, that you are satisfied beyond a reasonable doubt in relation to the evidence, having heard that warning, having considered it, that the accused is guilty of the offence, you are entitled to proceed to convict. If there is any doubt in your mind, reasonable doubt based on reasoned understanding, and having identified matters upon which you can act in relation to a reasonable doubt, well then that is matter which is important and leads to his acquittal. If there is any reasonable doubt whatever in relation to the matter, you must acquit."

These words "if there is any reasonable doubt whatever in relation to the matter, you must acquit" were the last words that the jury heard as they retired.

32. In the Court's view, there is no criticism to be advanced of the trial Judge's treatment of the issue of reasonable doubt. The point is made that the reference to the surgeon was unfortunate because surgery may have a bad outcome without fault on the part of the surgeon. While that is so, it is not really realistic to focus on one phrase from a lengthy charge. Overall, what the Judge had to say in relation to proof beyond reasonable doubt was comprehensive and appropriate. If the charge is considered as a whole, there is no reason to conclude that it was unfavourable to the defence. Accordingly, the Court will dismiss this ground of appeal. In doing so, we note that the trial Judge is not to be criticised for urging the jury to focus on the facts of the particular case that they had been sworn to try, rather than being diverted by consideration of miscarriages of justice in other cases.

Restrictions on Cross-Examination of the Complainant in Relation to Prior Sexual History

33. In the course of cross-examination of the complainant, counsel on behalf of the accused sought leave to cross-examine her in relation to aspects of her prior sexual history. Prior warning of this approach had been given and the complainant had, in the usual way, a legal team in Court on her behalf. Counsel outlined the basis for the application. He said that the complainant had, in evidence and in her statement to Gardaí, said that the allegation of rape came out because the complainant found that she was acting "weird" when her boyfriend touched her. He said that the matter was dealt with slightly differently in the notes of a social worker which had been disclosed, where there was a reference to the fact that the complainant had been going out with her boyfriend for eighteen months at the time of the disclosure, that he was getting more "touchy-feely", but she did not want anything sexual with him. He said she was making the case to the social worker, including, he thought, to St. Louise's Unit, that because of the rapes to which she was subjected, she did not have or could not have a normal relationship with other boys. He said that the complainant had also said on a video that she had "no boyfriend etc" during the period of time when she was living with her cousin, D, and it appeared, therefore, that the complainant was making a case to say that she could not have normal sexual contact, sexual interaction, because of the effects the alleged rape had upon her.

34. Counsel then referred to the issues which he proposed to explore. He said that the complainant's cousin, D, could give evidence that the complainant admitted to her that she had sexual intercourse with a particular person, named later in submissions as Jo, just after her birthday on 3rd May 2013. He said he had a witness, a different boy, DF, who would say that he had been the boyfriend of the complainant for a period from May 2013 up to Halloween 2013, and that he would speak of them engaging in removing of clothing and sexual touching.

35. He said that D and a friend, Z, would give evidence that the complainant spoke openly and good-humouredly about sexual activity, including activity in which she herself had been involved. They would say that the complainant had spoken about having sex with a boy named T on a mattress in D's kitchen.

36. At one point in the course of the submissions, the Judge intervened to ask pointedly, and it seems to the members of this Court, with some justification, "does that mean in any case in which a female alleges that she has been raped and says that she can't really thereafter feel comfortable with men or engage with men in a sexual relationship, that that always becomes an issue upon which they can be cross-examined in relation to their post-event sexual history?" Counsel on behalf of the Director, whose position was broadly supported by counsel instructed to appear on behalf of the complainant, said the debate was taking place because the complainant had said that when engaged in intimate touching with C, who came on the scene long afterwards, she felt "weird". She said all the material referred to by her colleague, whether Tusla material or St. Louise's material, amounted to no more than that. She said that despite what had been submitted by counsel on behalf of the accused, there was no reference to being unable to have sex. Counsel on behalf of the prosecution contended, with some force, that there was no logical link between a young teenager saying she found it weird to engage in touching with her boyfriend and the conclusion that she did not or was unable to engage in sex thereafter. The complainant had never said "I never engaged in touching again, I never had sex again". She had not sought to pretend that she had

never had sex afterwards.

37. Counsel for the prosecution said there was only one area that she could conceive of as having any relevance and which might be in any way appropriate for cross-examination. She noted that there was scope for limited cross-examination on the issue of when and with whom the complainant had lost her virginity. This arose in a situation where, on the prosecution case, the complainant was first penetrated by her uncle, but her cousin would say that she had been told by the complainant that her virginity was lost on a date proximate to 3rd May 2013. This limited concession by counsel for the prosecution was endorsed by counsel for the complainant.

38. The trial Judge took some time to consider the matter and then delivered a careful, considered ruling. It set out, over some nine pages of the transcript, his views on the issue. In the course of the ruling, he addressed each of the sub-issues that had been canvassed and then proceeded to permit cross-examination on two of these sub-issues; the question of when virginity was lost, and in relation to the making of the complaint to C. He explained his ruling by saying that the narrative relating to the first rape involved the application of a degree of pressure, that, in a situation where the complainant was *virgo intacta*, not, it should be said, an expression used by the trial Judge or any of the parties. So far as C was concerned, the prosecution had not sought to adduce the evidence by reference to the doctrine of recent complaint. However, the defence had engaged in some limited exploration of the issue and the Judge felt it proper to permit some cross-examination about their sexual relationship with each other and the length of their relationship. However, he was not prepared to permit cross-examination outside the two areas identified. In the view of the Court, the approach taken by the trial Judge was not only a considered and careful one, but a very proper one. The Court saw as somewhat contrived and artificial the suggestion that because the complainant indicated a degree of discomfort in situations of intimacy that this should open up the possibility of a wide-ranging, if not unlimited trawl. In that context, the Court would associate itself with the intervention of the trial Judge. At an early stage of the debate on the issue when he asked does that mean in any case in which a female alleges that she has been raped and says that she cannot really thereafter feel comfortable with men or engage in a healthy sexual relationship, that that would always give rise to a cross-examination to past sexual history. The Court sees the response of counsel as somewhat defensive "I wouldn't say automatically always". This reveals the lack of any reality in such a proposition.

39. For those reasons, we are satisfied that this ground of appeal has no basis and must fail. Having considered all of the forgoing, the Court has come to the conclusion that the appellant has not advanced any grounds upon which he could succeed.

40. Accordingly, the Court will dismiss the appeal.