THE COURT OF APPEAL

[161/17]

The President

Edwards J.

Hedigan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

KM

APPELLANT

JUDGMENT of the Court delivered on the 26th day of July 2018 by Birmingham P.

1. In February/March 2017, the appellant stood trial in the Central Criminal Court on an indictment that contained multiple counts of sexual assault and rape, as well as two counts of attempted rape.

2. On 20th March 2017, the appellant was convicted by a unanimous jury on ninety-one counts. In respect of the first count on the indictment, an offence of sexual assault, he was convicted by a majority of 11:1. One count, a count of attempted rape, resulted in a verdict of not guilty by direction of the trial judge. Subsequent to his conviction, he was sentenced to a term of twelve years imprisonment with the final two years suspended. He has now appealed against both conviction and severity of sentence. This judgment deals with the conviction aspect only.

3. By way of background, it should be explained that the complainant was the stepdaughter of the appellant. The complainant gave evidence that the appellant had begun to sexually abuse her when she was approximately eight years old. The abuse in question normally took place in his bedroom, a room which he shared with the complainant's mother. Initially, it took the form of the appellant taking the complainant's hand and using it in conjunction with his own hand to masturbate himself. The complainant gave evidence that, in or around 2010 or 2011, when she was approximately eleven years old, the abuse escalated to attempted rape and rape. The last offence, she stated, occurred on 13th November 2015, being the day before she first disclosed the offending behaviour to Gardaí. Contact with Gardaí came about in a situation where the complainant had left her home and made her way to the home of an aunt of hers. There, she spoke first to a cousin and then to her aunt. The complainant's mother and other family members made their way to the aunt's house and then the complainant, along with her mother and her aunt, went to the local Garda station.

4. Much of the focus at trial was on the last alleged offence. The complainant said that on this occasion, the appellant had raped her in his bedroom. During the course of the incident, he had licked her breast and had ejaculated onto her stomach. When the complainant went to the Gardaí, she was brought to the Sexual Assault Treatment Unit (SATU) in the local hospital. There, swabs were taken in the usual way. Semen was identified on swabs taken from the complainant's stomach.

5. Subsequently, a DNA profile was created and that profile matched that of a blood sample taken from the appellant while in Garda custody. A test for saliva was carried out on swabs taken from her left breast and though they appeared to indicate the presence of saliva, no DNA profile could be extracted therefrom. When the underwear the complainant had been wearing on the day of the alleged offence was analysed, semen, an analysis of which matched the appellant's DNA, was found on the inside of the front panel and waistband.

6. When initially arrested and detained, the appellant had denied all the allegations. Upon the results of the forensic analysis becoming available, he was rearrested in accordance with the statutory provisions and was questioned in relation to the results of the forensic analysis. He offered, as a possible explanation for the presence of the semen on the body of the complainant, the fact that he had sexual intercourse with his wife, the complainant's mother, in their bed on the evening of 13th November 2015, and that the complainant had been lying in the same bed for some period during the afternoon of the following day. Some support for aspects of this narrative were provided by the complainant and her mother. Later testing revealed trace amounts of semen on the duvet cover and sheet of the appellant's bed.

7. The prosecution case was that the semen on the complainant's stomach and on her underwear was as a result of the untoward sexual activity on the part of her stepfather that she had described. The now appellant's case was that there had been no untoward sexual activity involving his stepdaughter and that the presence of the semen on her stomach and her underwear could be attributed to the fact that she was lying on a bed where he had previously engaged in sexual intercourse.

8. The significance of the forensic evidence was addressed by Dr. Charlotte Murphy of the Forensic Science Laboratory, a prosecution

witness. Her evidence was to the effect that the forensic evidence in the case provided "very strong support" for the proposition that the appellant had indeed had sexual intercourse with the complainant in the manner described by her. Dr. Murphy was cross-examined in relation to her conclusions at great length; the cross-examination spread over three days.

9. Against that background, the following Grounds of Appeal have been formulated:

> i. That the trial judge erred in permitting the prosecution to ask questions of the complainant during re-examination when such questions were not appropriate for a re-examination and ought to have been disallowed.
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> ii. That the judge erred in incorrectly admitting evidence of recent complaint when this ought to have been excluded.
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> iii. That the trial judge's charge to the jury was inadequate in that she failed to marshal the evidence to the issues in the case, this in circumstances where it was particularly necessary that she should have done so, having regard to the challenge of the scientific evidence.
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> iv. That the trial judge dealt with the cross-examination of Dr. Charlotte Murphy, a key prosecution witness, in a manner fundamentally different to the rest of the evidence in the case and in a manner which unfairly detracted from the effectiveness of the appellant's right to challenge the evidence of that witness.
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> v. That the judge charged the jury on a majority verdict at a time when they had not had a sufficient opportunity to deliberate, having regard to the nature and complexity of the case.
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> vi. That the trial judge mischaracterised the evidence in the case and this was to the detriment of the appellant when charging the jury.
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> vii. That the trial judge, when charging the jury, mischaracterised the appellant's case and, in general, failed to put the appellant's case fully and fairly to the jury.
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> viii. The trial judge erred in law and in fact in refusing to give a corroboration warning.
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> ix. That the trial judge erred in referring to the issue of corroboration in the course of her charge in a manner which was to the prejudice of the appellant.
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> x. That the trial judge erred in refusing to give a delay warning when one would have been appropriate.
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> xi. That the trial judge, when charging the jury on the issue of sample counts, did so in a manner which was apt to suggest that the appellant may have been suspected of further alleged offending, which was not the case.

It will be appreciated that while eleven grounds of appeal have been formulated, in some cases, the same complaint has been couched in slightly different terms, and in other cases, grounds are so closely connected or overlapped that they may be dealt with conveniently together. In opening the case,, Senior Counsel on behalf of the appellant, Mr. Ronan Munro SC, makes the point that the appeal is all about due process. He acknowledges that there is significant evidence available to the prosecution in the case, but says that the case is all about fair trial rights. He says that, notwithstanding that the trial judge was a very experienced lawyer in the area of criminal law that the conduct of the trial fell below the very high standards demanded by the Irish criminal justice system.

Ground 1: The trial judge erred in permitting the prosecution to ask questions of the complainant during re-examination when such questions were not appropriate for a re-examination and ought to have been disallowed

10. The background to this ground is that the complainant, in direct evidence, had said that on the day after the last rape, she was on the bed and did not get in under the covers [emphasis added]. It was suggested to her in cross-examination that when providing a statement to Gardaí, she had said "I got into my Mam and K's bed" [emphasis again added] and that she had specifically told Gardaí "I was under the duvet while I was eating my sweets and watching TV". Senior Counsel for the defence's cross-examination concluded as follows:

> "Q. And now, giving evidence to the jury on oath in a criminal trial, when you know how important this could be, you have falsely told them that you were not under the duvet and you were on top of the bed: isn't that right?
>
> A. Yes.
>
> Q. Thank you. I have no further questions."

11. Counsel for the prosecution sought to re-examine on the issue. The transcript of the re-examination includes the following exchange:

> "Q. (from prosecution counsel): When the Guards asked you about that day (the day she went to the Gardaí), subsequently, you said about being in that bed 'I didn't take my clothes off while I was in my Mam and K's bed'. Is that correct?
>
> A. Yeah.
>
> Q. Did you deliberately tell any lies in relation to 14th November 2013 because –?
>
> A. No.
>
> Q. Okay. Well, Mr. Guerin said to you this morning that you did falsely state -

Mr. Guerin (Senior Counsel for the defence): Sorry, and the witness accepted that and my friend is now trying to cross-examine the witness. She is trying to cross-examine her own witness on this issue. The witness gave an answer and she is trying to undermine it, that's not right. Judge, you can ask her why she said that.

Ms. Farrelly (Senior Counsel for the prosecution): The answer is non-committal.

Mr. Guerin: No, no, it wasn't non-committal, the answer was 'yes'.

Ms. Farrelly: I'm going to ask the witness what she was saying 'yes' to, because I have 'yes, yes, yes's' compound questions.

Mr. Guerin: I have an issue here. This is quite improper, in my submission, Judge.

Judge: A short break for you, Ladies and Gentlemen please, thank you."

12. It is the situation that at the time the complainant was giving evidence she was seventeen years of age and was describing events that she said had occurred approximately twenty months earlier. One must not lose sight of that fact. It is also the case that many people, not just children, when a proposition is put to them, particularly a complex or compounded proposition, have a tendency to answer 'yes'. Sometimes it is not clear whether that 'yes' is an indication of complete agreement with each and every element of the proposition put or merely an acceptance that a proposition has been put and formulated. Undoubtedly, the cross-examination of the complainant was an effective one, and undoubtedly, from the defence perspective, it finished on a high. An examination of the transcript would suggest that thereafter, the defence was anxious to curb the prosecution's ability to re-examine. However, the Court can see no basis for any suggestion that the prosecution should be precluded from re-examining, as would ordinarily be their right.

13. In this case, once the jury withdrew, in the course of the debate that followed, the judge observed:

"[a]s I say, I have a concern of the level of understanding of this witness of various matters and it appears that the defence made considerable headway in the cross-examination on that issue, but I would not – I think an unfairness may be done to the witness if she is not allowed to, at least if she is not given the opportunity, to clarify that."

The cross-examination of the complainant was conducted over two days of the trial. On both days, the judge expressed some anxieties about the extent to which the complainant appeared to understand some of the questions that were being put to her.

14. The judge has had the advantage, which we have not had, of viewing the cross-examination of the complainant. However, if a trial judge as experienced at this one has a concern about whether a vulnerable witness fully understood the questions she was being asked, then it seems to us that it would be inconceivable that there would not be efforts to clarify what the situation was and inconceivable that the prosecution should be refused an opportunity to re-examine. It seems to us that the prosecution was entitled to clarify whether the complainant was accepting unequivocally that she had told a deliberate untruth, in the sense of a deliberate falsehood, or whether she was, for whatever reason, acquiescing and not challenging propositions put to her. The very experienced trial judge who observed the cross-examination had concerns. As we have already pointed out, we have not had the same advantage that the trial judge had, but a perusal of the transcript does give rise to some degree of concern on our part. Overall, we are satisfied that the judge was acting correctly in permitting the re-examination. Certainly, we do not see any basis for suggesting that the fact that re-examination was permitted renders the trial unsatisfactory or the verdict unsafe.

15. Accordingly, we reject this ground of appeal.

Ground 2: The judge erred in incorrectly admitting evidence of recent complaint when this ought to have been excluded

16. This ground of appeal has a relevance to the evidence of two witnesses: ML, a friend of the complainant, and SR, a cousin of the complainant. The appellant says that the complaints that were allegedly made to Ms. L and Ms. R were not sufficiently consistent with the evidence given by the complainant herself to come within the doctrine of recent complaint. Ms. L gives the following account of an encounter with the complainant which occurred in or around Halloween night 2014:

> "[s]he started breathing heavily. I asked her if she was okay. I thought she was having a panic attack, then she started crying. I asked her again if she was okay. I gave her time to calm down and T (the complainant) said to me that K had molested her. She was really upset. I asked her if she was serious, she looked me in the eye and she said she was. I told T to tell her Mam about it. But T said she couldn't and asked me to keep it to myself and made me promise not to say anything."

Ms. L describes a second report emerging in June 2015. In relation to that, she said:

> "[i]t was June because it was around the time of my Mam's anniversary. T had been grounded for a week and I was concerned. I asked her why she was grounded, she told me she hadn't done her study. I knew she was lying because she had her lying face. I know when T is lying because she blinks twice. I asked her again why she was grounded and she said 'he done it again'. I asked her what T had done and she said 'K molested me'. I was shocked again because she hadn't told me in so long. We were standing at the door of my house. It was on holidays from school and it was about 2.30pm in the day. I remember T was wearing a dress."

17. The appellant says that what is reported by ML at its height amounts to an allegation that the appellant had molested the complainant. However, the appellant says what must be borne in mind is that at the time of both disclosures, on the plaintiff's account, the appellant's activity had escalated from sexual assault to rape. The appellant says that molesting equates to inappropriate touching and is far removed from actual rape. Accordingly, it is said that the account given to ML was fundamentally inconsistent with the account given by the complainant in evidence.

18. The respondent says that there is no question of the complaints lacking consistency. They draw attention to Professor O'Malley's work 'Sexual Offences' 2nd Ed. Thompson Reuters 2013 at para. 2109 where it is stated:

> "[l]ike all evidence, that relating to recent complaint must pass the test of relevancy. Since the sole purpose is to show consistency, evidence of a complaint, the terms of which were entirely inconsistent with the complainant's testimony in Court, would be therefore inadmissible. Problems may occur where there is some inconsistency between the two accounts, but the general consensus seems to be that the evidence of the complainant should not be rendered inadmissible unless it is completely inconsistent with the complainant's evidence."

19. A case where the view was taken that there was such inconsistency was the case of DPP v. Gavin [2000] 4 IR 537. In that case, at trial, the complainant gave evidence that he accompanied a friend and fellow wedding guest to his hotel bedroom. His evidence was that he removed his jacket, shoes and socks, went to bed and fell asleep. He woke up at in or about 5.30am to find the appellant in bed behind him and pushing up against him. The appellant was wearing a pair of underpants together with the complainant's shoes and socks, but no other clothing. His underpants were pushed down his thighs somewhat. The complaint made to Gardaí, which at trial was admitted, was that the complainant was in bed and awoke to find a man in the bed and the man had a hand on his groin. In the course of giving the reasons of the Court of Criminal Appeal for quashing the conviction, McGuinness J. had commented as follows:

> "[i]f the complaint is admissible at all, its terms are also admissible. But here, the complaint does not meet the primary criterion of being consistent with the complainant's evidence at trial. We do not accept the contention of the prosecution that it is sufficiently consistent because both descriptions are of sexual assault. The description of a hand on the groin is crucially different from the account given by the witness at trial. If the complainant evidence did not meet the primary criterion of demonstrating consistency, should it have been admitted at all? I think not."

20. This Court would observe that it could imagine that there might have been other courts that would have taken a different view as to whether the degree of inconsistency and divergence was such as to preclude the evidence of the complaint. However, even taking the view of the Court of Criminal Appeal in that case at face value, the divergence there was altogether on a different scale than what is in issue here. There, there were two specific and reasonably detailed accounts; one of waking to find a man with his hand on the complainant's groin and the other of being awoken to find the appellant in bed behind him and pushing up against him dressed in the particular fashion described.

21. Here, there is no inconsistency in the accounts. What has occurred is that on one occasion, an elaborate and detailed account is given. First, over several days when providing a statement to the Gardaí, and then in the witness box during examination, cross-examination and re-examination, whereas on the other hand, the account given to Ms. L was really lacking in all detail. However, in the Court's view, that is what is in issue: the distinction between an account where detail was not provided and an account where considerable detail was provided. Viewed in that light, there are no real inconsistencies. The Court does not believe that the reference to "molesting" can be interpreted as an account involving but limited to and not going beyond inappropriate touching. It is the nature of things that individuals who have been the subject of sexual abuse, in particular, perhaps, child sexual abuse, when they first bring themselves to speak of it, that they are likely to be very reticent and to provide few details. This is a factor that trial judges are entitled to have regard to when deciding whether to admit evidence of recent complaint that is offered. In this case, so far as the evidence is concerned, the Court is satisfied that the trial judge was well within her rights to admit it.

22. As far as SR is concerned, Ms. R was the first person whom the complainant met after she had left the appellant's house on the day after the final alleged incident of rape and had made her way to the home of her aunt. SR gave the following account:

> "T looked upset to me. I asked her what was wrong, she started crying and she told me that K, her stepfather, had been raping her since she had moved up to C [precise location]. I asked her will I call my Mam, she said do. I went into the kitchen to get my mother. I told my mother that T was here and that she told me that K had been raping her. Before I went into my mother, T also told me that K used to rape her when her mother was gone to work. I was upset when I told my Mam and started to cry. My Mam went out to T and I remained in the kitchen. I'd also like to say that when I was speaking to T in the hall, she also mentioned that when K was raping her that he came over her and that it went all over her bellybutton and her belly. T also said to me in the hall that when she ran away from home that day, she intended on going to her Nan's house in L [location] but changed her mind and came to our house. She also said that when she was going to tell what K was doing, but K said that she wouldn't be able to see any of the other family any more. She said she didn't tell anyone because she was too young. She was afraid she would be taken away. I didn't speak to TA any more while she was at my house."

The appellant focuses on the phrase "since moving to C" and says that this suggests that rapes had occurred from the point in time when the move occurred up to the time when disclosure was being made, but that account was quite different to the complainant's account which involved an incremental escalation. Again, attention is drawn to the phrase "he used to rape me when my mother was at work". It is said that the continuous past tense is used and clearly connotes an ongoing state of affairs. While the final incident described by the complainant might be said to have occurred when her mother had gone to work, this was not true of earlier incidents.

23. The Court feels that it is possible to over-parse and analyse a conversation between two children especially when one of them is in a distressed state. The reliance on the fact that the continuous past tense was used is over-analytical. Again, the reference to rapes "since moving to C" is capable of bearing the interpretation contended for by the appellant that rapes started at move time and continued thereafter, but it is equally open to the interpretation that rapes occurred from a period in time that was subsequent to the move to C.

24. The Court is quite satisfied that such matters as the defence is in a position to point to would not have required the exclusion of the evidence of Ms. SR. Indeed, in terms of the overall consistency of the complainant, what Ms. SR had to say about the fact that she was told by her cousin, the complainant, that K came all over her and it went all over her bellybutton and her belly, certainly indicates a high degree of consistency by the complainant on a key issue.

Ground 3: The trial judge's charge to the jury was inadequate in that she failed to marshal the evidence to the issues in the case, this in circumstances where it was particularly necessary that she should have done so, having regard to the challenge of the scientific evidence

25. The trial judge is criticised for having adopted the approach of reading from the transcript, witness by witness, in chronological order. It is said that in the light of the complexity of the issues and the length of the trial, it was incumbent on her to actively engage with the evidence and connect it to the specific matters which had to be resolved. The point was made that that was of particular relevance to the scientific evidence and the challenge to it which was mounted by the defence.

26. The enormous efforts that the defence went to, to prepare for the cross-examination of Dr. Charlotte Murphy, is highly commendable, as is the manner in which they deployed the results of their investigations during the course of a lengthy and extremely detailed cross-examination. However, one must be careful to avoid a situation of failing to see the wood for the trees. A young girl says that she was raped on 13th November 2015. She describes that during the course of the incident, her breast was licked and

that the appellant ejaculated onto her stomach. The following day, semen was recovered from swabs taken from the complainant's stomach. There was also semen identified on the underwear the complainant was wearing on the day of the alleged offence, on the inside of the front panel and waistband. What appeared to be saliva was also found on the appellant's left breast. The forensic scientist expressed a clear view that, as between the two competing theories, these being that they resulted from the untoward sexual activity that had occurred, and the alternative theory, that the results were explicable because the complainant lay in a bed where sexual intercourse had previously occurred, that the evidence provided very strong support for the proposition that there had been sexual intercourse with the complainant in the way described. In truth, the findings of the forensic scientist were really just self-evident common sense. The jury sat through the direct evidence and the extremely lengthy cross-examination; were addressed on the significance of the evidence from the forensic scientist by counsel and had the benefit of the judge's charge. The jury can have been in absolutely no doubt about the import of the witness's evidence and about the challenge to that evidence that was mounted by the defence.

Ground 4: The trial judge dealt with the cross-examination of Dr. Charlotte Murphy, a key prosecution witness, in a manner fundamentally different to the rest of the evidence in the case and in a manner which unfairly detracted from the effectiveness of the appellant's right to challenge the evidence of that witness

27. Summarising a cross-examination can often prove difficult for a judge delivering his or her charge. It is for that reason that some trial judges have made the point to juries that the task of summarising a cross-examination is fundamentally different to that of summarising a direct examination. In this case, the cross-examination was very lengthy, spread over three days, and dealing with it would have proved a challenge for any trial judge. However, despite the diligence of defence counsel, and despite the conspicuous ability with which it was conducted, in truth, the cross-examination met with only very limited success. Unsurprisingly, the forensic scientist never resiled from her view that the forensic evidence provided very strong support, and that for reasons that she explained clearly to the jury, she preferred the theory that the evidence was explained by the untoward sexual activity over the alternative theory which was being canvassed.

28. Some extracts from her evidence merit quotation. These quotations are taken from the re-examination of Dr. Murphy which occurred on Day 10 of the trial:

> "[w]hen I consider the results that I got in this case, when it came to the amount of semen in this case, I considered a number of things. I considered that the stain would have been dried, I considered that there was more semen on [the complainant's] underwear and bellybutton than there was on the bed sheets. I considered that the inside front [of the complainant's underwear] gave a positive reaction to a screen so I knew we were talking about something like a body fluid going into the fabric, soaking in. It was not a fleck of something dry that was sitting on top of the item. And I considered that our own experience is when it comes with dry semen that we do not expect it to transfer, so it was all of that information that was all feeding into the evaluation."

A little later that day, she commented:

> "[w]hat I considered in this case was that the results either happened as was alleged by [the complainant] or that the results in this case happened because she got into the bed. So when I looked at the results, I looked at two things. I looked, firstly, at the amount of semen, that there was more semen on the complainant than there was on the bed, and if I consider those results, that it was a result of a transfer, that would be highly unusual, be a very rare event. Then I considered the location of the semen, that if transfer occurred, where would I expect to find the semen and I did not find any semen on the outside of her clothes, nor on her back, or on the seat area of her pyjamas or anywhere on the pyjamas or on the vest top and the only place I found the semen was on the inside of her underwear so, again, if transfer occurred, in order for it only to be on the inside front of the underwear and not on the outside of the clothes, that would be another very, very rare or unexpected result. So for those two unexpected results to happen in combination, that is where I came to the conclusion that the results in this case would provide very strong support that sexual intercourse occurred rather than that the semen was there as a result of transfer."

29. The Court does not feel that the criticisms of the trial judge's handling of Dr. Murphy's evidence in the course of her charge are justified. The judge sought to put before the jury the flavour of the approach that had been taken by the defence. She is criticised because on a number of occasions, she introduced topics by saying "Mr. Guerin said" or "Mr. Guerin put it" or "Mr. Guerin asked her". The Court feels these criticisms are quite misplaced, and that as is often the case in cross-examination, the interest of the defence was, as much in the questions being asked and the propositions put as in the responses being received because the forensic scientist was not resiling from her conclusions.

Ground 5: The judge charged the jury on a majority verdict at a time when they had not had a sufficient opportunity to deliberate, having regard to the nature and complexity of the case

30. This ground does not take into account the fact that it was not the judge who took the initiative in raising the issue of majority verdicts, but that it was, in effect, the jury. Prior to a point when the judge was about to embark on a recharge in respect of the evidence of Charlotte Murphy, the jury asked a question of the trial judge which was to the effect: what would occur should they be unable to reach a unanimous verdict in respect of a single count? If it is a situation that a jury is able to come to a verdict on a number of counts and brings that to the attention of the trial judge and the Court, then some response to that is required. A trial judge cannot be expected to ignore what the jury is communicating and leave the jury to their own devices.

31. The appellant has suggested that it would have been appropriate for the jury to have been asked not to commence their deliberations until the judge had dealt with the requisitions that were raised and, if relevant, had recharged the jury. This has not been the traditional approach. It might be that there may be some cases in the future where a request to the judge to follow that procedure will be made. However, there was no such request here and the usual practice was followed. We do not believe that the judge can be criticised for doing so. We would point out that this was not a case where the requisitions were focused on what was suggested to have been a significant misstatement of the law: rather, to use the language of the late Carney J, this was a case where one side was anxious that favourite bits of the transcript should be read to the jury.

Ground 6: The trial judge mischaracterised the evidence in the case to the detriment of the appellant in her charge to the jury

Ground 7: The trial judge mischaracterised the appellant's case in her charge to the jury and generally failed to put the appellant's case fully and fairly to the jury to the detriment of the appellant

32. These grounds overlap with Ground 4, and again, the focus of attention is the testimony of Dr. Murphy, and in particular, the cross-examination of that witness. Again, the words of Carney J. about the parties to a trial wanting their favourite bits of the evidence contained in the transcript to be read come to mind. The Court would simply observe that the arguments do not fully reflect the fact that the judge was, of course, charging a jury who had heard the evidence being given from the witness box, and in particular, had heard the forensic scientist being cross-examined. The jury cannot have been unaware, having sat through the cross-examination in their jury box, that the defence case was that there were other possibilities that could not be excluded. There is absolutely no doubt that the judge's handling of these issues was more than adequate notwithstanding the vigour displayed during cross-examination. Attention has focused on two aspects: the saliva on the left breast and a comment by the trial judge about the semen passing through the clothing.

33. In relation to the indications for the presence of saliva on the left breast, the defence focused in its cross-examination on the concept of false positives. Certainly, the defence established that false positives can occur, though how likely that would be when the indicative presence of saliva was on the left breast and the suggestion was that false positives could be linked to the presence of urine and sweat was unclear.

34. The Court is quite satisfied, as it has already indicated, that the judge's handling of the scientific evidence was more than adequate.

35. The issue relating to the transfer through clothing arises in the following circumstances. At the close of the section of her charge dealing with the issue of the semen evidence, the trial judge commented:

> "[s]o, those are what the defence is inviting you to consider, whether in this case it is reasonably possible that the semen resulted from the fact that Mr. M and his wife, MM, had sex transferred from their bed through her clothes onto her stomach and onto the inside of her underpants. So, they are saying to, you might that, having regard to the fact that there is transfer, could that be reasonably possible? And those are the questions that the defence are seeking to raise by their cross-examination of Dr. Murphy and that is really a matter for you." [Emphasis added by defence]

36. The defence say that it was never part of their case that the semen must have passed "through the complainant's clothes". At the requisition stage, junior counsel for the defence posited the fact that pyjamas are loose-fitting articles which fit together in a particular way, consisting of a top and bottom half. It was asserted that as a matter of common sense, garments of such a kind can move as a person is wearing them, can ride up on a person's waist or torso or equally down on their hips or legs. Again, the defence case proceeded on the basis that it would be reasonable to assume that a person who was in a bed for a period of time, as the complainant had been, would likely move around and shift their position. These efforts were undoubtedly valiant, but with all respect to counsel, references to clutching at straws come to mind. The appellant was referred to the case of DPP v. Rattigan in the course of written submissions. However, in the Court's view, the cases are not remotely comparable. In that case, the trial judge concluded his charge in a manner which the Supreme Court felt unbalanced and otherwise appropriate charge.

37. In this case, the most that can be said was that the phrase "through the clothes" was an infelicitous one. Any jury considering the matter would have to have been conscious that if this had been a case of innocent transfer, the transfer was not onto the outer garments of the person lying on the bed sheet, but rather the semen had avoided contact with the outer garments and made its way onto the bellybutton area and the inner panel of the front of the underwear.

38. The Court does not believe that the criticisms that have been formulated of the judge's charge give rise to any concern about this fairness of the trial or the safety of the verdict.

39. The Court rejects these grounds of appeal.

Ground 8: The trial judge erred in law and in fact in refusing to give a corroboration warning as part of her charge to the jury

40. After all the evidence had closed and after both sides had made their final speeches, counsel on behalf of the appellant applied for a corroboration warning. This was a departure from the normal procedure which is that the application is made before closing speeches so that counsel can tailor their speeches in the knowledge of what the judge will be saying. The Court cannot but believe that the fact that there was not an application at the usual time must have been influenced by a belief that this was not a case for a warning. However, even belatedly a number of grounds were advanced as to why a warning should have been given. There is no doubt, indeed, it is specifically accepted by the appellant that the giving of a warning is, and has been since the enactment of the Criminal Law Rape Amendment Act 1990, a matter for the judge's discretion. The circumstances in which a warning might have been given was the subject of discussion in the Court of Criminal Appeal in the case of DPP v. JEM where the approach of Lord Chief Justice Taylor in Makunjola was broadly approved.

41. This Court has made clear that it is very conscious that the decision is, in the first instance, a matter for the discretion of the trial judge. Moreover an appellate Court should be slow to intervene or interfere with the exercise of that discretion. There have, however, been a number of cases where this Court has quashed a conviction.

42. This Court is in no doubt that whatever arguments could have been advanced and are advanced in favour of a warning that this was far from a situation where the discretion could be exercised only one way. The trial court took the view that the forensic evidence, in terms of semen on the bellybutton and inside the underwear, was potentially corroborative but only in respect of the last count on the indictment. In the absence of argument addressed to the issue specifically, the Court will express no view on whether the trial judge was correct in taking the view that the forensic evidence went only to the last count on the indictment or whether it was of wider application.

43. However, in a situation where the complainant's case was that there had been protracted untoward sexual activity, and the case put on behalf of the accused was that there had never been any such, the forensic evidence was obviously relevant to assessing the

complainant's credibility and obviously relevant to the question of whether it could be said that this was a case where it would be dangerous to convict in the absence of corroboration. The Court is quite clear that this was a case for the unfettered discretion of the trial judge, that it was not a case where it could conceivably be said that she was coerced to exercise her discretion one way.

44. The Court rejects this ground of appeal.

45. To the extent this is in issue, the appellant points out that the judge delivered her charge without giving a reasoned ruling on the issue of whether to give or not give a corroboration warning. This was in circumstances where the issue was canvassed; the judge left it over until the following day, but then the following day, she began her charge, and so next dealt with the issue of corroboration warning at the requisition stage. The Court has already explained that the procedure followed in seeking a corroboration warning represented a departure from that normally followed. This, undoubtedly, shaped the nature of the judge's response.

46. In all the circumstances, the Court has no hesitation in dismissing this ground of appeal.

Ground 9: The trial judge referred to the issue of corroboration in the course of her charge in a manner which was prejudicial to the appellant

47. This ground has been formulated in circumstances where the trial judge did make a reference to corroboration, it is in the nature of a passing reference while dealing with the question of recent complaint:

> "[a]n exception is made in sexual offences, and I say the reason is for hundreds of years and right up until the 1980s, our courts treated the evidence of women and children, particularly in sexual matters, as somehow suspect and unreliable. So, in the case, if there was a case before the courts, we'll say up until the 1980s, where the only evidence of the sexual offending was the evidence of a woman or a child, then the courts routinely gave a warning to juries that it was unsafe to convict on the uncorroborated, in other words, without independent evidence, uncorroborated evidence of a woman or a child, but that a jury, notwithstanding the warning, if they were convinced it happened, they could convict. So, the evidence of women and children was treated as somehow lesser or suspect."

48. The appellant says that the remarks appear to have been made in the context of saying that the law has evolved and moved away from outdated and perhaps offensive attitudes regarding the manner in which certain classes of witnesses were viewed. It is submitted that by referring to corroboration in such terms, the trial judge may have given the impression that corroboration warnings and the requirement to give them were relics of a distant past which were generally insulting to and demeaning of females and child witnesses. The appellant says that this in turn could only have had the effect of suggesting to the jury that there was no need for corroboration in cases such as this, and that even doing so might be commensurate with adopting an unjust and unfair approach to complainants. It is said that the effect of this was that a jury might be more ready to convict in the absence of corroboration rather than feeling any unease about doing so by reason of the absence of corroboration.

49. The Court does not believe that there is any reality to this criticism. The trial judge is entitled to comment, and by no stretch of the imagination can this be seen as straying beyond the bounds of proper comment.

Ground 10: The trial judge erred in fact and in law in refusing to give a delay warning

50. Prior to commencing her charge, the judge was requested by the appellant to give a delay warning. The reasoning advanced related to the lack of specificity and detail surrounding the vast bulk of the counts. It was pointed out that there were only four specific accounts given by the complainant as regards identifiable incidences of offending charged. The judge refused to give the warning, pointing out that the allegations concerned ongoing conduct which subsisted up until 2015 and that no specific prejudice had been advanced on behalf of the appellant. The judge did, however, indicate that she would inform the jury that as there was no specific date alleged in respect of all but the final count on the indictment, this could create difficulties for the appellant.

51. Ultimately, the judge dealt with the issue as follows:

> "[n]ow, one – it is a fact because of the nature of child sexual abuse, that dates are not specified within the particular month. And that can pose a difficulty for an accused person because if, for example, the date, the May one was 15th May and Mr. M was able to say 'oh, I was down in the South Infirmary getting an injection for a neck pain that day and they kept me overnight', if you had that – it can – the lack of specificity makes it slightly more difficult. However, there has been no prejudice, particular prejudice alleged by Mr. M in this case. And it seems to me that, in relation to the evidence, there is no dispute that the parties were living in C from 2007 up until the time that TAR complained in November 2015. It does not seem to be disputed that Mr. M was at home, having been injured at work throughout that period. It does not appear to be disputed that on occasions, yes, TAR was up in her mother and Mr. M's bedroom watching movies. It does not appear to be disputed that, on occasions, they were there and the door was locked. So, no particular has been alleged in this case, but you should bear in mind when looking at it, nonetheless, that the absence of a specific date can potentially – should make you more careful about coming to your decision if your decision is to convict."

52. It is said that the reference to specific prejudice was inappropriate and appears to have arisen from confusion on the part of the trial judge between the criteria applied in the context of pre-trial applications to prohibit a prosecution and the test as to whether a warning should be given.

53. The timetable of alleged offending in this case was an unusual one. Many cases involving allegations of child sexual abuse date back years or indeed decades. In this case, unusually, the abuse alleged continued up to the eve of the complaint to Gardaí, and even more unusually, the prosecution was in a position to produce forensic evidence.

54. In those circumstances, the trial judge was correct in taking the view that this was not a case for a classic delay warning. However, the remarks that she did make, and in particular, her reference to what the situation would be if someone was in a position to establish that they were hospitalised on a date when a particular offence was alleged, echoed the language of the traditional or classic warning. The judge's remarks about the absence of specific or particular prejudice would seem to have been made in a situation where she was calling to mind some of the older cases where there had been controversy as to whether it could be

established that the complainant and accused had or had not overlapped at a particular location at a particular time, as well as cases where there was controversy about whether it was possible or not possible to lock a particular room. The situation that the judge, and indeed the jury, was facing was an unusual one, with allegations of abuse over a period of seven or eight years and the abuse commencing a number of years ago, but continuing right up to the eve of the making of the complaint. While the judge could have made her point without reference to the lack of complaint about prejudice, the Court has not been persuaded that the trial judge's charge has been rendered an unsatisfactory one by reason of the remarks.

55. Accordingly, this ground of appeal fails.

Ground 11: The judge charged the jury on the issue of sample counts in a manner which was apt to suggest to them that the appellant may have been suspected of further alleged offending behaviour which was not the case

56. The Court can say immediately that it regards this complaint as entirely without substance. It is advanced in a situation when the judge, in the course of her charge, had commented as follows:

> "[n]ow, when phenomenon of child sexual abuse began to emerge in this society, with frightening regularity, in the 1980s and 1990s, the sheer volume of complaint from individual victims about the level of offending against them posed a problem: how are these offences to be charged in an indictment? Take an example away from the case, say a young boy who had been to an industrial school for ten years made a complaint that he had been abused twice a week by a particular Brother in the school for ten years. Since each count on an indictment could only charge one offence, the indictment in that case would have to contain, by my reckoning, 1,040 counts, being 104 a year by ten years. Now, such an indictment would be totally unwieldy and would be overloaded, and unfairly loaded, against an accused. So, a balance had to be struck which would allow a complainant to give evidence of all the sexual offending that had occurred, but which was not over-unwieldy and unfairly prejudicial to an accused."

57. The complaint is made that the judge's remarks about abuse in the context of an industrial school and then her subsequent remarks about the approach to drafting indictments by reference to the Supreme Court decision in the case of DPP v. EF might have led jurors to speculate that there were additional alleged incidents of abuse which had not been charged.

58. We have already seen examples where the judge was keen to explain rules of law or practice to the jury and to provide some historical context by way of explanation. The Court is absolutely satisfied that these remarks were entirely innocuous and has no hesitation in dismissing this ground of appeal.

59. In summary, then, the Court rejects each of the individual grounds that have been argued. However, that is not the end of the matter because counsel for the appellant was prepared to acknowledge that he had no knockout point, instead he said that the cumulative effect of a number of these points gives rise to a sense of unease and a concern that the trial was not fair or satisfactory. The Court agrees that it is appropriate to step back and look at the overall fairness of the trial. In that context, we call to mind remarks of a number of Canadian jurists to which we have referred in the course of earlier decisions. La Forest J. in *R. v. Lyons* [1987] had commented:

> "[i]t seems to me that section 7 of the Charter entitles the appellant to a fair hearing: it does not entitle him to the most favourable procedures that could possibly be imagined."

The same judge, *in R. v. Harrer* [1995] had commented:

> "[a] fair trial must not be confused with the most advantageous trial possible from the accused's point of view . . . nor must it be conflated with the perfect trial: in the real trial, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."

60. Former Chief Justice McLachlan, when sitting in the British Colombia Court of Appeal, had commented:

> "[t]he Charter guarantees, not the fairest of all possible trials, but rather a trail which is fundamentally fair: what the law demands is not perfect justice, but fundamentally fair justice."

61. In this case, the Court has had the advantage of written and oral submissions. The written submissions are among the very longest that the Court has received since its foundation. The focus on the individual grounds that have been formulated might serve to detract from the fact that the Court is in no doubt that Mr. M. was properly and safely convicted after a fair trial. Recent decades have seen many cases of child sexual abuse come before the courts. In very few, if any cases, has the prosecution had available to it evidence of the quality that it was able to mount in the present case. No doubts have been raised in our minds about the fairness of the trial or the safety of the verdict.

62. Accordingly, the Court dismisses the appeal.