THE COURT OF APPEAL

Edwards J.
McGovern J.
McCarthy J.

Record No: 194/2018

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

J. K.

Appellant

JUDGMENT of the Court delivered on the 18th of July, 2019 by Mr. Justice Edwards

Introduction
1. The appellant in this case was charged and tried before the Central Criminal Court with two counts of rape, allegedly committed against the complainant, a female friend of his sister, and which were said to have taken place on the 21st January, 2015 and on the 7th March, 2015, respectively. These were charged as counts no.'s 1 and 2 on the relevant indictment.

2. On the 21st of February 2018, following 5 hours and 8 minutes of deliberation, the appellant was found not guilty in respect of count no. 1, but guilty in respect of count no. 2, by a 10-2 majority decision of the jury.

3. The particulars of count no. 1 had involved an allegation that on the 21st of January 2015, at a piece of waste ground in Clondalkin, the appellant had sexual intercourse with the complainant, C.K., who at the time did not consent to it, and that at the time he knew that she did not consent to the sexual intercourse, or was reckless as to whether she did or did not consent to it.

4. Count no. 2 involved an allegation that on the 7th of March 2015, at a specified address in Lucan, the appellant had sexual intercourse with the complainant, C.K., who at the time did not consent to it, and that at the time he knew that she did not consent to the sexual intercourse, or was reckless as to whether she did or did not consent to it.

5. On the 11th of June 2018 the appellant was sentenced to 6 years' imprisonment on count no 2 with the final year suspended on condition that he enter a bond in the sum of €100 to keep the peace and be of good behavior for one year. This sentence was back-dated to 1st of January 2017. The appellant was also added to the sex offenders register.

6. The appellant now appeals against both his conviction and sentence.

Background Facts
7. The complainant, born on the 23rd of June 1997, was the best friend of the appellant's sister, S. K. They grew up together and lived nearby, and the complainant knew the appellant through this relationship. As the appellant has been acquitted of count no. 1, it is only proposed to describe in brief the evidence given at trial in relation to count no 2.

8. The complainant gave evidence that on the evening of the 7th March, 2015, her mother rang her with the request that she "*come home before half ten*". When she got close to home, the appellant emerged from nearby and remarked "*you're not going in yet are you?*", to which she replied "*Yeah, my mam wants me to go in*". The appellant persisted, asking "*do you want to come on a walk with me?*", to which she answered "*No, I have to go in*". The complainant claimed that the appellant then grabbed her arm and started walking with her, moving his hand onto her hips and beckoning her to continue walking with him. The complainant stated that she feared for her life. She claimed that they entered a certain park, at which point the appellant relinquished his grip. The complainant told him, "*I'm not doing anything*", "*I have a boyfriend*", hoping this would deter him. However, the appellant simply said "*Ah sure nobody has to know*", before grabbing her by the arm and leading her to a rock, adjacent to an Astroturf surfaced area, pulling down her bottoms and saying "*I'm just doing a quickie*". The appellant then bent her over, inserted his penis in her vagina and had sexual intercourse with her, during which, she said, he had a hold of her hair bun while going back and forward. She said it felt like "*when someone was reefing the hair out of you.*"

9. The complainant said she was crying and felt sick to her stomach, and was fearful that the appellant would beat her. She claimed that her body went into shock. She could not remember what bottoms she was wearing but did remember her underwear was branded '*Hello Kitty'*.

10. Both parties then pulled up their bottoms and began walking back. During this time the appellant grabbed the complainant's face and said "*I've to stay away from you*". She entered her mother's house and informed her of the events straight away. She was in shock and traumatised, was getting sick, and had vaginal bleeding, for which she got a sanitary pad. Her mother telephoned the Gardaí and they then went to a named Garda Station to make a complaint. Thereafter she went to a particular Sexual Assault Treatment Unit. The complainant stated that she was raped by the appellant and that had not consented on either occasion.

11. Under cross-examination it was put to the complainant that she had had consensual sexual intercourse with the appellant on the

night of October 31st, 2014, and that no further contact occurred as the appellant was involved with another woman at that time, thus he was not interested in pursuing their relationship further. She agreed that when he said at one point "*Oh, come on, walk down here*", she had said "*Okay, I will*". However, she had been adamant that this was in circumstances where he had grabbed her arm.

12. The complainant admitted that she had seen the appellant on the night of October 31st, 2014, and that they had been text messaging around this period, but insisted that no sexual contact had occurred, and that she was with her mother at the time.

13. It was put to the complainant that kissing occurred on the lips during the March incident. She stated that the appellant kissed her on the lips and she froze. It was put to her that prior to the insertion of his penis, the appellant digitally penetrated her vagina – this was accepted by the complainant, stating that she forgot to mention this in her evidence. She stated that he grabbed her face after sex and said "*I have to stay away from you*", and that she had a bruise on her face. It was put to her that she had been examined by a doctor, who detected nothing abnormal. The complainant denied a suggestion that she had told a Counsellor that the appellant had used a knife to threaten her into submission. She agreed that she saw a Counsellor at the Rape Crisis Centre but denied telling her that a knife had been used. She denied telling the appellant that she had been fighting with her mother about coming home before she wished to. She stated that she went straight home. She agreed that her mother rang her asking her to go home and she told her mother she was on her way home. She denied that the sexual intercourse had been consensual. She denied coming up with a story and repeated that she was raped.

14. The complainant agreed under further cross examination that she had seen a psychiatrist and that she had a history of hallucinations. She confirmed that she saw shadows of the devil in a mirror. She agreed that she told her counsellor of demons and voices. She said she was highly depressed at the time and she was taking Prozac, that was in 2013 and 2014. She was asked about certain texts on her phone and counsel read from what was a series of deleted texts taken from her phone regarding sexual activity with the sender, R. M. She agreed that those texts indicated that there had been something physical between them as suggested to her but she denied she was making up a story about the appellant because she didn't want her boyfriend to know. Asked about contraception, she said she was on the injection that lasts for about three months. She accepted that she had thought that DNA evidence, i.e., the presence of the appellant's DNA on swabs taken from her, were proof that he had raped her. It was put to her that there was not forced sexual intercourse on any occasion between them, and she responded, "*there was*".

Medical Evidence of Dr. Hynes

15. A Dr Hynes gave evidence that she is a medical doctor attached to a Sexual Assault Treatment Unit. She stated that on the 8th of March 2015 the complainant, aged 17, presented with her mother and said that she hadn't showered since the incident which was five hours previously. An examination was carried out and she found the head and face to be normal, there was redness on the right arm and fingers, and a genital examination showed some haematoma. Dr Hynes stated she took swabs and clothing and gave the complainant a pain relief tablet. She stated that the morning after pill wasn't necessary. There were findings of recent trauma on non-genital examination. There were also signs of recent trauma on genital examination which Dr Hynes said were consistent with the possibility of non-consensual sexual intercourse. The examination took three or four hours.

16. Dr Hynes was cross examined and she said the complainant had indicated that she had a history of depression and was prone to bruising. She confirmed that the complainant said that she had sex five weeks previously and before that, she had sex the previous June with a boyfriend. Dr Hynes didn't recall any allegation of reefing or violent pulling of the hair. She agreed there was no injury to the waist and there were no marks except on her arm. There were no marks on her face. She accepted that the injury can occur in consensual sexual intercourse too but stated that it is more common in non-consensual sexual intercourse. She agreed that Ms K told her she was taking Prozac. She was re-examined and she agreed that she was told by the complainant that the last sexual encounter was non-consensual.

Interviews with the Appellant

17. The appellant did not personally give evidence, although the defence did call the aforementioned counsellor who had had dealings with the complainant as a witness. Her evidence was with respect to a history she had taken from the complainant when seeing her professionally, and this was introduced on the basis that it was potentially relevant to the reliability and credibility of the complainant, or lack thereof as the defence sought to contend. However, this witness could not give any relevant testimony concerning what had occurred at the time of the alleged rape. For that, the defence relied upon the appellant's account of events, and his contention that what had occurred was consensual, as recorded in memoranda of the interviews that were conducted by members of An Garda Síochána with him following his arrest. These memoranda were placed in evidence by the Gardai concerned who were called as witnesses for the prosecution.

18. The following is a summary of the appellant's version of events (with names of persons and locations redacted). He states the first time he had sex with the complainant was at Halloween, 2014. When asked about the next time he had sexual intercourse with the complainant he answered:

> *"Well, the same as the last time, we were just out together and my sister S and her boyfriend, N, was there as well. She asked me did I have any weed. I asked my sister and her fella to go and get it. We were just at the park there at [*a specified location*]. We were supposed to meet back up at the field across from the station, CK chose to stay with me when S and N went. Me and CK went over to the field and obviously, we were talking and having a laugh and all, we started kissing and obviously had sex again."*

19. He was then asked to explain exactly how it had transpired that he had had sexual intercourse with the complainant. He stated:

> *"We were kissing for a couple of minutes then I asked her did she want to have sex again, and she said yeah. I had a condom this time and put it on. There's a rock in the field and she bent over it and we had sex. She put her hands on the rock, I got behind her, and we had sex. We walked off together after this. We got the phone call from my sister and they were on their way back, we decided to meet them halfway. We went into the park and then met them on [*a specified road*] past the second entrance. I was going to go home, and we met my sister and she asked for a bit of weed and I gave her some for a joint. She went with my sister and N came with me. We walked back to my girlfriend's house and they went back to mine, me ma's like."*

20. He was then asked:

> *Q. Who pulled down her trousers and underwear?*

A. She pulled down her jeans herself and I pulled down her knickers. She never told me not to because if she did, it wouldn't have happened. She wanted sex and that was that. My own bottoms were down around my ankles, as I said, I had the condom on and she was bent over and stayed in that position. If she didn't want to, all she had to do was come up. We were very close to the garda station as well, why didn't she report it that night? She's just devious. Her ma is also known for telling lies as well as I was told by close friends and neighbours, she's classed as a freak. Maybe she found out and got CK to say this.

Q. "Did you specifically ask CK if she wanted to have sex?

A. Yeah on all occasions. I'm just shocked why she would do such a thing as this. I have kids, I have a girlfriend, I'm not violent towards girls or women, it's actually breaking my heart."

21. He denied pulling her hair during intercourse when asked. When asked if he had sexual intercourse with the complainant against her will on the 21st of January 2015 he stated:

"No, it was with consent."

22. When asked what happened what happened when he had sexual intercourse with the complainant in March, 2015 he stated:

*"I was actually going over to my partner in [*a named location*], I was walking on the left-hand side of [*a specified*] Green, I heard people calling me. It was my sister, CK and another friend of theirs. I was talking to them for a few minutes, telling them where I was going. I walked back across the green and I kept on the left-hand side, walking up. My sister and her friend were supposed to walk CK to her house, she usually takes one route to her house. She told them not to walk with her." I carried on through... is it [*a specified place*]?"…*

*"My sister and her friend were watching CK and she appeared at the same place as me. They said as if she was following me. CK called me, she did, we were in [*a specified place*] at this stage. We were talking for few minutes. I think her ma was arguing with her on the phone. She told me she was afraid to go home. We were kissing for a few minutes in [*another specified place*], I asked her was she staying out. Did she want to come on a stroll to the park with me, she replied yeah. In the park I asked her did she want to have a quick ride, she said yeah. She had told me she couldn't stay out that long. We walked over to bushes and there's a brick there, we went there and had sex."*

Q: "Whereabouts in the park are you talking?"

A: "When you go in the entrance from the church, go all the way over to the right, there's a big rock there, she pulled down her trousers, I pulled down mine. We had sex. That was it. No complaints. She never said no. We were kissing first. Then we had sex. We were talking for a few minutes. I said I'll see you later. She said the same. And the next morning the guards are at the door. Ever since that I don't even feel safe having sex with my own girlfriend."

Q: "Describe how you had sex on this occasion?"

A: "She bent over and I got behind her. That was it."

He denied putting his fingers into her vagina and stated he did not wear a condom. He confirmed he ejaculated but did not know if he ejaculated inside her vagina.

23. Part of the complainant's statement was read to the appellant. He responded:

*"I just want to say more lies. We were kissing each other in [*a specified place*] for a few minutes. As I said, she told me she was afraid to go home because her ma would beat her. She was happy enough to go off with me. In fact, she wanted to come with me more than she wanted to go home."*

24. The appellant denied asking her to go to the park because he wanted to have sex with her, stating:

"No, definitely not. I was more worried about her going home because she was afraid her ma was going to beat her. I had asked her did she want it go for a walk first, and then when we were at the church I asked her did she want to go into the park, she said 'yeah'. If she didn't want to she wouldn't have gone. She wanted it as much as I did."

The appellant further denied finger penetration during the incident in March, 2015 and denied forcing complainant to go to [the locus of the alleged rape] and denied raping her.

25. The appellant was asked about a possible motive for the making of the allegation by the complainant.

Q: "Can you explain to me why suddenly CK would make up these allegations about you?"

A: "She's sick in the head. She's fond of the drugs as well, maybe that has something to do with it. Maybe her ma found out we were with each other and made her do it. How do you think I feel being blamed like this? I've two kids. She's made up lies. She's made up loads of lies about people before. I don't see why she wouldn't make them up about me."

Grounds of Appeal

26. The appellant appeals against his conviction on the basis that:

(i). The trial judge erred in law in not explaining the issue of recklessness correctly to the jury when the issue was specifically raised as a question when they were deliberating; and

(ii). The trial judge erred in the manner in which he dealt with the corroboration warning.

The Recklessness Issue

27. In the course of his charge, the trial judge addressed the definition of the offence of rape in this way: -

> *"Rape is defined by statute and it says, this particular type of rape, there's other types of rape, but section 2 says, if a man -- a man commits rape if he has sexual intercourse with a woman who at the time of the intercourse does not consent to it and, and it is an important "And", at the time he knows that she doesn't consent to the intercourse or he is reckless as to whether or not she does consent to it. And it's also declared in the section that if at a trial for a rape offence, the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard in conjunction with any other relevant matters in considering whether he so believed."*

28. The trial judge elaborated further in his concluding remarks: -

> *"And then I dealt with the definitions of rape and in this case, the – it's a question of consent because the sexual intercourse did occur on the evidence of the defence. And on consent, it's not just a question of the - of the complainant consenting, but it's a question of - it's essential that - or not consenting, it's a question of whether the accused knew that she was not consenting or was reckless as to whether or not she was consenting."*

29. The prosecution raised a requisition regarding the definition of recklessness, seeking further elaboration, and proposing the following definition:

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

The trial judge recharged the jury, this time stating:

> *"As you know in this case the issue is consent and the Act says, "He has sexual intercourse with a woman who at the time of the intercourse she doesn't consent to it, and at the time he knows she doesn't consent to it, or is reckless as to whether or not she does consent to it." And it has been properly pointed out that I didn't give you a legal meaning of reckless. And the -- I'll give you a quotation just in relation to that, just it's quite simple, "A person acts recklessly with respect to a material element of an offence when he is conscious ..." -- "... when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard regards culpability to a high regard." [*Sic*] I hope that doesn't confuse the matter further. But basically it says that you must be conscious and you must disregard a substantial and unjustifiable risk that she is not consenting."*

30. It is clear that the trial judge, when purporting to quote to the jury the definition of recklessness that had given to him by counsel, which in turn counsel had taken from "The Judge's Charge in Criminal Trials" by Coonan and Foley, (Round Hall:2008), a well-regarded work, unfortunately mis-read it.

31. The full quotation, if it had been accurately read out, was a correct statement of the position with respect to recklessness in Irish law. It reflected the formulation in the Model Penal Code adopted by the Supreme Court in the case of *The People (Director of Public Prosecutions) v. Cagney and McGrath* [2007] IESC 46, namely that:

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

32. It was further consistent with and reflective of a more recent judicial pronouncement of the Supreme Court on recklessness, namely that in *The People (Director of Public Prosecutions) v C.O'R* [2016] 3 IR 322, which was opened to the trial judge and which maintained the position as stated in *Cagney and McGrath*, while elaborating somewhat further on it. Giving judgment for the Supreme Court in *C.O'R*, Charleton J stated, at 352:

> *"In this country, the model chosen in the Act of 1981, as amended, clearly adopts not what a reasonable man believed as to the presence of consent, but rather what the individual accused actually believed. The mental element of rape requires the accused to know that the woman does not consent to intercourse or for him to be reckless as to whether she does or does not consent. Recklessness is the taking of a serious and unjustified risk. That does not mean that a reasonable man would be aware that a woman may not be consenting; ascribing to the accused what a reasonable or ordinary person would have perceived. Rather, recklessness is advertent. As Hardiman J put it in The People (DPP) v Cagney and McGrath [2008] 2 IR 111 at 126: 'an accused in Ireland must have foreseen the risk that his conduct would bring about the relevant result but have elected to proceed with his conduct nonetheless.' This has been the position since the decision in The People (DPP) v Murray [1977] IR 360. In cases of rape, recklessness means that the possibility that a woman was not consenting actually occurred in the mind of the accused. Where an accused decides to proceed with or continue with intercourse in spite of adverting to that risk; that is recklessness. Alternatively, it may be claimed by the accused at trial that the man genuinely believed that the victim was consenting, even where the basis for such a belief is totally unreasonable. The resolution to any such claim must depend, in the first instance, on the jury deciding what facts they accept beyond reasonable doubt. The absence of consent to sexual intercourse is an objective fact. The accused's view as to the existence, or non-existence, of this fact is subjective. An honest, though unreasonable, mistake that the woman was consenting is a defence to rape. Any such alleged belief in consent must be genuinely held. Self-deceit is not a defence. Certainly, while the test of belief is subjective, even still, individual states of mind are based on how the underlying facts are resolved. To analogise, it might be useful to imagine a claim of right made in good faith in a theft charge, which again is subjective and entirely dependent on the state of mind of the accused. Were an accused in such circumstances to assert that he had an entitlement to cash a cheque which he had forged by making pretence of being the person to whom it is made out, that would not be a credible defence because the facts in question make it clear that good faith or honest belief were not present. Belief in a set of facts is generally only validly grounded on circumstances which themselves have a foundation in reality and it is for the jury in a given case to determine whether a claim of honest though unreasonable belief in consent was held by the accused."*

33. Charleton J subsequently went on to say: -

> *"The Act of 1981 as amended draws a distinction between knowledge and belief. It is unnecessary to explain ordinary words to a jury. An accused man is guilty of rape if he has sexual intercourse with a woman who is not consenting and he knows that she is not consenting. That category constitutes the vast majority of cases and unless the evidence suggests a belief detached from the facts necessarily proven by the prosecution to establish lack of consent, no issue of the accused having a separate belief in consent is raised;* The People (DPP) v Mc Donagh *[1996] 1 IR 565. Recklessness as to the woman not consenting requires that the accused advert to the lack of consent of the woman and for him to proceed nonetheless."*

34. He later added: -

> *"Recklessness is the taking of a serious and unjustified risk. The crime of rape is about the right of a woman to be protected against a gross violation of her mental and physical integrity. Those rights are protected by the Constitution as part of the collection of rights which the State guarantees to respect and, specifically by making rape an offence, to defend and vindicate as far as practicable. No one is entitled under our law to justify any deprivation of the constitutional rights of another person on the basis that they might have been consenting. For any accused person to take any such risk would be unjustifiable. To violate a woman on any such premise as that she might be consenting to intercourse is outside the legal order as defined by the Act of 1981. If an accused is aware of the possibility that a woman may not be consenting, any conscious disregard of this advertence to that possibility means that for him to proceed is for him to act recklessly; and thus criminally."*

35. Unfortunately, and as already alluded to, the trial judge in the present case misread the last sentence of the quotation given to him from the Coonan and Foley textbook when recharging the jury; and possibly realised that something was not quite right when he added "*I hope that doesn't confuse the matter further*". However, he was not further requisitioned, and seemingly nobody adverted to the misquotation at the time, or if they did they exhibited no concern about it. Certainly, no issue was raised with the trial judge about it.

36. Having stated "*I hope that doesn't confuse the matter further*", the trial judge then went on to further add: "*But basically it says that you must be conscious and you must disregard a substantial and unjustifiable risk that she is not consenting.*"

37. We consider that this latter formulation captured, albeit tersely and omitting much nuance, the essentials of the proposition expounded upon in *Cagney and McGrath*, and in *C. O'R*, as it applies to rape, namely that recklessness involves actual advertence to a substantial and unjustified risk that the woman is not consenting, and continuation regardless. Had matters rested there the trial judge's instructions to the jury on recklessness would have been adequate (just about) and therefore unobjectionable. However, they did not rest there.

38. Following a two-and-a-half-hour period of deliberation, the jury returned, requesting the definition of recklessness in writing. That they did so prompts the appellant, reasonably it seems to us, to assume that this must have been a live issue in their deliberations.

39. Prior to addressing the jury on this point, the trial judge discussed the issue with counsel, stating:

> *"The first is definition of recklessness, can we have it in writing please? Answer no. And you gave me a passage, I had anticipated -- like I mean if we go down the road of having to read a passage that some other judge uses, what we're trying to do is explain things to the jury. I had picked -- pulled from another charge, a Law Reform Commission dealing with the question of recklessness and I see nothing wrong with it. I don't see why I should have to slavishly follow what Mr Justice O'Donnell says or whatever".*

40. He then addressed the jury in the following terms:

> *"The first thing you did, and I'm sorry for not having my glasses yesterday, the first thing was is it possible to have in writing a definition of recklessness in relation to consent and I said no, we can't be handing in definitions and I don't want to be abrupt about that, I want to explain it as best I can why we can't. The whole idea of juries is that you get a lay person's view about matters as opposed to a lawyer's and if we started handing you in one bit of law, well then the other side might say oh we'll hand them in that. We'll end up giving you books and telling you to go off and study to become lawyers which defeats the whole object of the exercise but it is a crucial question you asked in relation to recklessness and there are a lot of statements on it and I'll read one that I have read to juries before. It comes from the Law Reform Commission and their report says, "On the question of recklessness case law is that in rape and other sex offences the defendant is reckless if he does not have a belief that the other person is consenting in circumstances in which he either knows there is a risk she does not consent or his attitude is one of indifference whether she consents or not. Thus it covers a situation where he knows there is a risk that she does not consent and carries on regardless. It also appears to apply where a defendant has not specifically considered whether she consents, could not care less whether or not she is consenting or presses on regardless. To put it another way, if a jury is sure that the defendant wasn't indifferent to the wishes and feelings of the victim, aptly described as couldn't care less, then in law he is reckless for the purpose of the sex offences". I hope that clarifies it but it has its ordinary meaning really. If you're reckless you couldn't care less or you see a risk but you decide to go ahead, that there isn't consent and you decide to go ahead nonetheless. So, I hope that deals with that".*

41. Although it is not apparent from the transcript that anyone specifically adverted to it, and we think that ultimately nothing much turns on it, the passage read to the jury by the trial judge, and described by him as being "*from the Law Reform Commission*", was not from any report, consultation paper or issues paper published by the Law Reform Commission of Ireland. Rather, it was a passage from a report of the Law Commission of England and Wales established under that jurisdiction's Law Commissions Act 1965 with a remit to keep the law of England and Wales under review and to recommend reform where it is needed. The report in question is the Law Commission's report on *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (London: 2000). The passage quoted by the trial judge appears at para 7.8 of that report, and is in turn cited in *Sexual Offences*, by Thomas O'Malley (2nd edn, Round Hall: 2013) at para 3-33 of that work.

42. The jury having retired again, counsel for the appellant requisitioned the trial judge on the basis that the definition of recklessness that he had provided was not in accordance with current Irish law to the extent that it had contained the sentence "*"It also appears to apply where a defendant has not specifically considered whether she consents".* Recklessness based on indifference involves an objective test of recklessness. Counsel submitted that Irish law, however, was based on a subjective test of recklessness in as much

as it requires conscious advertence. That this is the position in Irish law is, he submitted, clear beyond any doubt from the judgment of Charleton J in C.O'R, where he had expressly said: *"In cases of rape recklessness means that the possibility that a woman was not consenting actually occurred in the mind of the accused".*

43. This was followed by further discussion:

> *"MR. BOWMAN: I think it requires a conscious aversion [sic]. So, I do think you must address your mind to the presence or existence of that risk and act regardless. That's my understanding.*
>
> *MR BARNES: I think that if one doesn't consciously advert to the issue of consent before embarking on the particular transaction it is the very definition of recklessness and I prefer the way the Court put it actually but I don't support my friend's objection.*
>
> *JUDGE: No, I accept, Mr Bowman, that that has been used but in this case I think I've, rightly or wrongly, I have charged the jury twice in relation to it. I don't want to add a confusion to it".*

44. The appellant now submits that the trial judge erred in law by not explaining the definition of recklessness correctly to the jury in instances where it was evidently a live issue in their deliberations. Having asked for further clarification on the issue, the appellant submits that the jury received a flawed explanation from the trial judge, as he did not state that there is a requirement for conscious advertence to the possibility that the complainant is not consenting. It is suggested that the jury may have been left under a misapprehension that the test in this jurisdiction was an objective one, rather than a subjective one. Accordingly, the appellant submits that the instruction to the jury on the definition of recklessness was such as to render the conviction unsafe and unsound.

45. The distinction between recklessness based on advertence and recklessness based on indifference is a nuanced one, and it is discussed at some length by Thomas O'Malley in his work on *Sexual Offences* to which we have already alluded, at paras 3-32 to 3.33. As Mr. O'Malley points out:

> *"The concept of recklessness has caused its share of problems, especially in English law, during the past few decades. It may be defined subjectively in the sense of consciously taking an unjustified risk. This is commonly known as Cunningham recklessness [footnote reference here to R v Cunningham [1957] 2 QB 396; 41 Cr. App. R. 155], and requires actual awareness of the risk which is nonetheless taken. An objective test of recklessness, on the other hand, involves asking whether a reasonable person in the position of the accused would have been aware that there was an obvious risk. An affirmative answer to this question would render the defendant liable even if he gave no thought to the existence of the risk. This was known as Caldwell recklessness [footnote reference here to R v Caldwell [1982] A.C. 341; 73 Cr. App. R. 13] which caused its share of injustice, as in Elliott v C, [footnoted citation is [1983] 1 WLR 939; 77 Cr. App. R. 103], and was eventually abolished by the House of Lords in R v G and R [footnoted citation is [2004] 1 A.C. 1034; [2004] 1 Cr App. R. 21]. It is now firmly established in Ireland that recklessness involves "not merely the taking of a risk but the advertent taking of the risk [footnote reference to The People (DPP) v Cagney and McGrath [2008] 2 IR 111]."*

46. Mr. O'Malley points out at paragraph 3-33 of his work that English courts struggled repeatedly with this problem when their governing law was identical to s.2 of the Irish Criminal Law (Rape) Act 1981. According to O'Malley, the passage quoted by the trial judge from the English Law Commission report represented an apt summary of English law as it is then applied to recklessness in rape. He goes on to offer the following commentary which we have regarded as being particularly helpful:

> *'Being aware of the risk of non-consent is unproblematic because that suggests some degree of advertence. Indifference is a more ambiguous concept. Using the expression "couldn't care less" is not particularly helpful because the question should be: "did he care at all?" Did he even advert to the possibility of a risk that the complainant might not have been consenting? Professor Smith, in one of his classic commentaries in the Criminal Law Review, wrote:*
>
> > *"all the jury need to be told is, 'He is guilty if you are sure, either that he knew she was not consenting, or he was aware that she might not be; and, if you think a reasonable man would have so known, or been so aware, that is a factor which you take into account with all the other relevant evidence in deciding whether you are sure that he knew or he was so aware'."*
>
> *This would certainly be in harmony with the advertence requirement in recklessness as to consequences, as confirmed by the Supreme Court in The People (DPP) v Cagney. However, in the leading English case on reckless rape, R v Satnam and Kewal [footnoted citation is (1983) 78 Cr.App. R 149], the Court of Appeal took the opportunity to clarify the law and it stressed that the statutory definition (identical to the present Irish definition) "allows of none other than a subjective state of mind of a person of whom it is said he acted recklessly". It concluded: -*
>
> > *"If [the jury] came to the conclusion that he could not care less whether she wanted to or not, but pressed on regardless, then he would have been or reckless and could not have believed that she wanted to and they would find him guilty of reckless rape."*
>
> *A subjective test need not be unduly favourable to the defence because in many cases juries would not easily be convinced that an accused did not even turn his mind, however fleetingly, to the possibility that the complainant was not consenting. Some support for the need for advertence to the risk of non-consent in rape cases may also be garnered from People (DPP) v. Creighton [footnoted citation is [1994] ILRM 551 at 555-556], where the trial judge had, at one point in his charge to the jury, said that it would be sufficient if the accused was "reckless or heedless or careless" as to the complainant's consent. It was argued on appeal that this might have led the jury to believe that "mere want of care as distinct from the recklessness provided for [in s.2 would suffice]". From its very brief response to that argument, the Court of [Criminal] Appeal seems to have accepted the point, although ultimately it found no merit in it because, later in his charge, the trial judge had omitted any reference to carelessness and referred instead to "reckless or heedless". In this regard the court said: -*
>
> > *"Quite clearly the words 'heedless' and 'reckless' would appear to be very closely equated and therefore even if that portion of the charge had remained unaffected by the review which the learned trial judge subsequently in his charge gave of the evidence which had been adduced in the trial, it is extremely improbable in the view of the court that the jury would have been misled as is submitted by these words."*

References to heedlessness and "could not care less" are acceptable provided they are understood to imply that the matter about which the accused was heedless or uncaring was present in his mind and not something that never occurred to him.'

47. We have given careful consideration to the issue that has been raised. We have also considered the transcript in full and have had regard, in particular, to "the run" of this case. We do not believe that indifference to whether the complaint was consenting or not was an issue in the case at any stage, having regard to the evidence.

48. The appellant certainly did not make that case. His case, based on what he had told gardaí during interviews, was that the complainant had consented to sexual intercourse. It will be recalled that he stated expressly:

"She pulled down her jeans herself and I pulled down her knickers. She never told me not to because if she did, it wouldn't have happened. She wanted sex and that was that. My own bottoms were down around my ankles, as I said, I had the condom on and she was bent over and stayed in that position. If she didn't want to, all she had to do was come up."

49. He further said in answer to the question, "*Did you specifically ask CK if she wanted to have sex?*": "*Yeah on all occasions*."

50. There was of course a conflict in the evidence since the complainant contended in her testimony that she had most definitely not consented and that she was raped. Her testimony was that she had said to him "*I'm not doing anything, I have a boyfriend*", that "*Me Mam wants me to go in*", and "*No, I have to go in*". She agreed that when he said "*Oh, come on, walk down here*", she had said "*Okay, I will*". However, she had been adamant that this was in circumstances where he had grabbed her arm. Her testimony was that she had been afraid that he would beat her up, and that he had been rough, grabbing her by her hair bun and "*reefing her*", and that she was crying and in shock as he did so.

51. Be that as it may, it was never at any stage suggested that the prosecution was contending that it was a case of reckless indifference as opposed to reckless advertence. Equally it was never the case that the defence were relying on the difference between the two and saying that the evidence supported the former rather than the latter. The main prosecution case was at all stages that he knew full well that the complainant was not consenting and had had sexual intercourse with her in that knowledge; however, their alternative position was that even if the accused did not know for certain that the complainant was not consenting he must have adverted to that possibility, and indeed that the circumstances were such that he could not have failed to advert to it, but that he had pressed on regardless. Reckless indifference was simply not an issue on either side's case.

52. The instruction given to the jury based on the quotation from the English Law Commission's report might, in another case, have had the potential to confuse or mislead the jury. However, in the present case, in circumstances where reckless indifference simply did not arise on the evidence that the jury had heard, and in circumstances where it was not being relied upon by either party, we do not consider that there is any appreciable risk that the jury were materially misled. It was certainly not ideal that the jury should have been given the quotation from the English Law Commission's report in the circumstances in which it occurred. To the extent that it might have been construed as suggesting that objective recklessness forms any part of Irish law it represented a misdirection. However, it must be said that it was a misdirection only in so far as it suggested the possibility of an occasionally arising nuance to the general rule, which general rule was correctly stated. It is true that no nuance such as that suggested in fact ever arises under Irish law. However, we believe that the jury were not left under any misapprehension as to the correct position, (save to the extent of being led incorrectly to believe that an occasional exception might arise), namely, that for there to be criminal liability based on recklessness the accused must have adverted to a substantial and unjustified risk, and that he proceeded regardless of that risk.

53. It would have been much better if the trial judge had allowed himself to be guided by counsel and had stuck with the quotation that he had been given from Coonan and Foley's text book which correctly stated the position in Irish law. Despite this, we see no evidence that the jury appreciated for a moment the nuance upon which the appellant now seeks to rely, or that to the extent that the trial judge was wrong in what he said to them, in so far as that supposed nuance was concerned, that they were at all influenced by it. We consider any such possibility to so remote as to be fanciful having regard to the evidence and the run of the case, and certainly not one grounded in reality.

54. We fully endorse as being entirely apposite to the circumstances of this case the observation made by Mr O'Malley that "in many cases juries would not easily be convinced that an accused did not even turn his mind, however fleetingly, to the possibility that the complainant was not consenting."

55. In the circumstances we are not disposed to uphold ground of appeal no. (i).

The Corroboration Issue

56. For the purposes of unfolding the background to this complaint, it is necessary to record that the trial judge decided in the exercise of his discretion to give a corroboration warning. The complaint relates to the terms of the warning given.

57. The evidence in the case lasted just two and a half days. On the afternoon of day 3, just before the luncheon break, and at a point where the prosecution case had just closed, a discussion took place between the trial judge and counsel concerning how the trial would proceed from that point on, and whether it would be possible to conclude closing speeches from both sides in what remained of the day. Defence counsel had previously flagged that the defence would be going into evidence, but that his sole witness was expected to be brief. A discussion then ensued about corroboration, and whether there was any evidence capable of amounting to corroboration. Counsel for the defence contended that there was no evidence capable of providing either corroboration in the strict legal sense or even support short of corroboration in the strict legal sense, in relation to the January incident (with which we are no longer concerned). He further argued that there was no corroboration in the strict legal sense in relation to the March incident. He requested therefore that the trial judge should give a corroboration warning. Counsel for the prosecution opposed the application and sought to argue that evidence of the complainant's distressed state in the aftermath of the incident, and certain forensic evidence, was in fact capable of providing corroboration of the complaint.

58. Having heard the submissions on both sides the trial judge ruled: -

"Okay, look it's my intention to give a corroboration warning in relation to – it's difficult for two incidents, but in relation to the January incident because although reported, no complaint was pursued then. In relation to the second incident, I'm not to go beyond saying that in any view there isn't corroboration of the actual act, but that there is evidence that could be consistent. But whilst saying that, I'm going to remind them that when two pieces of evidence – or when there

two possibilities available, they must adopt that favourable to the accused".

59. Following this ruling, defence counsel took no issue with what was proposed.

60. During his charge to the jury on day 4, the trial judge said the following with respect to corroboration: -

> *"Now, there's one general warning I want to give you in this case, and that's in relation to corroboration. It is very rare that there is actual -- I came across one recently actually, but it's very rare that there's actually somebody looking on, there's somebody who can give independent evidence of the act alleged. And in this case, you have the complainant say in both cases, but more particularly the first case in the January case, you have the complainant saying it happened and the accused -- and the accused saying there was not -- sorry, the complainant saying there was not consent, and the accused saying that it was consensual. Corroboration is evidence which is independent of the evidence which is -- which it is corroborating. And it doesn't really exist -- it doesn't exist in the first case, there's some supportive evidence in the form of complaint, but there's no actual corroboration. You must take that into account in your deliberations.*
>
> *In the second, the March incident and there was an incident on both cases, in the March incident equally there's nobody looking on. But you do have a more timely complaint if you like, and this isn't blaming anybody. There is more supportive evidence, but again there isn't actual corroboration".*

61. Later in the trial judge's charge he made a further reference to corroboration: -

> *"I dealt with the fact that there wasn't corroboration in the matter in the sense that there wasn't independent evidence that the acts occurred. I did say that there was evidence which may or may not be considered to be supportive in the second case of complaint. But not independent evidence and you must take that into account in your deliberations."*

62. Following the charge, the trial judge was requisitioned by defence counsel on the adequacy of his corroboration warning, stating:

> *"In terms of corroboration, the Court indicated that the absence of corroboration and my quote is that 'that's something which you must take into account'. In my respectful submission, the Court is obliged to address in clear and unmistakeable terms what the corroboration warning actually means. And in the case of DPP v. CC No. 2, the Court without -- and I acknowledge fully that the Court is very much at large, there's no formula of words to be used, it's at its discretion. But the Court must inform the jury of the risks and perils of convicting on uncorroborated evidence in circumstances where historically the courts have observed that it is dangerous to so do, and people who have been apparently offering evidence which is plausible, it has subsequently been shown to be untrue".*

63. The trial judge then re-charged the jury, now stating: -

> *"The other brief matter, I may not have added when I was dealing -- I gave you a warning in relation to corroboration and I hope I made it clear that you have to be particularly careful where there is not corroboration, that people have been wrongly convicted -- have been found to have been wrongly convicted in the past and people's recollection has been found to be flawed but, having said all that, this case wouldn't be going to you if you weren't absolutely entitled to find the accused guilty or not guilty."*

64. After the jury had been re-charged, the defence then further requisitioned the trial judge on the adequacy of the corroboration warning, stating:

> *"And just the final matter, the Court has addressed the issue of corroboration. It has my requisition yesterday in relation to it. I'd respectfully submit that the Court ought properly to contextualise it and give the historical reference to it. May it please the Court."*

65. The trial judge was not disposed to address the jury further on corroboration and the appellant submits that he either refused to, or failed to, adequately address the situation after being specifically requisitioned to do so. The appellant contends that the trial judge's warning was inadequate having regard to relevant legal precedents, namely: *The People (Director of Public Prosecutions) v Gentleman* [2003] 4 IR 22 and *The People (DPP) v D and People (DPP) v C.C. (No.2)* [2012] IECCA 86.

66. In *People (DPP) v Gentleman*, the Court of Criminal Appeal found the corroboration warning of the trial judge to be inadequate even though he had instructed the jury *"to take great care"* before convicting on the uncorroborated evidence of the complainant. Keane C.J stated:

> *"That is the extent of the warning given by the trial judge in this case and it has 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 a complainant in relation to a matter of sexual assault. He does not draw the jury's attention to 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.*
>
> *Those were matters to which the trial judge certainly, in the view of the court, had not drawn the attention of the jury, nor had he explained that this is not some formalistic requirement of the law and that it is a real and important requirement, based on the experience of courts that caution must be exercised by a jury when they are dealing with an uncorroborated allegation of this nature".*

67. This was approved and applied in *The People (Director of Public Prosecutions) v D* [2014] IECCA 20. In that case, MacMenamin J. held that there was a requirement that a warning, if given, must be "*clear, unmistakeable and contextualised*". The Court of Criminal Appeal there held that that standard was not met.

68. Further, we are asked to note that counsel for the appellant handed in to the trial judge the judgment in the case of *The People (Director of Public Prosecutions) v C.C. (No.2)* [2012] IECCA 86, and that the following quotation from O'Donnell J.'s judgment was specifically drawn to the attention of the court:

> *"…the warning on corroboration was not in this court's view sufficient to convey the essence required by the law once it is decided, within the court's discretion, to give such a warning. To say that "the law requires care and caution to be exercised before you arrive at a view of guilt" is likely to be confusing, since a jury might well consider that they were obliged to exercise care and caution before coming to a view of guilt in any case. It is not clear what was added by these words. Furthermore, all warnings given to juries are an attempt to give to a jury approaching a one-off task something of the general experience of courts. Thus whatever language is used, it is necessary to convey to a jury that the law considers it dangerous to convict in the absence of corroboration, because by definition these offences occur in private, or at least in circumstances of some furtiveness, and there have been occasions where evidence apparently plausible, has subsequently been shown to be untrue. Accordingly, over and above the degree of care and caution they would normally expect to exercise in coming to a verdict of guilt beyond any reasonable doubt, the jury should recognise that it is the law's experience that it is dangerous to convict on the uncorroborated evidence of a complainant, and should only do so when, having considered the warning, they nevertheless feel a very high degree of assurance that the evidence is true. Unless something of this nature is conveyed to the jury, there seems little benefit in giving a corroboration warning at all."*

69. The appellant submits that the trial judge did not contextualise the corroboration warning or give it a historical reference and thus the instruction to the jury on corroboration rendered the conviction unsafe and unsound.

70. Responding to the complaints made, counsel for the respondent asks us to note that following the charge to the jury, counsel for the appellant requisitioned in relation to, *inter alia*, corroboration, and acknowledged "*that the Court is very much at large, there's no formula of words to be used, it's at its discretion*". He continued:

> *"(T)he Court must inform the jury of the risks and perils of convicting on uncorroborated evidence in circumstances where historically the Courts have observed that it is dangerous to do so, and people have apparently been offering evidence which is plausible, it has subsequently been shown to be untrue".*

71. At first, the trial judge did not re-charge the jury in respect of corroboration, and this was pointed out to him. However, after the jury then raised two matters, the trial judge returned to the issue of corroboration and gave the further re-charge set out at paragraph 60 above.

72. The respondent submits that the words used in this recharge were fully in line with what was requested of him in the appellant's requisition – namely that he should set out the *"risks and perils of convicting on uncorroborated evidence"*. He told them they had to be *"particularly careful"* in the absence of corroboration, because *"people have been wrongly convicted in the past and people's recollection has been found to be flawed."* This was against the background that they had already been told earlier that in rape cases *"it's very rare that there's actually somebody looking on, there's somebody who can give independent evidence"* and that this case was in that respect not untypical. Contextualising it in that respect, the trial judge had specifically alluded to the fact that *"you have the complainant saying it happened …, the complainant saying there was not consent and the accused saying it was consensual"*. They had been further told that *"in the March incident equally there's nobody looking on. But you do have a more timely complaint if you like, and this isn't blaming anybody. There is more supportive evidence, but again there isn't actual corroboration"*.

73. The respondent further submits that the trial judge's failure to inform the jury that *"it has been the law's experience that it can be dangerous to convict on uncorroborated evidence"* is not fatal in the particular circumstances of this case where the trial judge correctly informed the jury that they must be particularly careful in the absence of corroboration, because, in effect, the case did amount to one person's word against the other's.

74. The respondent contends that the trial judge was incorrect in his assessment there was no evidence which could potentially corroborate the second incident in March, and that in ruling *"There is more supportive evidence but again there isn't actual corroboration"*, he had been in error. However, this was an error that favoured the accused.

75. In addressing the jury in relation to corroboration, the trial judge distinguished between the January and March incidents. When giving their verdict, the jury found the appellant *"not guilty"* of the January charge. The respondent submits that the fact that the jury rendered different verdicts in respect of the January and March incidents is a clear indicator that the jury considered the evidence, and heeded the directions given to them by the trial judge.

76. We have carefully considered the corroboration warning given in this case. While it could certainly have been more detailed and fulsome, and is perhaps susceptible to criticism on the basis that it took several attempts to elicit from the trial judge a warning that specifically directed the jury's attention to, what counsel has characterised as, the *"risks and perils of convicting on uncorroborated evidence"*, we are satisfied on balance that the cumulative remarks of the judge on the issue of corroboration did draw to the jury's attention, not just that they needed to take care, but *"particular care"* before convicting on the basis of the uncorroborated evidence of the complainant; and that the reason for this was because experience had shown that mistakes had been made i.e, *"people's recollection has been found to be flawed"*, with the result that *"people had been wrongly convicted in the past"* on the basis of uncorroborated evidence that had seemed plausible at the time. The corroboration warning given in this case was by no means a model warning, and it could have been better contextualised, but we are satisfied that it was nevertheless adequate in the circumstances of this case.

77. Finally, while it has not ultimately influenced our decision, we do think that the respondent's observation that the appellant received a questionable ruling to the effect that there was nothing which was capable of amounting to corroboration of the March complaint, and that this was very much favourable to him, is a point well made. Had the matter been more finely balanced, we might have been prepared to take this into account. In that regard, we draw attention to how on a previous occasion this court approached a somewhat similar situation in the case of *The People (Director of Public Prosecutions) v M.L.* [2015] IECA 82 In that case Sheehan J, giving judgment for the Court, said: -

> *"54. While the Court holds that the trial judge's corroboration warning did not adequately contextualise the warning either in general terms or terms specific to the case and particularly failed to point the jury to a number of important areas of evidence where corroboration might be found, the overall effect of what was said in relation to corroboration was to the benefit of the appellant.*
>
> *55. It would be unjust to overturn the conviction on the basis of a defect or defects in the charge which operated in favour of the appellant and especially when he did not then complain about the inadequacies which he now seeks to rely on as a reason for setting aside the verdict. Accordingly, the Court dismisses the appeal."*

78. In the circumstances indicated we are not disposed to uphold the appellant's complaint based on the alleged inadequacy of the corroboration warning. Accordingly, ground of appeal no (ii) is also rejected.

Conclusion:
79. In circumstances where we have not been disposed to uphold either of the two grounds of appeal that were advanced, the appeal is dismissed.