THE COURT OF APPEAL

[89/18]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PAUL FLAHERTY

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2019 by Birmingham P.

1. Between 21st November 2017 and 12th December 2017, the appellant stood trial in the Central Criminal Court charged with offences of rape, s. 4 rape (oral rape), making threats to kill, and sexual assault. Following a three-week trial, he was convicted of the offence of sexual assault. Subsequently, on 9th March 2018, he was sentenced to a term of five years imprisonment, to date from 7th March 2018. He has now appealed against both his conviction and the sentence imposed; this judgment deals with the conviction aspect only. For completeness, it should be pointed out that the jury returned verdicts of not guilty in relation to the s. 4 rape count and the threat to kill count with there being a disagreement in respect of the rape count. It emerged at the March 2018 sentencing hearing that the DPP was not seeking a retrial on the count in respect of which a disagreement was recorded.

2. Extremely lengthy submissions were prepared on behalf of the appellant, among the very longest, if not, in fact, the longest, that the Court has encountered to date. At the original appeal hearing, the Court was somewhat critical of the length of the submissions and the multiplicity and overlapping nature of the grounds advanced. In a situation where one member of the Court was feeling unwell, the appeal hearing on that day did not proceed after the lunch break and the hearing of the appeal was adjourned from 4th April 2019 to 16th May 2019. As it happens, and with the benefit of hindsight, it seems unlikely that the case could ever have concluded on 4th April 2019, given that on the resumed hearing, it was possible to finish the appeal only by sitting on well outside usual Court hours. The appellant availed of the opportunity provided by the fact that the appeal was being adjourned to produce submissions which were more concise and much more focused. In passing, it may be noted that the revised submissions suggest that this Court regarded the original submissions as "obtuse". The Court said nothing of the sort; rather, the Court's comment was that the original submissions were overly verbose and might be regarded as prolix. By reference to those modified submissions, it can be said that there are three substantial grounds in issue, these being:

> (i) That the trial Judge erred as a matter of law in refusing to stay the proceedings and/or grant a direction of not guilty on the application of the defence at the conclusion of the prosecution evidence;
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> (ii) having refused to accede to the application the subject matter of ground (i), the trial Judge erred in law in refusing to discharge the jury on the application; and
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> (iii) the verdict was perverse, or in the alternative, the verdicts were inconsistent with each other or a bad for uncertainty.

3. By reference to the written and oral submissions, it can be said that the grounds can be further condensed as follows:

> (i) That the trial Judge should have acceded to an application under the jurisdiction identified in DPP v. POC [2006] 3 IR 238. This was the substantive contention under this heading, but in the alternative, it is said there should have been a directed verdict of not guilty on R v. Galbraith [1981] 1 WLR 1039 grounds; and
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> (ii) That the verdicts of the jury were inconsistent with each other. It is said this is a cause of particular concern in a situation where the sexual assault count on the indictment was not particularised. The effect of this, it is argued, is that one cannot know with any precision or with any certainty of what Mr. Flaherty was convicted.

4. In order to put the grounds of appeal in context, it is useful to set out the background to the extent that it is largely non-controversial and then refer to the respective contentions of the parties in relation to the matters which were keenly in controversy. The trial was concerned with events that occurred on Sunday 30th August 2015, into the early hours of Monday 31st August 2015.

5. The complainant was born in June 1989 and the appellant was born on 2nd October 1987. The complainant had been married, but was separated. Thereafter, she was involved in a relationship with her landlord that had recently ended by the time of the events with which the trial was concerned. The complainant and appellant came into contact with each other through an online dating application known as 'Tinder'. They were in contact through Tinder and then exchanged telephone numbers. There was communication by phone over a week or slightly more than that.

6. At that stage, they decided to meet for a date, which was arranged for 30th August 2015. They met at the Spire in O'Connell

Street, Dublin, with the intention of acquiring tickets for the All Ireland Football Semi-Final between Dublin and Mayo which was taking place that afternoon. Tickets were expensive and not easy to come by and they spent the afternoon and early evening drinking in a number of public houses around the Croke Park and Dublin central area. They walked back into the City Centre, had a drink in the Parnell Mooney public house, and went to another licensed premises where partook in some dancing. They also spent some time in Burger King where the appellant consumed a burger. The appellant then hailed a taxi after the pair had kissed briefly on the roadside. The appellant physically picked up the complainant and put her into the back seat. They went by taxi to the appellant's family home at Kiltipper Avenue in Tallaght. The house in question belonged to his parents. There, they sat in the kitchen drinking tea for a time. Around 00.30am on the morning of 31st August 2015, they went to his bedroom and to bed. Thereafter, what occurred is hotly in controversy. The complainant alleges that the appellant forced himself on her, that she was raped, orally raped, had her jeans and clothing forcibly removed from her, and was threatened that she would be killed. The appellant says that what occurred was consensual, he says the complainant was a willing participant in everything that occurred, indeed, that she was taking the initiative.

7. As a point of reference, it is convenient to set out the contentions of the parties as to what occurred in the bedroom. This account of the prosecution case is taken from the complainant's direct evidence and the language used reflects same. She said that they went up to the bedroom. She said that she took off her shoes and that he, having gone to the bathroom, said "come on, we'll go to bed". She stated that other than removing her shoes and jacket, she was fully clothed. He asked her what time she had to get up at and she said "about 7am". He said "we'll have seven hours sleep". She got comfortable on the mattress. He put his arms around her. She commented that he kept going on about her jeans and said "take off your jeans". The complainant had told the jury that she was wearing black skinny jeans and a black top at the time. She noted that he just kept going on about the jeans and he then started kissing her frantically, "milling into me". She remembered kissing him back. He started pulling at her jeans and trying to pull them down and she was saying stop. On the complainant's account, he got on top of her two legs. He put his hands around her neck and started strangling her. She said "please stop it, Paul, please, you're hurting me". She kept saying "please will you stop, you're hurting me". When she asked him to stop, he said "shut up, bitch, I'm going to kill you". He kept saying "I'm going to kill you, do you understand me, I'm going to kill you". He stood up and started trying to take off her jeans. He pulled at her jeans, pulling really hard, grabbing everything, underwear and socks. At one point, he turned on the light. He stood up on the mattress and tried to put his penis in her mouth. She was sobbing at this stage and he "rammed" his penis into her mouth. At one point, he left the bedroom and went into the bathroom. She covered herself with the sheet or something, but he came back and "reefed it off". He got on top of her, put his hand over her mouth and started to "ram" his penis inside her. She does not know how long it lasted, but he was unable to maintain an erection. He commented "you're not going to ruin my life. I'm going to tell everyone you wanted it and there's cameras in this room so everyone knows you wanted it". At one point, he put a pillow over her face. While he was unable to maintain an erection, he said that he had taken Viagra. At one stage, he decided to go for a smoke, he put a jumper on. At one point he said "do you understand me? I'm going to kill you if you tell anyone, I'm going to get a knife out of the kitchen". She sought to use his phone which he had plugged into charge beside the bed when he left the room, but without success. She ran down the stairs, the key was in the back of the door, she opened the door and ran out.

8. The defence case, as summarised in the revised written submissions, is that the appellant agrees that there was kissing and that he was unable to sustain an erection. At her suggestion, he put his hands on her neck and spoke roughly to her as they engaged in sexual roleplay. He broke character on a couple of occasions as he was worried that she might be uncomfortable. She assured him that she was not. On one occasion, she actually laughed. When interviewed by Gardaí, he made the following observations:

> "[t]o be honest, it was her, it was all her, she wanted it, that's what she wanted. She wanted me to choke her. I stopped three, four times, to check on her, to ask if she was okay because I wasn't comfortable with it. I was like, are you into this? She said 'shut up, keep going', I wasn't even having sex, I wasn't even choking her hard, like, it was obviously making her horny, like, that's when I thought I was pushing down too hard. I stopped a few times to say 'are you alright?' and one time, she burst out laughing and said 'yeah'. She was laughing at the worried look on my face . . . she was obviously turned on by it, that's obviously what she wants."

9. When interviewed, the appellant agreed that there was oral sex, which was consensual, and that he attempted to have vaginal intercourse, but was unable to sustain an erection and was uncertain whether penetration had occurred. He rejected any suggestion that he had threatened or intimidated the complainant in any way.

The POC Application

10. After the Court and jury heard from the last prosecution witness, counsel for the accused, in the absence of the jury, told the trial Judge he was making an application for an order staying the prosecution and preventing the prosecution proceeding any further. He explained that he was basing the application under four different headings. The Court will turn to these presently. Responding to the application, counsel for the prosecution began by highlighting that this was not a Galbraith application. He said that was significant because the absence of a Galbraith application has to carry with it a concession on the part of the defence that the evidence was sufficient to allow a properly-charged jury to convict. In response to this, counsel for the appellant, in the course of his reply, indicated that if the Court was of the view that he was not entitled to an POC order, but because of the frailties which had been pointed out would be entitled to a Galbraith direction, that he was making such an application. In a situation where prosecution counsel had not addressed the Galbraith principle, because at the time of his earlier submissions, there had been no application for a direction on Galbraith grounds, the prosecution was permitted a further reply.

11. The appellant's legal team made their application by reference to the aforementioned decision in DPP v. POC, a case in which the Supreme Court had commented on the inherent power to withdraw a case from a jury if a fair trial could not be achieved. The defence relied at trial and relies now upon four matters in support of its application. The defence says that while each of these is a point of significance in its own right, that regard must also be had to their cumulative impact. These points might be summarised as:

> (i) The delay in investigating the complaint;
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> (ii) The failure to follow up on the appellant's contention that while he had put his hands on the complainant's neck or throat, that this was done at her behest and at her instigation;
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> (iii) the striking similarities between the initial account given to Gardaí by the complainant and a formal statement of complaint furnished at a later stage and
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> (iv) the unavailability of Dr. Gouri Columb.

12. It is necessary to consider each of these four issues in greater detail, always bearing in mind the point made by the appellant i.e. that it is the cumulative impact that has to be considered.

The Delay in Investigating the Complaint

13. This ground is based on the fact that Gardaí became aware, during the early hours of 31st August 2015, that there was an allegation that a rape had occurred a very short time earlier at an address at Kiltipper Avenue in Tallaght. It was only on 22nd September 2015 that there was an application to a Judge of the District Court for a warrant to search the premises, and only on 26th September 2015, when a number of Gardaí in possession of the warrant attended at the premises, and when Mr. Flaherty was arrested and subsequently detained and during the course of detention interviewed on a number of occasions. The appellant says that this was an allegation that should have been investigated promptly and this was not done. The appellant's parents were asleep in their home during the period when the rape was alleged to have been taking place. They claim that they had heard nothing untoward on the date in question. However, in a situation where they were not interviewed until about a month after the events in issue, the impact of their evidence was diluted because, as it is put, they were simply being asked to recall the events of "any other night".

14. The point is also made that because the house was not declared a crime scene, as the appellant argues that it should have been, this meant that there was no timely forensic examination. It is said that a forensic examination of the pillow and bedsheets would have been particularly significant. A further criticism is made that when Gardaí did eventually get to interview the appellant, that on a number of occasions, he was challenged on his lack of detailed memory or precise recall and this was contrasted with the very detailed account provided by the complainant. It is acknowledged that for the most part, these were not central issues, were not "make or break" issues, but it is said that anything that disadvantages the appellant and casts him in an unfavourable light in comparison with the complainant is significant in the context of what was a finely balanced case.

15. The respondent says that no prejudice was caused by reason of the fact that the house or bedroom were not designated as a crime scene and matters seized and retained for forensic analysis. The Director says that given the uncontroverted evidence that the complainant and the accused were both present in the bedroom, were in physical contact with each other, and engaged in sexual activity, it is pure speculation to suggest that forensic evidence would have assisted the defence.

16. In relation to the position of the parents, on behalf of the Director it is said that the situation is that both parents had stated that they were not aware that there was a female visitor in their house. As such, there was no reason whatsoever to believe that they would have anything different to say had they been interviewed at an earlier stage. As to the point about the lack of detailed memory, it is pointed out that in the context of historic sex abuse cases, that accused persons or suspects are often asked to recollect events which occurred years or decades earlier. It follows that there was nothing at all unusual or nothing to cause disquiet in circumstances where the accused found himself being interviewed in relation to events that had occurred less than a month earlier.

The failure to follow up on the issue arising from the fact that the appellant accepted that he had put his hands on the complainant's neck, but said that he had done so in circumstances where this was happening at her instigation

17. This is dealt with in the appellant's written submissions as follows:

> "Paul Flaherty had requested during his formal interviews with Gardaí that further enquiries be carried out. None were."

In truth, this might be seen as something of an overstatement. The memoranda of an interview which commenced at 4.12pm and was conducted by Sergeant Phil Roe and Garda Aisling O'Connor records the appellant answering a question as follows:

> "I wasn't gripping her tight, I wasn't even choking, choking is too strong a word, it only went on for two minutes, less than that wasn't even much. She was obviously turned on by it, that's obviously what she does."

The memo then records:

"Q. We can take a statement from her partner to confirm or deny that?"

While this is recorded as a question, it is more accurate to describe it as an observation or response. The answer to it is recorded as:

"Okay, that's great news that you're going to get him involved, get to the bottom of all this."

18. In responding to this argument, counsel for the DPP summarises the complaint as being one that the former boyfriend of the complainant was not interviewed. He said the significance or otherwise of that was a matter for the jury to adjudicate on. He said that what was critical to appreciate was that the situation would be very different if the complainant had denied having been in any relationship and denied that it was a relationship that involved force or violence, but, he said, that the jury knew that she had been in a relationship where force or violence was used on her.

The Striking Similarity

19. This issue arises out of an exercise conducted by the defence comparing the account given to Garda O'Connor and the account contained in the complainant's formal statement furnished at a later stage. The defence say that a comparison of the two texts discloses striking similarities, and that indeed, a great number of topics are dealt with in language that is identical or all but identical. The issue was pursued at considerable, indeed, one might think extraordinary, and moreover, inordinate length, with both the complainant and the investigating member: Garda O'Connor, during their respective cross-examinations.

20. Counsel on behalf of the appellant submitted at trial, and essentially repeats the same submission, that the level of similarity and uniformity requires an explanation. He says that the only explanation that accords with common sense is that the account given on 31st August was learned by rote. He submits that if that was so, or if that might as a reasonable possibility be so, that an accused person should not be put in peril on a statement coming into existence in such a fashion.

The Absence of Dr. Gouri Columb

21. On behalf of the appellant, the point is made that when the complainant was cross-examined, it was the understanding of all sides that Dr. Gouri Columb would be a witness who would be giving evidence at a later stage of the trial and who would be available for cross-examination. However, it later emerged that due to cognitive memory difficulties, the doctor was not in a position to give evidence.

22. It is said by the defence that this worked to the disadvantage of the accused. It was pointed out that when counsel for the defence put to her matters that had been recorded by Dr. Columb, she responded by saying that that what was Dr. Columb had written down, carrying with it the implication that what was written down was not accurate. Moreover, the complainant sought to deal with suggested inconsistencies or omissions by referring to her confused or distressed state, whereas Dr. Columb had described the complainant as "calm". The prosecution's response to this was to say that if any party was prejudiced by her absence, it was the prosecution. The issue that arose was a completely unexpected one and emerged in circumstances where, on the afternoon of Friday 24th November 2017, contact was made with the investigating Garda by the daughter of the intended witness, who was herself a doctor. She contacted the investigating Garda in order to draw to the Garda's attention the fact that her mother had gone through significant medical difficulties, and arising from this, there was some room for concern about the extent of cognitive functions. It also emerged that Dr. Columb Snr. had taken her name off the Medical Register. The prosecution says that the absence of Dr. Columb was unexpected, but that if anything, her absence served to disadvantage the prosecution. It is said that this conclusion is to be derived from the fact that her notes recorded:

> "[o]n genital examination, there was tenderness of the fourchette and multiple linear abrasions, which were bleeding on contact."

It is said that this was material which the prosecution would have wished to put before the jury and which would have assisted the prosecution.

23. Having heard the submissions in support and in opposition to the POC application, the Judge took the opportunity to consider the matter overnight and then the following day, delivered a detailed ruling covering some twenty-two pages of the transcript. In the course of the ruling, the Judge indicated that one issue that had not been canvassed was where the onus of proof lay in relation to such matters. He felt that three of the four issues raised fell within well-established boundaries. The issue about the timing of the arrest, the detention of the accused, and the interviews with his parents was essentially a delay issue. The failing to take forensic samples in a timely fashion, to follow up by taking a statement of the ex-partner of the complainant in relation to their prior sexual history, the failure to designate the property as a crime scene, and to apply for a warrant at an early stage could be seen in terms of the jurisprudence relating to the obligation to seek out and retain evidence. The issue that had arisen in relation to Dr. Columb was a missing witness situation. However, he felt the fourth issue raised, the question of the credibility of the complainant because of the striking similarity of the two accounts given by her to Gardaí was unique.

24. By reference to judicial review cases, he felt that the onus of proof was on an accused who seeks an order prohibiting his trial to establish a real risk that he cannot obtain a fair trial. So far as the missing witness situation was concerned, the Judge said he had not been able to find an exact precedent, but that he was in no doubt that the onus rested on the prosecution to persuade the Court that the absence of the missing witness did not compromise the right of the accused to have a fair trial. In relation to the complaints about delay, the Judge was prepared to accept that there was certainly some delay on the arrest, but that in the Court's view, it was minimal. He felt that in that regard, the accused was not in any way affected by a degree of prejudice which would provoke the Court to stay a trial. In relation to the failure to obtain a search warrant in a timely manner, the Judge was of the view that there was no doubt that a search warrant could have been obtained at a much earlier opportunity to search the bedroom, but he questioned the import of same. In terms of revelations, the sheets would not have provided any forensic material relevant to the investigation, he observed, adding:

"[s]o that leaves the final submission, that if the pillowcases were seized and analysed and if they were free of DNA, it would discredit the complainant's evidence that a pillow was placed on her face. . . in my view, this is a very tenuous submission not supported by any evidence. The Court is therefore of the view that in relation to the principles which I have already set out in relation to the preservation of evidence, that there is no ground on this matter to stay the proceedings."

25. The trial Judge then turned to the situation of the parents of the accused. He commented that there was no reflection at all in the evidence or cross-examination that their memory of the events in question was poor or that the fact that a statement was taken later rather than earlier would have made any difference.

26. Dealing with the question of following up with the former partner of the complainant, the trial Judge was of the view that the Garda should never have made the statement that they could take a witness statement from the ex-partner. He felt that any information obtained from the complainant's former partner about her prior sexual history could never have formed part of the Book of Evidence as special leave of the Court would have to be sought and granted before information about the complainant's prior sexual history could be put before the Court. He said that he understood the defence's concern about the fact that the information in relation to BDSM arrived very late, but he noted that when an application was made to examine the complainant on the issue, that the prosecution readily consented and the Court granted leave. The complainant was cross-examined on the issue, so the jury had the evidence before them that on a previous occasion, the complainant engaged in BDSM activity with her ex-partner. The Judge felt that really what should have happened is that the Gardaí should have returned to the complainant and taken another statement from her arising from issues raised during the course of the interview of the accused. The Judge felt that it would be totally contrary to public policy for the Court to approve an approach to an ex-partner not involved in any way and not the subject of any suspicion. The Judge's observations in that regard are the subject of criticism by the defence

27. Finally, the trial Judge turned to the situation of the absence of Dr. Columb. The Judge referred to the protest by the defence that, other than the injuries to which reference has already been made, there were no other injuries and he was denied the opportunity to cross-examine about the absence of other injuries. The Judge pointed out that the defence had a possibility of having another medical practitioner deal with medical matters, but that carried with it the prospect of having matters which would be potentially damaging to the accused person also being dealt with. He felt that the cross-examination of the complainant enabled the defence to raise all the issues that they wished in relation to the account that she gave to the Sexual Assault Treatment Unit (SATU) and to Dr. Columb herself.

28. Dealing with "striking similarities" point, the trial Judge expressed some understandable concern about the document produced in

order to illustrate to the jury the extent of the similarities. The Judge was addressing this issue in a situation where the defence had created a document designed to illustrate the extent of the similarities in visual form which the defence solicitor had been permitted to hold up in front of the jury. He pointed out that everything was highlighted in green, both where the terms used were exactly similar and where there were mere similarities. He said he had looked at the document over the weekend and he was concerned, because while there were striking similarities, there were clear differences in syntax. He felt that for the defence theory to work, that the complainant had learned off her first account by rote, this would have required not only that she remember what she had said in her first account, but that she would also have had to remember the changes to the syntax in the second statement. He said that he was in absolutely no doubt that the complainant did not, in fact, learn her first statement by rote.

29. As to the suggestion that there was an omnibus principle in play, the Judge felt that the application made by the defence, in his view, fell a long well short from what would be required for the Court to stop the trial. Such a relief was quite exceptional in nature and he was declining to same game.

Discussion

30. In the Court's view, the trial Judge was quite correct to take the view that stopping the trial on foot of a POC application would be an exceptional step and that what had been put before him fell well short of what would be required to justify such a step. This Court shares the view of the Judge that the various points put forward, whether considered individually or cumulatively, came nowhere close to what would be required before one could seriously contemplate stopping the trial. The Court sees very little substance in the criticisms that have been made about the delay in investigating the complaint. The accused's parents were unaware of the fact that there had been an incident of any nature, and indeed, unaware of the fact that there had been a female visitor to their home on that particular evening. The situation would have been the same regardless of when they were first approached.

31. As to the point about a failure to declare the dwelling a crime scene, again, the Court sees little substance in this in a situation where it was undisputed that the accused and the complainant were in the house, were in the bedroom, and were in a degree of physical contact with each other.

32. As to the "striking similarities" point, members of the Court have, as requested, read the accounts and there is no doubt that there is a high degree of conformity. Events are marshalled in the same order and the language used to describe events bears a high degree of consistency. Certainly, it is not an exaggeration to describe the similarity or consistency as striking or remarkable. However, the explanation suggested by the defence of learning by rote seems less than convincing. In general, it is the nature of learning by rote that one can repeat what one has learned, but in general, someone who has learned something off by rote or learned it off by heart, while they could repeat what they learned off, would struggle to change the tense of the narrative, change the person e.g. from first person to third person, and change from active to passive voice. It is also worth noting that there is no suggestion that the complainant was in possession of a text document which she could learn off by heart. However, whatever be the explanation for the similarity, it does not seem to the members of the Court that it would prevent the receipt of the evidence. It was a matter for legitimate comment by the defence, but we would not see the matter going further than that.

33. The Court agrees with the trial Judge that this was not a case where the POC application should have seen the trial halted. Whether the various issues explored are considered in isolation or cumulatively, there was no basis for stopping the trial. The trial Judge gave the application very careful consideration, but it is very hard indeed to see that he could ever have reached any different conclusion. Again, the Court is in no doubt that this was not a case for a direction on Galbraith grounds. Such issues as were raised about what were contended to be inconsistencies in the evidence of the complainant, and such issues as were raised about her credibility and reliability as a witness were quintessentially matters to be considered by the jury.

34. As to the point about contacting the complainant's former partner, the Court acknowledges the considerable difficulties that would have arisen in pursuing such a course of action. However, in the context of what occurred at trial, what the Court sees as critical is that the defence were in a position to raise with the complainant her relevant previous sexual experience. That, in the Court's view, is sufficient to dispose of this aspect of the issue.

35. The Court agrees with the trial Judge that this was not a case where the POC application should have seen the trial halted.

The return of a guilty verdict of the count of sexual assault was perverse, or alternatively, was so inconsistent with the not guilty verdict returned on the section 4 (oral rape count) and the threat to kill count that it cannot stand

36. Essentially, two points are made. It is said that there is a fundamental and irreconcilable inconsistency in the verdicts returned. The prosecution case was that a non-consensual sexual transaction occurred, while the defence case was that what occurred was entirely consensual. The defence says that if the complainant's evidence could not be relied on to the extent that it left room for doubt on any aspect of the narrative, then placing reliance on her account so as to return a guilty verdict on one count, but not others, was entirely impermissible. Moreover, it is said that the sexual assault count was not particularised, and because of the failure to particularise the activity covered by the sexual assault count, as distinct from other counts on the indictment, one cannot be sure of what the accused was convicted. On behalf of the appellant, it is said that the sexual assault could and should have been particularised, and that doing so is good practice, but it is acknowledged that in the present case, neither side raised any issue with the failure to particularise. It is also said, however, that was a function of the fact that two such starkly different narratives were presented, to the extent where it would have seemed unthinkable that the jury would acquit on one count and convict on the other.

37. It must be said that cases where several counts appear on an indictment relating to the same complainant, but where different outcomes emerge in respect of those counts, are far from unusual. Given that juries are frequently told by counsel and/or the trial Judge that a number of trials are being conducted together for reasons of administrative convenience, and that it is open to them to acquit on one and convict on another, it is far from surprising that should be the case. Frequently, the fact that different outcomes result is a function of the fact that the jury have approached their task in a particularly careful, conscientious, and indeed, forensic fashion. It may well be that a particular observer would take the view that the case turns largely on the evidence of a particular witness, usually the complainant, and that such an observer might expect all counts to stand or fall on that evidence. However, the experience of the courts is that juries will frequently grapple with the minutiae of the evidence on the individual counts, and as a result, sometimes come to different conclusions. Even where the verdicts on different counts diverge and might, on one view, be regarded as inconsistent with each other, an appellate Court should be very slow to intervene, recognising the primacy of the jury's role in criminal trials. Traditionally, appellate courts have taken the view that they should intervene only if the outcome was one that

no reasonable jury could properly have reached.

38. The matter was considered recently by this Court in the case of DPP v. BF [2017] IECA 2019. There, the Court, in a judgment delivered by Edwards J, referred with approval to principles outlined in the case of R v. Dhillon [2010] 2 Cr. App. R 1:

> "(i) The test for determining whether a conviction can stand is whether the verdict is safe;
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> (ii) where it is alleged that the verdict is unsafe because of inconsistent verdicts, a logical inconsistency between the verdicts is a necessary condition to a finding that the conviction is unsafe, but it is not a sufficient condition;
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> (iii) even where there is a logical inconsistency, a conviction may be safe if the Court finds there is an explanation for the inconsistency. It is only in the absence of any such explanation that the Court is entitled to conclude that the jury must have been confused or adopted the wrong approach, with the consequence that the conviction would be quashed;
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> (iv) the burden of establishing that the burden is unsafe lies on the appellant; and
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> (v) each case turns on its own facts and no universal tests can be formulated."

39. In this case, there are a number of factors that might have led the jury to distinguish between the sexual assault count on which a conviction was recorded and other counts. So far as the rape count is concerned, there was some element of uncertainty as to the fact of penetration, which was, of course, an essential ingredient of the offence. The accused accepted that he had attempted vaginal intercourse, but said he was unable, he thought, to achieve penetration as he could not sustain an erection. The complainant's account was of limited penetration. In those circumstances, it would not be altogether surprising if some jurors had doubts about whether penetration had been proved beyond reasonable doubt, and accordingly, whether the proper verdict, assuming that they were satisfied on the other ingredients of the offence, was one of rape or attempted rape.

40. Again, the trial Judge's charge may provide an explanation as to why the jury would have been prepared to record a conviction on the sexual assault count, but baulk at doing so on other counts. This was a case where the Judge discussed with the jury the concept of corroboration, explaining that in the ordinary affairs of life, if one is faced with an important decision, a decision whether to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances. The Judge pointed to aspects of the evidence which, he said, were capable of amounting to corroboration; the evidence of the complainant's distressed state after leaving the house, the photograph of an injury to the complainant's neck, and evidence in relation to a text between the appellant and a friend of his. Jurors might well take the view that this evidence, taken at its height, was supportive or corroborative of the fact that there was untoward sexual activity which caused distress to the complainant. It was also open to the jury to conclude that the evidence did not go beyond the general and provide particular support in relation to particular counts on the indictment, be they vaginal rape, oral rape, or a threat to kill.

41. The Court is not at all persuaded that the fact that there were different outcomes in relation to different counts establishes, or indeed even suggests that the jury were confused or misunderstood their role or approached the case on a fundamentally wrong basis.

42. As to the point about the failure to particularise the details of the sexual assault, it is the case that when the Judge was dealing with the individual counts on the indictment, he dealt with what was covered by the allegation, explaining to the jury that the allegation related to the general allegations made by the complainant of sexual misconduct by the accused, allegations apart from the allegations of rape and s. 4 rape, in other words, pulling off her clothes, that type of allegation. Again, when explaining that the offence of sexual assault had a common law history and used to be known as indecent assault, the Judge said that circumstances of indecency were what a normal person would consider to be indecent, and that, obviously, the touching of another's genitalia or their private parts without their consent comes within the definition of the offence. Overall, it seems to the Court that this count of sexual assault was properly left to the jury and the verdict on it was properly received.

43. In summary, the Court has not been persuaded to uphold any of the grounds raised in written or oral submissions. The Court has not been persuaded that the trial was unfair or unsatisfactory or that the verdict is unsafe. Accordingly, the Court will dismiss the appeal against conviction.