THE COURT OF APPEAL

Birmingham P.
Edwards J.
McGovern J.

Record No: 239/17

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

MOHAMED OKDA

Appellant

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

Introduction
1. The appellant in this case was convicted by a jury on the 7th of July 2017 in respect of three offences: rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act, 1990; sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990; and rape contrary to section 2 of the Criminal Law Rape (Amendment) Act, 1990. Having been found guilty on all counts, on the 23rd of October 2017 the appellant was sentenced to 11 years' imprisonment with the final year suspended.

Background Facts
2. On the night of the 8th of February 2014, the complainant, a married mother of two, had travelled by bus from a town in the south east of Ireland to Dublin with a friend, D, to attend a concert in the Olympia Theatre. D had pre-arranged that they would meet up in Dublin with another girl, J, before the concert and that the three of them would attend the concert together. Following the concert, the complainant went with her two companions to a nearby bar, namely "Yamamori" on South Great George's Street, for a drink. At some point while in this bar, the complainant's companions began to argue so the complainant left them to go outside for a cigarette. While outside she observed a group of homeless people who were begging and recognised one of them as being the brother of her friend D. She engaged him in conversation and she decided she wanted to give him some money, but also that she needed to lead him away from the vicinity of the bar lest D would see him and become upset. She persuaded him to walk with her to a convenience store on nearby Dame Street which had an ATM, but when they got there she was unable to remember her PIN and was unsuccessful in withdrawing money. Accordingly, she gave D's brother some money from her purse, then took her leave of him and proceeded back to the bar.

3. However, on returning there, the complainant was unable to locate D and J. She searched up and down the street for them without success, and tried phoning them without success. At this time, she was tired due to the cumulative effects of being somewhat sleep deprived because she had a small child who tended to wake up at night seeking attention, and also due to alcohol consumed.

4. Having become separated from her companions, the complainant was quite upset and began talking to a man in an archway beside the George Bar which is also on South Great George's Street. This man was Irish and as she was talking to him another man, who was dark skinned, possibly Turkish she thought, joined in the conversation. It was accepted at trial that this man was the appellant. During this conversation she was crying and distressed. This was shortly after 3.00 a.m. The appellant then offered to help her to look for her friends, and a taxi was hailed and they both got in to it.

5. The complainant was not sure what route the taxi took but she estimated that they were in the taxi for about 10 minutes. She alleged that while they were in the taxi the appellant put his hand over her mouth. The taxi ultimately stopped outside the appellant's flat on North King Street. The complainant was brought inside, following which she lay on the bed and her evidence was that she blacked out for a short period.

6. The complainant testified that she awoke to find the accused pulling her dress up and trying to touch her intimately. She requested that he stop, stating that she was married with children, and reiterating her need to find her friends. She renewed attempts to contact her friends with her phone, but the appellant then took the phone off her. He also removed her glasses, severely impacting her ability to see. The appellant attempted to remove her leggings and unzipped her dress. Her attempts to leave were met with utterances of "*no*", and "*shush, shush, you stay it's ok*", as he repeatedly pushed her back down.

7. The appellant succeeded in pulling up the complainant's dress and unhooking her bra. He then positioned himself on his knees and attempted to put his penis in the complainant's mouth as she lay there. The complainant stated that throughout this time she repeatedly said "*no*", but eventually gave up, hoping that discontinuing her struggles would allow the ordeal to end quickly. At this point, the complainant felt "*really scared*" and felt the gravity of the situation. The appellant believes that the oral penetration lasted somewhere between five and eight minutes. As much as she could, she kept reiterating her desire to leave. The complainant's evidence was that the appellant progressed to digitally penetrating her vagina, starting with one and then two fingers, whilst also sucking on her nipples for a short period. The complainant pleaded with the appellant not to kill her, reiterating her relationship with her husband and small children.

8. The complainant stated that the appellant was aggressive, and she was wary of higher levels of violence if she resisted further. The appellant then tried to penetrate the complainant's vagina with his penis but was unable to as he did not have a sufficient

erection. Eventually however, he was successful and engaged in vaginal sexual intercourse with the complainant for around 10 minutes, before either ejaculating or appearing to ejaculate inside her. Once this occurred, the complainant asked if she could leave, to which the appellant replied, "*yeah*". The complainant attempted to dress herself as quickly and efficiently as possible before exiting. She did not get her glasses back and was quite disorientated. The time spent in the flat by the complainant amounted in her estimation to approximately two hours.

9. Upon leaving the appellant's flat the complainant says she ran out on the road where traffic was heavy and flagged down the first vehicle she could, which happened to be a taxi. Recognising that she was distressed, the taxi driver took her to Pearse Street garda station where she made the complaint of rape. On her arrival at the garda station, her bra was unhooked, her dress was unzipped, her boots were unlaced, and her underwear was only half-on one of her legs. She presented with bruising on her arm. She was taken to the Sexual Assault Treatment Unit at the Rotunda Hospital. There, semen was found on her cervix and high vaginal wall. In the course of the garda investigation the appellant was identified as a suspect and his flat was searched. The complainant's glasses were found, bent and damaged, in a bin beside the building in which the events occurred. Her phone however, was never found.

10. When interviewed in the course of the investigation the appellant contended that the complainant's distress outside the George Bar was as much to do with the fact that she was not from Dublin and had nowhere to stay, as with the fact that her friends had left the bar without her. He stated that he had offered to let her stay at his flat for the night. He also stated that he had suggested to the complainant that she should text her friend to provide her with the address of his flat so that she could be collected from there. These matters were put to the complainant during her cross-examination at the trial, and she stated she had no recollection of them being said. The appellant further admitted that when they got back to his flat, sexual activity did occur but maintained that it was consensual. While the complainant's memory of events was imperfect, she rejected the suggestion that she had consented. She said: *"I do remember saying no positively and I do remember telling him to stop."*

11. The prosecution case closed at the end of day 5, and the defence did not go into evidence. Following closing speeches by both prosecution and defence counsel on day 6, the judge's charge straddled the latter part of day 6 and the morning of day 7. The jury retired to consider their verdict shortly before lunch on day 7. They deliberated for the remainder of that day and, following an overnight break, resumed on the morning of day 8. Following a total deliberation time of two hours and 52 minutes, at 12.14 on day 8 the jury returned unanimous guilty verdicts on all three counts.

Existing Grounds of Appeal, and Motion to Add Additional Grounds

12. The appellant appeals against his conviction (and sentence) on all counts. Following the end of the trial, a Notice of Appeal was filed, within time, on the 8th of November 2017, listing twenty-six grounds of appeal. This had been drafted by the original legal team that had represented him at the trial and in so far as it related to his intended appeal against conviction it complained about:

> (i) the trial judge's refusal to grant a direction in various circumstances including alleged failures by police investigators to seek out evidence - grounds 1, 2, 6, 11, 12, 13 and 14;
>
> (ii) the trial judge *"relying on"* certain evidence concerning telephones, including evidence that the complainant's telephone had been "pinged" in the course of the Garda investigation – ground 3, evidence concerning when the complainant's mobile phone was last topped up – ground 4, and evidence based on allegedly inadequate "disclosure requests" made on foot of s. 5 of the Communications (Retention of Data) Act 2011- ground 5;
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> (iii) issues arising from late disclosure of, and reliance upon, a hand-written police note – ground 7;
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> (iv) issues arising from alleged inadequate disclosure concerning the complainant's phone and text records – grounds 8, 9, 15, and 17;
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> (v) the failure by the prosecution to adduce evidence concerning the cancellation of a sim card with a particular phone number – ground 10;
>
> (vi) issues arising from alleged misleading statements said to have been made by prosecuting counsel – grounds 16 and 18;
>
> (vii) issues arising from late disclosure of certain video evidence – ground 19; and
>
> (viii) the failure by the trial judge to uphold a claim of oppressive treatment during the appellant's interviews - grounds 20 and 21;

13. It will be seen from this list that it focuses primarily on rulings made by the trial judge in the course of the trial and on the failure to withdraw the case from the jury. However, it contains no complaint whatsoever concerning the judge's charge or the nature of the legal instructions given by the trial judge to the jury during that charge.

14. Subsequent to the filing of this Notice of Appeal the appellant discharged his original legal team, and then engaged his present legal team. By a Notice of Motion dated the 22nd of June 2018, grounded on an affidavit of his new solicitor, Mr Gerard Cullen, sworn on the 21st of June 2018, the appellant then sought the leave of this court to add certain additional grounds of appeal and to substitute a consolidated Notice of Appeal for the one originally filed, in the following terms:

> 1. The appellant's trial was not in due course of law in circumstances where the trial judge failed to adequately or at all charge the jury on the fundamental rules pertaining to all criminal trials and as to how those rules should be applied to the appellant's case and in particular: –
>
> > a) The trial judge failed to instruct the jury on the legal concept of the presumption of innocence, the relationship of the presumption of innocence with the burden of proof, and how the said presumption should affect the manner in which the jury should carry out their deliberations in the appellant's case.;
> >
> > b) The trial judge failed to properly instruct the jury in relation to the burden of proof in a criminal trial, that the responsibility or burden of proving that the accused committed the offence with which he is charged lies at all times on the prosecution and the prosecution must negative the existence of all defences raised by the accused.;
> >
> > c) The trial judge failed to properly instruct the jury in relation to the proper standard of proof in a criminal trial as did not properly explain to them the meaning of proof beyond reasonable doubt as opposed to any other standard of

proof.;

d) The trial judge failed to properly instruct the jury that in circumstances where a reasonable doubt exists, the accused must be given the benefit that doubt and further, where two views on any part of the case are possible on the evidence, the jury should adopt that which is favourable to the accused, unless the other view has been established beyond a reasonable doubt.;

e) The trial judge did not address the legal concept inferences and that the jury should not in any way speculate on matters that had not been proved beyond reasonable doubt on the evidence adduced by the prosecution.

2. Having decided that a corroboration warning was necessary, the trial judge erred in law and in fact in failing to give an adequate and proper corroboration warning and in particular: –

a) He failed to explain the difference between corroborative evidence and evidence of recent complaint and in particular did not deal with the effect of the evidence of the complaint made by the complainant to Garda Jennifer Clancy.;

b) He caused confusion in introducing the comparison of old cases to the appellant's case and the issue of delay.;

c) He failed to indicate to the jury that the warnings should be utilised by them in their deliberations in dealing with each separate account of the indictment.;

3. The trial judge did not in his charge deal or deal adequately with the legal concept of recklessness which was at all times a live issue in the trial having regard to the nature of the offences upon which the appellant was being tried and the nature and thrust of the prosecution case being made against the appellant.

By reason of the above new grounds and the original grounds of appeal as consolidated and as set out below, the trial of the appellant was unsatisfactory.

CONSOLIDATED GROUNDS OF APPEAL

1. The trial of the appellant was unfair and the convictions unsafe by reason of the failure of the Director of Public Prosecutions to make full and proper disclosure prior to the trial of the appellant and in particular disclosure of the following materials: –

a) all telephone records and data relating to the complainant's mobile telephone usage of 0872376328, including times of calls and texts and any other relevant information relating to 9 February 2014 and the surrounding days;

b) all records, information from the relevant telephone service provider in relation to the last top up made to the complainant's telephone apparatus;

c) all material, documents, records, memoranda in relation to a "ping" request made by An Garda Siochána in relation to the complainant's mobile telephone.

2. The trial of the appellant was unfair and the convictions unsafe by reason of the failure of An Garda Siochána to properly investigate the allegations made by the complainant against the appellant and in particular, there was a failure by An Garda Siochána and the Director of Public Prosecutions: –

a) to seek out all telephone records and data relating to the complainant's mobile telephone usage of 0872376328, including times of calls and texts and any other relevant information relating to 9th February 2014 and the surrounding days;

b) to seek out and interview all potential witnesses and in particular a man seen with the complainant outside the George pub on the relevant date and Nasr Mari and Islam Abouchain who were present in the apartment at the time of the alleged offences;

c) to seek out and interview the taxi driver who brought the appellant and the complainant from Georgia Street to North King Street;

d) to seek out and interview the taxi driver who brought the complainant from North King Street to a place near Pearse Street Garda station to whom the complainant stated "her husband would never forgive her";

e) to carry out a forensic examination of the complainant's underwear or the bed linen from the bed of the apartment.

3. The trial judge erred in law and in fact in refusing to grant a direction on each of the counts on the indictment by reason of the following:-

a) the failure of the prosecution authorities to make every possible effort to obtain the mobile telephone data relating to the complainant's mobile telephone usage including calls and text relating to 9th of February 2014 and the surrounding days;

b) the failure of the prosecution authorities to seek out and interview all potential witnesses and in particular a man seen with the complainant outside the George pub and Nasr Mari and Islam Abouchain who were present in the apartment at the time of the alleged offences;

c) the failure of the prosecution authorities to seek out and interview the taxi driver who brought the appellant on the complainant from Georgia Street to North King Street;

d) the failure of the prosecution authorities to seek out and interview the taxi driver who brought the complainant from North King Street to a place near Pearse Street Garda Station to whom the complainant stated that "her husband would never forgive her";

e) the failure of the prosecution authorities to carry out a forensic examination of the complainant's underwear or the bed linen from the bed of the apartment;

f) having regard to the oppressive and unfair nature of parts of the interview of the appellant with members of An Garda Siochána.

4. The trial judge erred in law and in fact in allowing the prosecution play (without sound) to the jury during the course the trial CCTV footage showing the complainant arriving at and entering Pearse Street Garda Station.

5. The sentences imposed on the appellant on each of the accounts were excessive having regard to all the particular circumstances of the appellant and the surrounding circumstances of the case."

15. The appellant's motion was not dealt with on the day to which it was returned, but rather was adjourned to the trial of the action and still requires to be ruled upon. At the oral hearing of this appeal the court permitted the appellant to rely "*de bene esse*" upon the proposed new grounds, and his original grounds in the proposed consolidated form, on the understanding that the motion would be formally ruled upon in the course of a judgment on the conviction appeal.

Ruling on the motion

16. In circumstances where serious issues are raised in the proposed new grounds of appeal which, if made out, could have resulted in a denial of justice to the appellant, and in circumstances where we are further satisfied that the respondent has been afforded ample time to engage with them, we are disposed to grant leave to the appellant to rely on the additional matters that he seeks to rely on. While there was a failure to complain at the trial about the alleged deficiencies in the trial judge's charge now sought to be relied upon, we do not consider that the failure to do so could in any circumstances have been the result of a tactical or strategic decision on the part of the defence legal team. Moreover, the original defence legal team having been put notice at this Court's direction that the appellant is seeking to rely upon these new grounds; and it being understood that no affidavit has been filed by or on behalf of the previous legal team offering any formal explanation for the failure to have requisitioned the trial judge; and the court being prepared to infer, notwithstanding the absence of explanation, that the failure to requisition may have occurred through mere inadvertence in circumstances where there had been a break in the case and the prosecution had also failed to advert to the deficiencies now complained of, we are satisfied that it would be contrary to the interests of justice to apply *The People (Director of Public Prosecutions) v Cronin (No 2)* [2006] 4 I.R. 329 so as preclude the appellant from relying on the proposed new grounds.

17. Further, the consolidation of the original grounds in more focussed terms is a development to be welcomed.

18. We will therefore grant the relief sought in the appellant's Notice of Motion dated the 22nd of July 2018.

Procedural ruling

19. At the opening of the appeal hearing in this matter we indicated to counsel that it was our impression that the likely main focus of any arguments to be advanced on the appeal would be on the proposed new grounds. It was suggested to the parties that if that was the case, it would represent the most efficient use of the court's time if the proposed new grounds were advanced first, on the basis that if leave to rely upon them was granted and those new grounds, or any of them, were to be upheld, it would be dispositive of the appeal. Counsel for the appellant responded that while he was not to be taken as abandoning the original grounds and would seek to rely upon them if he was either not permitted to rely upon the new grounds (when the court came to rule upon his motion) or, having been permitted to rely upon them, was unsuccessful in sustaining them, he was nevertheless content to proceed in the manner suggested by the court. Counsel for the respondent then indicated that he also had no objection. The matter then proceeded in the manner agreed. The new grounds were argued *de bene esse*, and the balance of the appeal stands adjourned pending our decision on those grounds.

Additional ground 1(a), (b), (c), (d) and (e) – failure to charge on fundamental rules.

20. The first of these complaints relates to an alleged failure to instruct the jury adequately or at all concerning the legal concept of the presumption of innocence, its relationship with the burden of proof, and how the said presumption should affect the manner in which the jury should carry out their deliberations.

21. In order to deal with this ground, it is necessary to consider what the trial judge said to the jury concerning the presumption of innocence and the burden of proof. Before doing so, however, it is necessary to make some contextual remarks.

22. The first thing to be said is that the trial judge in this case was one of the most experienced criminal trial judges on the bench at that time. The transcript reveals that he began his charge late in the morning on day six of the trial, which was a Wednesday. When adjourning at the end of day five, the trial judge had flagged to the jury that, as the trial was nearing a conclusion, they would have to hear three speeches in the next stage. He told them that they would hear speeches from both of the senior counsel in the case and that: - *"[d]epending on how far we get on that, you may perhaps hear some early remarks from me, but I'm not going to give you three long speeches in one day, which would be quite a lot to assimilate and it may be that I will split my remarks into the closing part of tomorrow and then into Thursday."*

23. The trial had resumed that morning (the Wednesday) at 11.00am. At the sitting of the court, and in the absence of the jury, defence counsel had renewed an application for a direction, in circumstances where a similar application that had been made earlier in the trial had been refused. The trial judge heard submissions from both sides on the renewed application and then ruled upon it, refusing to grant a direction for a second time. The jury were then brought out and the trial proceeded immediately to the closing speeches stage, in circumstances where defence counsel had indicated on the previous evening that the defence did not intend going into evidence. There was then a closing speech by counsel for the prosecution followed by a closing speech by counsel for the appellant. Neither of these was in fact very long. The trial judge then, without adjourning for a break, proceeded directly into his charge. It was late morning at this stage. He went a certain distance with it and then, when the clock indicated that it was lunchtime, broke at that point until the following morning when he resumed and concluded his charge.

24. The trial judge outlined his intention to proceed in this way in his opening remarks and indeed it was consistent with what he had flagged would be the likely course of proceedings when adjourning the case on the previous evening. He commenced his charge by stating:

> *"Well, Mr. Foreman, ladies and gentlemen, I'm going to adhere to my initial plan of really only detaining you with some of the introductory matters, most of which have already been touched upon by both Mr. Guerin and Mr. O' Loughlin and that tomorrow at 11, we will make a start. I'm not going to be unduly long then but I want to simply review some aspects of the evidence that we've heard over these past several days and the remarks that were made to you by both Mr. Guerin and Mr. O'Loughlin and I feel whilst I only for less than an hour tomorrow (sic) it's probably more satisfactory than you having three relatively long speeches and proceeding to start your deliberations perhaps in mid-afternoon.*
>
> *Whilst the convenience of any of us, including yourselves, is a lesser matter than the necessity that we provide a fully fair and just trial for Mr. Okda, nonetheless I think it is a more harmonious arrangement that we split my closing remarks over a brief portion of it today and the remainder at 11 tomorrow."*

25. It is a matter of some significance that both prosecution and defence counsel were also highly experienced. As might be expected, both had addressed the jury succinctly and competently and they had each alluded accurately and with clarity to the related concepts of the presumption of innocence and who bears the onus or burden of proof in a criminal trial. In addition, they had each spoken with the same accuracy and clarity about the standard of proof, namely proof beyond a reasonable doubt.

26. When the trial judge commenced his charge on day six, having informed the jury that he intended to split his closing remarks, he immediately went on to say:

> *"I will be somewhat repeating myself because counsel have correctly stated the central rules that apply to all criminal trials in this country. The onus, as we have already heard, is at all stages on the prosecution to prove the guilt of Mr. Okda on any one or more of the three counts with which he is charged, all of which you have to consider separately. The rule of having to prove beyond reasonable doubt is partly based on the pragmatic consideration that it is a lesser evil in the imperfect process of our criminal justice somebody who may in truth actually be guilty should escape by reason of uncertainty or absence of sufficient proof rather than such a person being unjustly condemned in the particular similar circumstances of the evidence and arguments that has been heard."*

27. It is unfortunately the case that although both counsel for the prosecution and counsel for the defence had referred to the presumption of innocence, the trial judge omitted to do so. This omission was compounded by the fact that seemingly neither prosecution nor defence counsel adverted to the omission, with the consequence that no requisition was raised concerning it by either side after the charge. We are satisfied that the trial judge did adequately tell the jury about who bears the onus or burden of proof, but in the absence of any express reference by him to the presumption of innocence it is impossible to be confident that the jury fully appreciated the nexus between that presumption and the onus or burden of proof. Moreover, while the trial judge did explain that the standard of proof was proof beyond reasonable doubt, and he offered some explanation of that concept, he did not contrast the criminal standard with the civil standard. He also omitted to initially instruct the jury on the "two views" rule, a matter which was partially addressed (although the appellant would say not adequately) following a requisition, or to give them any instructions concerning how circumstantial evidence should be approached and the circumstances in which inferences might legitimately be drawn.

28. It is almost inconceivable that so experienced a trial judge would simply forget to give the jury several important instructions. Equally, it is hard to understand how very experienced counsel failed to advert to these omissions and to alert the judge to them in requisitions. Regrettably, it seems to us, the well-intentioned decision to break up the charge out of concern both for the welfare of the jury, and for the position of the accused, may have had the unintended consequence of causing both judge and lawyers to lose focus and to be somehow under the mistaken impression after the overnight break that the judge had covered more ground on the previous day than he had in fact done.

29. The question is, were these omissions fatal?

30. It is fundamental to our notion of trial by jury, a judicial process guaranteed in Article 38.5 of the Constitution, that the required instructions to the jury as to the law must come from the trial judge. Reflecting this, in *O'Callaghan v Attorney General* [1993] 2 I.R. 17, Finlay CJ, at 25, summed up the essence of trial by jury in these terms:

> "the purpose of trial by jury is to provide that a person should get a fair trial, in due course of law, and be tried by a reasonable cross-section of people, acting under the guidance of the judge, bound by his directions on law but free to make their findings as to the facts."

31. In any trial on indictment the trial judge bears the responsibility of instructing the jury on the legal principles that they must apply. If there is any dispute concerning what is the law, the trial judge is the sole arbiter as to what in fact represents the law and the jury must be told that they are obliged to take the law from the judge, regardless of whether they, or for that matter anybody else, happens to agree or disagree with it. In addition, notwithstanding that a proposition of law which the jury will be required to apply is well established, widely known about and uncontroversial in its terms, and/or that it may have already been correctly stated by counsel in addressing the jury, the trial judge remains under a duty to properly instruct the jury with respect to it. He/she cannot abdicate or abandon his/her function to do so on the basis that counsel has already correctly told the jury what the law is.

32. It is in many ways hard to conceive of a more fundamental instruction, and one of more importance, to give to a jury than to tell them that the accused enjoys the presumption of innocence, and to explain what that means.

33. The issue of a failure to instruct the jury on the presumption of innocence has arisen before in the case of *The People (Director of Public Prosecutions) v. D. O'T* [2003] IR 286, and the judgment in that case is instructive. In *D. O'T* the accused was convicted by the central criminal court in circumstances where, in his charge to the jury, the trial judge did not refer at all to the presumption of innocence. He was, however, requisitioned on this and he recharged the jury to the effect that *"there is a presumption of innocence and it is a very serious presumption"*, but did not further elaborate. The accused sought leave to appeal, *inter alia*, on the grounds that the trial judge had failed to direct the jury on the presumption of innocence and had failed to charge the jury correctly. The Court of Criminal Appeal allowed the appeal and ordered a retrial.

34. Giving judgment for the court, Hardiman J pointed to the identification of the presumption of innocence by Costello J in *O'Leary v The Attorney General* [1993] 1 I.R 102 as being *"a fundamental postulate of every criminal trial in this country"*, and to the same judge's view that the Constitution *confers "on every accused in every criminal trial a constitutionally protected right to the*

presumption of innocence". Moreover, Costello J had concluded that *"[t]hat right is now widespread and indeed enjoys universal recognition"* and had referenced in that regard Article 11 of the United Nations Universal Declaration of Human Rights, 1948, Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms, 1950, Article 8(2) of the American Convention on Human Rights 1969 and Article 7 of the African Charter on Human and People's Rights.

35. These views as to the importance of the presumption of innocence were consistent with earlier jurisprudence. In that regard Hardiman J pointed to O'Dálaigh C. J's earlier statement in *The People (Attorney General) v. O'Callaghan* [1966] IR 501 at 509, that: –

> "The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until tried and duly found guilty"

Moreover, Hardiman J noted, Walsh J, in the same case, at 513, had also said: –

> "The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial."

As Hardiman J pointed out, these dicta had been cited with approval by the Supreme Court in *Ryan v. Director of Public Prosecutions* [1989] IR 399.

36. The late learned Supreme Court judge then continued:

> "The presumption of innocence, thus so securely entrenched nationally and internationally, is not only a right in itself: it is the basis of other aspects of a trial in due course of law at common law. The rule that, generally speaking, the prosecution bears the burden of proving all the elements of the offence necessary to establish guilt is a corollary of the presumption. To state the incidence of the burden of proof without indicating its basis in the presumption is to risk understating its importance and perhaps relegating it to the status of a mere technical rule. The presumption is the basis of the rule as to the burden of proof and not merely an alternative way of stating it. The presumption also exists, and has effect, in ways other than simply dictating the incidence of the burden of proof at the trial. As the extract from Walsh J. quoted above indicates, it is, for example, the basis of the right to bail.
>
> It is therefore important that the presumption itself should be explained as an essential feature of the criminal trial. The prosecution's burden of proof, the corollary of the presumption, should be itself separately explained."

37. We are satisfied in the light of this jurisprudence, and indeed approaching the matter from first principles, that the failure to instruct the jury at all concerning the presumption of innocence was fatal flaw, one that renders the trial unsatisfactory and the appellant's conviction unsafe. Similarly, while the jury were told about the prosecution's burden of proof, the fact that the presumption of innocence was never mentioned by the trial judge meant that the jury could not have been expected to appreciate that the prosecution's burden of proof is the corollary of that presumption, and that the two things are inextricably linked, and this represents a further fatal flaw. We note the submission made by counsel for the respondent, in respect of this and the other complaints listed in additional ground no 1, that there is no evidence that there was any lack of understanding or confusion on the part of the jury. That may be so, but in our view the deficiencies identified are so fundamental that we are not prepared to wholly discount these as possibilities.

38. As regards the trial judge's instructions concerning the standard of proof, he did say several times in the first tranch of his charge that what was required was proof beyond reasonable doubt. He returned to the subject on the following morning, stating:

> *"And remember what was said both by Mr. Guerin and myself, you're not aiming for a mathematical certainty like adding up tables and coming up with the direct sum. You're basing the matter on your experience as people involved in work and in families and it's not unreasonable to take the comparison as was mentioned by Mr. Guerin at the very start several days ago of a very important decision in your own lives. Suppose that you're faced with a decision about moving a house, about changing the place for one of your kids is being educated, you will naturally think long and carefully about such a decision and if eventually you reach a conclusion that I am sure this is the correct thing to do and I do not have doubt about it, that's the sort of doubt that would enable you, faced with the quite momentous decisions you have to make later today or tomorrow, to convict. It mustn't be an imagined or trifling doubt. It must be a doubt on a matter of some substance, something that would fundamentally influence you in an important personal decision in your own life. But it's not a proof to the degree of mathematical certitude because nothing in the nature of trials such as this is capable of that. Juries for many years, and I've no doubt you will be no different, have exercised their knowledge of life and their common sense in coming to a fair and prudent judgment on thousands of cases comparable with this in the past, and I have no doubt that you will do the same."*

39. These instructions might perhaps have adequate in definitional terms had the trial judge not mistakenly said *"that's the sort of doubt that would enable you, faced with the quite momentous decisions you have to make later today or tomorrow, to convict."* It may be inferred that what he in fact meant to say was *"that's the sort of doubt, the absence of which, would enable you, faced with the quite momentous decisions you have to make later today or tomorrow, to convict."* Unfortunately, that is not what he in fact said. While we think it is likely that most jurors would have recognised the accidental perversity in the way the proposition was expressed and would have known what he had meant to say, we cannot foreclose on the possibility that some jurors would not have recognised it and that they might have been confused by it.

40. All of that aside, the charge on the standard of proof is open to the further criticism that it fails to follow the advice proffered by Kenny J when giving judgment for the Court of Criminal Appeal in *The People (Attorney General) v Byrne* [1974] IR 1, at 9, that:

> "The charge to a jury is that they must be satisfied beyond reasonable doubt of the guilt of the accused, and it is helpful if that degree of proof is contrasted with that in a civil case."

In the present case the trial judge did not contrast the standard of proof in a criminal case with that in a civil case. To do so is not mandatory but it is strongly recommended. The failure to do so in this case coupled with the accidental perversity of expression highlighted above leads us to the conclusion that the instruction on the standard of proof was not adequate in all the circumstances.

41. Counsel for the appellant is also correct in pointing out that the trial judge gave no instruction to the jury concerning how to approach circumstantial evidence or concerning when they may draw inferences. The failure to do this was also an error of principle.

42. Finally, it is complained that there was a failure to adequately charge the jury concerning the "two views" principle. It was emphasised that this is a necessary direction in *The People (Attorney General) v Byrne* [1974] IR 1, at 9, where Kenny J said:

> "It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt."

43. While there was an initial failure to mention the principle at all, following a requisition, the trial judge dealt with it in this way:

> *"JUDGE: Sorry again ladies and gentlemen. Just a very brief further word with counsel who are entirely doing their duty on behalf of the respective sides in the case. Mr O'Loughlin has pointed out that when as you will inevitably have to seek to do you are balancing and considering the differing accounts that you've received from the two principal people in the case, Ms M in her evidence on the second day and Mr Okda in his replies to the gardaí over the four interviews that he had with them. If it transpires that even though Mr Okda's account of events might reasonably -- might not be your preferred version. That you would as a probability prefer the account given by Ms M, if nonetheless Mr Okda's version of events that he gave in the responses to the gardaí might reasonably be true it would mean that you would have a doubt in the matter and you should acquit."*

44. While this formulation addressed the conflicting versions of the accused and the complainant, which might give rise to two possible views, it was not explained that the principle could also apply to any other piece or pieces of evidence in the case on which there might be two views, particularly circumstantial evidence. All in all, we do not consider that the charge with respect to this principle was adequate.

45. In conclusion, we find the complaints in additional grounds 1(a), (b), (c), (d) and (e) to have been made out and consider that they must be upheld. Accordingly, the appeal must be allowed on these grounds.

Additional ground 2 (a), (b) and (c) – Corroboration warning.
46. The issue of a corroboration warning had not been canvassed with the trial judge prior to closing speeches or immediately prior to the commencement of his charge to the jury on day 6. It was only at the beginning of the second day of the charge that the issue of corroboration was raised by defence counsel:

> *DEFENCE COUNSEL: Before the jury comes back, there's something I'd like to mention briefly. I had intended to leave the issue to requisitions if it arose in relation to the distinction between corroboration and early complaint and which is evidence only of consistency and I know you'll be intending to address the jury on it. I set out my factual basis on that to the jury yesterday. I noted afterwards I omitted for some reason to mention the law. Obviously, the law comes from you rather than me but*
>
> *JUDGE: Well, obviously I have the Coonan and Foley book with me –*

47. At this point, defence counsel then proceeds to seek a corroboration warning. He also requests a direction on the significance of evidence of recent complaint and how such evidence only goes to the consistency of the complainant's evidence. The judge is asked to make it clear to the jury that evidence of complaint is admitted for one purpose only and that it cannot be evidence that corroborates.

48. Counsel for the prosecution believed that it was not an appropriate case for a warning and that the application had been made in an unorthodox fashion. He contended that in any case there was evidence capable of providing corroboration, and he listed various matters including, but not confined to, certain bruising found on the complainant. He agreed that the trial judge should direct the jury on how they should approach evidence of recent complaint and to relate that to what the complainant had said to Garda Clancy at Pearse Street Garda Station. Following legal argument, the trial judge indicated that he was inclining towards giving a corroboration warning, but in circumstances where he felt he ought perhaps to tell the jury that the bruising found on the complainant was evidence that was capable of amounting to *"limited corroboration as to the circumstances"*. He was again pressed by prosecuting counsel not to give any warning, while defence counsel said *"I think there should be a corroboration warning and if you want to leave it over I'll deal with it in requisitions at a later stage."* The trial judge then indicated that he would be prepared to hear further argument or submissions but that *"for the moment I'm anxious to get ahead with the balance of the charge"*. Defence counsel then responded*: "Very good. Well I'll come back to it then. Thank you very much."*

49. Following the completion of the balance of the charge, further legal argument did ensue. The trial judge then indicated that he was disposed to give a corroboration warning. The jury were then brought back and were addressed again by the trial judge on the issue of corroboration, in these terms:

> *JUDGE: Thank you again, ladies and gentlemen. I've just had some brief discussion with both of the senior counsel and there are a couple of not particularly complicated matters that I feel having heard from them I should clarify. In sexual cases such as this, there often is the problem that we encounter in the courts of cases that go back an extraordinarily long amount of time. There have been cases and they were recently I think the subject of fairly stern judgments not only in our highest criminal court, the Court of Appeal, but also in the Court of Criminal Appeal before it became defunct and in our Supreme Court when the courts have taken the view that it is very dangerous for people to be put on trial for perhaps family related cases that sometimes went back 40 years. There were cases in which former National School teachers were put on trial for matters that went back as long as 40 years and there were attempts to reconstruct pictures of what classrooms looked like. And the view that was I think entirely properly taken by our highest courts was that it would only be in exceptionally rare circumstances that justice could be done that matters would go back as far as this and be adjudicated fairly and fully upon by a court and jury.*
>
> *So, that does not plainly arise in this case because things have moved quite fast since the complaint was made within hours of what Ms M has described of her experience and she was taken by the very public spirited taxi driver to Pearse Street and very promptly set out upon making fairly full statements to all the investigating gardaí and participating in the examination in the Sexual Unit of the Rotunda Hospital. But there are two things that courts look for in sexual cases. And the first and as I've just indicated to you is one that doesn't arise here. They look -- did somebody who alleges that he or she was wrongfully sexually assaulted be it by way of rape or some other sexual offence did he or she make a prompt complaint at the first available opportunity to do so. Well, plainly in this case the position could hardly be clearer due to the kindly taxi driver who brought her in when she left the premises. She was taken under care in Pearse Street and very promptly made full disclosure by way of a statement of her recollections of the incident. So, there's no*

problem about a very prompt complaint being made that is consistent with what she has described in the evidence. And I think you will probably agree that what emerged in her statement and what I summarised this morning was very much on all fours with what you heard in the course of her evidence that took up the whole of the second day of the trial last week. But, what is raised as a matter of some potential difficulty by Mr O'Loughlin very understandably and on the behalf of his client is the contention that there is no independent corroboration of the allegations made by Ms M and that in the past courts have directed trial judges such as myself to tell juries that it is actually dangerous to convict in the absence of independent confirmation or corroboration unless having regard to all the circumstances and the importance of the warning about the absence of corroboration the jury are nonetheless satisfied beyond reasonable doubt of the guilt of the accused person. This is a case in which although we do have the hickey on the arm, on the -- well, I'm showing my inexperience gentlemen. Did you say -- what part of the anatomy did you say?

DEFENCE COUNSEL: The side of the neck I think.

PROSECUTING COUNSEL: The hickey was on the neck but it was the bruise on the arm that has the --

JUDGE: The bruise on the arm and the hickey on the neck. And whilst this is an aspect that can be borne in mind by you there is no independent corroboration from any totally different source confirming the nature of the sexual activity that Ms M complains of. Obviously you don't have eye witnesses in the vast, vast majority of cases such as this. And it will rarely be the position that the prosecution can produce some bystander. But, while the medical evidence and that of the forensic scientist undoubtedly showed that there had been a sexual connection between the accused and Ms M and whilst we did have these particular -- not particularly obvious markings on the arm and on the neck, nonetheless you are essentially relying on the testimony of Ms M. I've already told you that unless you are persuaded beyond reasonable doubt that in the entirety of the case it is proved to the required high degree you should not convict and you should not feel that it is any reflection on her character. But, undoubtedly whilst you must tread warily in this case and whilst you must have regard to the dearth of independent confirmatory or corroborative evidence it is still open to you if having assessed carefully and objectively all the evidence in the case you are still persuaded that beyond reasonable doubt it has been shown to your satisfaction that Mr Okda was guilty of any one or more of the three charges that you should -- you consider separately, only then may you convict. It does not mean you can't convict. You undoubtedly can in this case on any one or more of the counts but you must bear in mind that warning that although she made the earliest possible disclosure of her experience and although there may be these forensic matters you do not have independent evidence per se that identifies particularly the rape or indeed the other matters and so you must tread warily. I will not tell you the precise terms because it's not now required to tell you it would be dangerous to convict unless you had other evidence. But, I do tell you. You must examine it all and you must be satisfied beyond reasonable doubt if you see fit to convict on one or more of the counts.

50. It was submitted that in introducing the issue of old cases and telling the jury that fortunately they did not face a problem of that sort in this trial, the trial judge negatived the purpose of the corroboration warning and seemed to give the impression that because it was not an old case it was not one where it would be dangerous to convict in the absence of corroboration.

51. Further, it is complained that the trial judge did not ultimately deal with the issue of recent complaint, and in particular what was said by the complainant when she first met Garda Clancy, who took notes of her complaint, at Pearse Street Garda Station. It was not explained that this could never amount to corroboration and that it was only evidence that might be taken as showing consistency in the complainant's evidence.

52. In support of the latter of the appellant's complaints, we have been referred to the case of *The People (Director of Public Prosecutions) v. M.A.* [2002] 2 I.R 601, a decision of the Court of Criminal Appeal which followed and applied an earlier decision of the same court in *The People (Director of Public Prosecutions) v. Sweetman* (Unreported, CCA, 23rd October, 2000). In M.A. it was held that where evidence of a complaint made by a complainant to third parties in the absence of the accused was admitted in a trial for a sexual offence to establish the consistency of the complaint with the evidence of the complainant, the purpose of the evidence should be explained to the jury in all cases and it should be made clear to it that such evidence was not evidence of the facts on which the complaint was based but could be considered by them as showing that the victim's conduct in so complaining was consistent with her testimony. It was further held that it should be explained to the jury that such evidence did not constitute corroboration, in the legal sense of that term, of the evidence of the complainant.

53. Responding to these complaints, counsel for the respondent emphasises that the trial judge expressly stated that it was *"dangerous to convict in the absence of independent confirmation or corroboration"*. He stated with regard to the bruising on the injured party's arm that whilst that could be borne in mind *"there is no independent corroboration from any totally different source confirming the nature of the sexual activity that Ms. M. complains of"*. He cautioned them that there *"were essentially relying on the testimony of Ms. M."* He described what he had said as a *"warning"*. He clearly told them on more than one occasion that each charge was to be considered separately. He also made clear that the complaint made by the complainant to the Gardaí was consistent with her evidence but that there was no independent evidence per se and that they must *"tread warily"*.

54. The point is made that no further requisition was raised in relation to this matter. It is suggested that the jury were left in no doubt that they had to approach their deliberations with particular care. The absence of any further requisition is indicative that the warning actually given to the jury in respect of this matter was not regarded as being deficient.

55. While we are inclined to agree with the submission that was made at trial by counsel for the respondent that this was not in fact a case that called for a corroboration warning, the fact of the matter is that the trial judge opted to give a corroboration warning in the exercise of his discretion. In those circumstances, the issues for us are whether the complaints that are made about the actual warning that was given are borne out.

56. It is appropriate to deal first with the complaint that the trial judge undermined his warning by referring to old cases, in circumstances where this was not an old case. The trial judge told the jury that in sexual cases there were two things that the courts look for as an aid to evaluating the credibility and reliability of a complainant's evidence. One was: did the complainant make a prompt complaint that was consistent with what she had described in evidence? The other was: is there independent corroboration of the allegations? In that context he was endeavouring to make the point to the jury that it sometimes arises that one, or other, or perhaps both, of these potentially important aids to evaluating the credibility and reliability of a complainant's evidence will be unavailable to a jury. This was with a view to impressing on them that where the case boils down to the complainant's word against the accused's word, great caution was required and that in the past the law had required judges to tell juries that it is could be dangerous to convict in the absence of corroboration, but that if notwithstanding the absence of corroboration, they were nonetheless satisfied about the guilt of the accused they could still convict. The reference to very old cases was offered as an

illustration, away from the circumstances of the instant case, of increased awareness by the courts that deciding cases on the basis of one person's word against another's can be very risky. We do not believe that in referring to old cases he undermined his warning.

57. However, what is of more concern is the fact that having interwoven a reference to evidence of complaint into his warning about corroboration, he did not go on to explain to the jury the important, but strictly limited, purpose for which evidence of complaint is admitted, and that it cannot and must not be treated by them as evidence capable of corroborating the complainant's allegations – in other words the instruction mandated in *The People (Director of Public Prosecutions) v. M.A.* Moreover, the judge had been expressly requested to do this, and counsel for the prosecution had agreed that it should be done. Counsel for the defence is now criticized by his opponent for not having raised a further requisition. In the absence of an indication that the omission was nothing more than the result of oversight, to have done so might have appeared argumentative. It is perhaps telling in that regard that counsel for the prosecution, whose bears the primary duty of drawing the judge's attention to any failure to give adequate and proper directions on the law (See Archbold, Criminal Pleading, Evidence and Practice, 2006 at paras 4-371 and 372, and the cases cited therein) also did not see fit to raise a further requisition, notwithstanding that he had considered it appropriate to support defence counsel's request.

58. We are satisfied that sufficient instruction was given to the jury concerning the need to treat of each count separately, and to apply the rules and instructions they were being given to each count separately.

59. In the circumstances we are disposed to uphold the complaint in additional ground of appeal no 2 (a) but are not disposed to uphold additional grounds of appeal no's 2(b) and (c), respectively. The appeal should therefore also be allowed on the basis of 2 (a) being upheld.

Additional ground 2 - Recklessness

60. The appellant had contended in the course of his interviews with An Garda Síochána that he had engaged in consensual sexual activity with the complainant and that he had stopped when the complainant expressed that she did not want to continue with certain specific sexual activity. However, the complainant in her evidence had stated *"I do remember saying no positively and I do remember telling him to stop."*

61. There is no doubt in our minds, but that recklessness was an issue in the case. This appears to have been accepted by the trial judge who, at one point in his charge, said: -

> *So I'm not going to go into detail on either the doctor, Dr Khan, who was in the appropriate sexual injuries clinic in the Rotunda hospital, or to the forensic scientist, because it seems to me that in the first instance undoubtedly their evidence proves sexual contact between the accused and the prosecutrix, Ms M, there is no doubt there was that, but the whole case is about was there consent to such forms of sexual intimacy and if there was not consent was it a situation in which, as regards recklessness, the accused felt on reasonable grounds that she was amenable to having the acts of sexual intimacy with him."*

62. The conflict in the evidence would have precipitated the following question for the jury: if it is accepted that the complainant was not consenting, did the accused know that the complainant was not consenting?

63. While such a question was capable of being answered in a binary way, by either "yes" or "no", a negative answer would not have been an end of the matter. Even if the jury had been prepared to answer "no", they would have to have gone on to address the further question as to whether the accused had been reckless as to whether the complainant was or was not consenting. It was therefore important that the jury should be properly and adequately charged on the law with respect to recklessness.

64. The trial judge did not deal with recklessness in the main body of his charge, apart from making the oblique reference to it quoted above, and another equally oblique reference to it. He was requisitioned on this omission by prosecuting counsel and following this the jury were brought back and recharged on recklessness. He told them: -

> *"Mr Guerin urges me to also tell you that even if you were to accept Mr Okda's account in part or in full it still would appear to amount to admissions of certain sexual inappropriate activity without the consent on the basis of recklessness. And you can bear that in mind. But, above all I am telling you that if you feel the account that Mr Okda gave in response to the guards, one he was not cross-examined on, but he did not have to take the witness box, and he was entitled to rely on his statements and the four interviews to the guards. If in your view it might reasonably be true subject to considering what would be left in the case, and I think that would be a very minor plank of the prosecution case, then you would be obliged by the rule of proof beyond reasonable doubt to acquit on whichever one or more of the counts that applied to."*

65. Regrettably, there was no explanation whatever of what can constitute recklessness, and in particular that the essence of it involves conscious advertence to a substantial and material risk, and a decision to press ahead regardless of that risk. In that regard the Supreme Court, in the case of *The People (Director of Public Prosecutions) v. Cagney and McGrath* [2007] IESC 46, adopted the formulation in the Model Penal Code, which expresses the test with perhaps more precision, as being 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."*

66. It has been argued on behalf of the respondent that while it may be that the trial judge could have addressed recklessness in a more concise and focused manner it remains the case that no requisition was made in regard to any deficiency in the charge in this respect. In effect the jury were directed in a manner most favourable to the defence insofar as they were told that that if what the accused said might reasonably be true then they would be obliged by the rule of "proof beyond reasonable doubt to acquit".

67. It was further submitted that the charge must be viewed in the context of the actual state of the evidence and the issues then live in the case. This new ground of appeal, resulting as it does from a trawl of the transcript, purports, it is said, to raise an issue which was not a significant feature in the case. The case was never truly one about recklessness as is clear from the body of evidence in the case.

68. If this were the only ground of complaint about the judge's charge this court might have been disposed to apply the *Cronin* jurisprudence to it, having regard to the run of the trial. It does seem to us that while recklessness was a live issue (the prosecution had stressed several times during the course of the trial that they were relying upon it), it was, to adopt the words of the trial judge,

"a very minor plank of the prosecution case". However, in circumstances where there are other serious criticisms of the overall charge which we have seen fit to uphold, and where notwithstanding the *Cronin* type objection this complaint is also made out in substance, we consider that to reject the complaint on *Cronin* grounds alone would serve no purpose.

69. In the circumstances we also uphold the complaint comprising additional ground of appeal no 3.

Conclusion
70. We are satisfied for the reasons stated that the appellant's trial was unsatisfactory and that his conviction was unsafe. Accordingly, the appeal against his conviction must be allowed.

71. It is unnecessary in the circumstances to consider the consolidated original grounds of appeal.

72. We will hear submissions on the issue as to whether there should be a retrial in the circumstances of the case.