



**THE COURT OF APPEAL**

**(CRIMINAL)**

**Record Number: 248/2021**

**High Court Record Number: CCC119/18**

**Birmingham P.**

**McCarthy J.**

**Ní Raifeartaigh J.**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC**

**PROSECUTIONS**

**RESPONDENT**

**-AND-**

**L.M.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 26<sup>th</sup> day of June 2024 by Ms. Justice Ní**

**Raifeartaigh**

## **Issues**

1. This is an appeal against conviction in a rape and sexual assault case. The issues raised concern (i) the refusal of the trial judge to accede to an application to halt the trial under the *PO'C* jurisdiction, and (ii) the refusal of the trial judge to allow the complainant to be recalled to be cross-examined on one particular point after her evidence (which included cross-examination and re-examination) had concluded.

## **Background**

2. The appellant pleaded not guilty to three counts on an indictment containing one count of rape, one count of sexual assault; and one count of false imprisonment. After a nine-day trial, he was convicted of the first two counts and acquitted of the third.

3. The alleged offences occurred in circumstances where the complainant met the appellant by chance on the street in a particular town in the early hours of August 21<sup>st</sup>, 2017. At the time she was fifteen years old and he was thirty-seven years old. She had left her family home without her parents' knowledge and walked with a male friend for some distance before they separated and she walked alone to the centre of the town. She said that she had arranged that her friend would meet up with her again in the town but that he failed to return. While she was waiting, she met the appellant who she did not know prior to this, and following a conversation between them in which she said she was cold, she accompanied him to his rented accommodation in the town. She said that he showed her into a bedroom, left the room, and she lay down on the bed and went to sleep. She said that she later woke up to find him on top of her and that he raped her. Further details of her evidence are given below.

4. The appellant in Garda interview accepted that the complainant had come to his apartment in the early hours of the morning but he denied having any sexual activity with her.

5. The issues in the case concern: (i) the refusal of the trial judge to permit a recall and further cross-examination of the complainant (after her re-examination) on an issue relating to blood on the bed in which the alleged rape was said to have occurred; and (ii) the decision of the trial judge to refuse an application to withdraw the case from the jury on the basis of *The People (DPP) v PO'C* [2006] 3 IR 238. In order to contextualise both issues, it is necessary to set out in greater detail the evidence given at the trial.

## **The evidence at the trial**

6. The complainant's account in evidence was as follows. She had been at a party the previous night and as a result her parents had grounded her for the day. She stayed in her bedroom most of the day and was annoyed at having been grounded. She did not come down for dinner and stayed in her room. After her family had gone to bed, she was talking on her phone with a male friend and arranged to sell him a mobile phone. She told him to come to her house in the middle of the night, which he did. He saw that she was upset (about being grounded), helped her out the window, and they went walking out of her estate. She said that at a certain point they separated, he having said he would drop his bike home and meet her in the town. She walked into town and ended up near a taxi cab premises. People were coming out of a nightclub and getting taxis. A taxi driver spoke to her but she ignored him. A woman who was working in the taxi cab premises came out to check on her but did not speak to her. Things became quieter after some time. The appellant then approached and had a brief conversation with her, asking did she need money for a taxi or food, which she declined, and asked her age, to which she replied that she was fifteen. He walked off and a

few minutes later, came back again and smoked a cigarette. Then he left again, went across the road, was looking at her, and came back a third time. At this stage she was really cold, but was afraid to go home because she thought her mother would have realized she was gone. He asked her if she wanted to go to his house, that he did not want her out there on the street on her own, and she could take his room while he slept on the couch. She agreed and went with him to his apartment. He offered her alcohol and a cigarette, which she declined, but took a pull on a joint he offered to her. Then he showed her the bedroom, left and shut the door after him. She lay on the bed fully clothed and fell asleep.

7. She said she woke up to find him on top of her, feeling her breasts, and she told him to stop and tried to push him off. He pulled at her clothes, broke her bra, took her shoes and leggings off, pulled at her thong so that it ripped, and then penetrated her vaginally. She said it was painful and she had never had sex before. He did not put on a condom and he ejaculated, which she knew because when he pulled out, his sperm went all over her stomach and between her legs. He told her that if she were older, he would keep her there forever. He then got up and left the room. There was no door handle on her side of the door. She said the sun was coming up at this stage.

8. She said that some time later he came back and asked if she wanted anything to eat. She was upset and in a corner of the room. He came back with fruit and told her to eat it. She said some hours went by and she then heard her brother calling her name in the street. The appellant said to her that he did not think anyone would be looking for her. She said that he went to have a shower and that was when she “took her chance” and left.

9. During her evidence in chief, the following exchange took place:-

*“Q. Okay. Now, just a couple of questions there, the bed, do you remember the mattress, were you shown anything on the mattress at any stage or did you see anything on the mattress?”*

*A. Yes, my blood.*

*Q. Your blood, and when did you see your blood on the mattress?*

*A. When it came into daylight.*

*Q. And when your blood was on the mattress when it came into daylight, what happened with the mattress, did anyone do anything to the mattress?*

*A. Yes, he flipped it over.*

*Q. He, again, this is the accused; is that right?*

*A. Yes.*

*Q. He flipped it over is what you're saying, yes?*

*A. Yes.*

*Q. So that the bit with the blood would be underneath; is that right?*

*A. Yes.”*

**10.** She said that she went to the train station where she saw a girl she knew, who told her that her family were looking for her. She got on a train and met another girl she knew. She gave the other girl a big hug when she saw her and was crying. They got off at a particular station and went to the Gardaí. She said they “gave out to her” because she had gone missing. She said she did not tell the girl what had happened because she was “numb” and “still in

shock”. She said her mother came to collect her at the station and the Gardaí gave out to her. Her mother brought her home and got her a pizza on the way home. Her mother was angry and upset and went to bed when they got home. Her two brothers and other people were in her home. She told her 19-year old brother that she had been raped. As a result of that, he and some of the others went back into town with her, and she pointed out the appellant’s apartment to them. Her brother went to the door and this led to a confrontation and assault of the appellant. She said that after this she did not tell her mother or the Gardaí what had happened to her because she did not want to get her brothers into trouble.

**11.** The next morning her brother’s girlfriend got her the morning after pill. She said she saw the appellant again in a supermarket about a week later, and went straight home and was crying and upset.

**12.** She said that on the 10<sup>th</sup> November 2017, she told a teacher at school what had happened. She said she “couldn’t get the words out” and so she wrote it down on a piece of paper. This led to her parents being contacted and it being reported to the Gardaí. It was arranged for her to go to the Sexual Assault Treatment Unit (SATU) on the 21<sup>st</sup> November 2017.

**13.** The complainant was cross-examined at length about many matters including the following:

- i. Discrepancies in the accounts she gave to her teacher, the Gardaí, to SATU, and during her evidence;
- ii. About the circumstances in which she had been grounded and had left her house in the early hours of the morning, and whether she was in fact seeking to run away from home on the night in question;

- iii. Whether or not she had conversation with the appellant during which she had “opened up” to him, including talking about violence in the home from her father;
- iv. What she had told the appellant about her age;
- v. About the fact that she failed to mention until October 2019 that she had taken cannabis and whether or not she had taken some whiskey;
- vi. About the door handle, the window, and her precise movements while in the appellant’s apartment;
- vii. Whether she had been seen by the apartment’s co-occupant;
- viii. About her suggestion that she had her leggings down for several hours after the appellant pulled them down just before the alleged rape;
- ix. About whether she fabricated stories generally and in particular a story she told the appellant about an uncle;
- x. About the train journey the next day, her encounter on the train, and her interactions with her mother and the Gardaí;
- xi. About her conversation with her brother (and others) and the incident in which her brother went to the appellant’s apartment and had a confrontation with him.
- xii. Mental health issues she had experienced, as documented in counselling notes.

**14.** It can be seen therefore, and the above is not an exhaustive list, that the complainant was cross-examined intensely with regard to every possible aspect of her account. This should be borne in mind when considering the “blood” issue. With regard to the blood issue, the following exchange took place during cross-examination :-

*“Q. Okay, what I suggest to you is that the blood that was on the bed because when you were sleeping there, that you started your period and as a result of that, there was blood on the bed?”*

*A. I didn't.*

*Q. And you explain that to Mr [LM] and in fact you tried to clear it up and he said, oh don't worry about that and he cleared it up for you?*

*A. That's a lie.”*

**15.** In re-examination, counsel came back to this issue briefly:

*“Q. Just in relation to the blood on the bed and it was suggested to you that you were having your period at the time, were you in fact having your period at that time?”*

*A. No.”*

**16.** After this, the appellant made an application to recall the complainant for the purpose of further cross-examination. Counsel for the appellant objected that he had not been given notice that the complainant was denying that her menstrual blood was on the bed. He referred to a notice of additional evidence dated November 22<sup>nd</sup> 2019 containing the statement of intended evidence of Ms. Deirdre Richardson, a nurse and sexual assault forensic examiner at the SATU, in which the issue of menstruation was briefly referred to. She said that the



complainant's menstrual cycle was irregular and that Ms. Richardson did not know whether or not the complainant was menstruating on the relevant date. He said that this was the only notice he had been given. He categorised this as "what I was on notice of was that she was unable to say one way or the other". (It is unclear whether by "she" he meant the complainant or the nurse, but strictly speaking the nurse's statement spoke only of her own knowledge, not that of the complainant). He pointed out that his client had in Garda interview asserted that the appellant had her period while she was in the bed and that the complainant had never been asked about this by the Gardaí, even though she had been asked about other matters in the appellant's Garda interviews. He submitted that he was entitled to have an opportunity to cross-examine the witness further about this matter. The application was refused.

**17.** The next witness was Ms. Richardson during whose evidence the following exchange took place:-

*"Q. The other thing you were asked about then is [the complainant's] menstrual cycle. Now, again if the examination had been within a day or two of the incident it would have been much easier to determine whether, or not, [the complainant] was menstruating at the time?"*

*A. Yes, well you would probably be able to see where the menstrual blood (sic) was coming from, which origin it was from, whether it was from an injury or whether it was from the cervix.*

*Q. Yes, whereas three months later, you're then reliant on the history from the complainant as to her cycle?"*

*A. Yes, that is correct.*

*Q. And I think what you were saying was that as of the date of your examination, the 21st of November 2017, [the complainant] indicated that her menstrual cycle was irregular?*

*A. Yes, she told me it was irregular.*

*Q. Do I take it from that then that she was unable to say whether, or not, she was menstruating at the end of August 2017?*

*A. I don't recall whether I had asked her that or not, I probably didn't ask her that as it wasn't of any benefit to my clinical examination.*

*Q. Oh I see, but certainly she indicated that it was irregular and that was as much as you felt was necessary to record?*

*A. Yes, yes."*

**18.** In addition to the Garda witnesses, the jury heard evidence *inter alia* from two of the complainant's brothers, her mother, two witnesses who had seen the complainant near the taxi base on the night, the teacher to whom the complaint was made and the school principal, a man who shared the apartment with the appellant, another man who had lived in the apartment previously, and the girl the complainant had met on the train. Also, an expert witness gave evidence that a full DNA profile matching the complainant was extracted from a section of blood stained mattress fabric taken from the bedroom.

**19.** The Gardaí gave evidence of the account given by the appellant during his Garda interviews. He accepted that the complainant had been in his apartment in broadly the circumstances that she described, but he denied that he had sexually interfered or had kept her there against her will in any way. He described a more extensive conversation between

them than she had described, and said that she had told him that she had problems at home and that she did not want to return there. He also said that when the complainant was asleep on the bed she had her period and that this gave rise to a bloodstain on the mattress. He said she brought that to his attention the following day and attempted to clean the sheets and the bed, and that he had told her to leave it and had cleaned it up after she had left. He said that she had wanted to stay longer the next day but that he had told her she had to leave.

**20.** During the trial, the appellant made an application to have the case withdrawn from the jury on the basis of the decision in *People (DPP) v PO'C* [2006] 3 IR 238. The trial judge ruled against the appellant in this regard. Further details of the submissions and ruling are set out later in this judgment.

## **Grounds of Appeal**

**21.** There was originally a single ground of appeal which was that “the appellant did not receive a trial in due course of law where upon application to withdraw the case from the jury, on the basis of the paucity of the evidence of the alleged offence, pursuant to the findings of the Supreme Court in *DPP v. P O'C* [2006] 3 IR 238, the learned trial judge refused the application”.

**22.** The appellant seeks to add a further ground of appeal, to the effect that he did not receive a trial in due course of law in circumstances where, upon his application to recall the complainant for the purpose of further cross-examination on an issue arising upon the re-examination of the complainant, the learned trial Judge refused to allow such recall. A decision on whether leave should be given was left over to the hearing of the appeal and will be dealt with in this judgment.

## **The refusal to allow further cross-examination of the complainant**

23. The appellant contends that the blood on the mattress was a vital piece of circumstantial evidence in the case, the importance of which was magnified by the absence of other pieces of evidence which could have been, but were not, obtained due to the delayed complaint. It is said that the appellant was not on notice of any intended evidence to the effect that the complainant did not have her period on the day. The appellant contends that the trial judge's refusal to exercise his discretion in favour of recalling the witness put him in a position of being unable to challenge the evidence of the complainant where she asserted for the first time in the course of the trial that she did not have her menstrual period at the time of the offence, contrary to what he had told the Gardaí during interview. The judge's refusal to allow the witness to be recalled was based on his view that the defence had first raised the issue of the complainant's menstrual cycle, and the prosecution was entitled to ask the question they did because it arose out of that question and answer. It is said that this position did not take into account the fact that the statement of intended evidence by the SATU nurse did not contain a categorical assertion that the complainant in discussing her menstrual cycle had informed the SATU examiner that she was *not* having her period at the time of the alleged crime.

24. The appellant refers to *Walsh v Tesco Ireland* [2017] IECA 64 where Irvine J. noted that if the result of calling a witness out of turn was the cause of some form of prejudice to one or other party, it could normally be overcome by the recalling of witnesses. This is all the more so, the appellant contends, in a criminal trial where the issue is one of vital importance.

**25.** The Director contends that it is important to distinguish the case from *Walsh v Tesco Ireland* where it was the complainant in a criminal trial that counsel for the defence sought to recall, in circumstances where she had already given evidence over a two day period, during which she engaged in examination in chief, cross-examination and re-examination, and most importantly had clearly answered questions put to her during cross-examination by Senior Counsel for the appellant as to whether or not she was menstruating at the time of the incident, and to which she had categorically stated that she had not been. The DPP submits that when one looks at the transcript generally as well as the particular passage in question, it is abundantly clear why recalling any witness will quintessentially be for a trial judge to determine. The court had observed the entirety of the questioning of the witness, and was best placed to assess whether a recall of the witness was warranted and did so carefully. He acted appropriately and within discretion in refusing to have the witness recalled.

**26.** We are not persuaded that the appellant's trial was unfair by reason of the trial judge's decision not to permit a recall of the complainant for a further cross-examination about the blood issue. We are not convinced that the blood issue was as central as the appellant now maintains, having regard to the totality of the evidence in the case and the wide range of matters addressed in cross-examination with the complainant.

**27.** Further, we are not persuaded that the appellant was taken by surprise by the evidence she gave at the trial in the manner suggested, or that there was an inconsistency between the evidence she gave and the information contained in Ms. Richardson's statement. The state of play, going into the trial, was as follows: (i) the complainant had in her statement described blood being on the mattress after the alleged rape and said she had never had sex before; (ii) the appellant had told the Gardaí that the complainant had her period while on

the bed and she tried to clean it up; (iii) Ms. Richardson had elicited the information that the complainant had irregular periods (i.e. in general) and added that she (Ms. Richardson) did not know whether the complainant was having her period at the time of the alleged rape or not; (iv) no one had asked, and the complainant had not addressed, whether she was having her period at the time of the alleged rape. In our view, none of this amounted to a clear indication that the blood on the mattress *was* due to her period. If anything, the complainant's description of blood on the mattress and comment that she never had sex before tended to suggest that the blood was caused by the sexual intercourse. But she had not explicitly said that; nor had she explicitly said she was not having her period at the time.

**28.** If the matter had been left alone in cross-examination, the defence might have been able to exploit the absence of any direct evidence from the complainant as to whether she was or was not menstruating, together with the nurse's evidence of irregular periods, to suggest there was reasonable doubt as to whether she was having her period at the time. However, defence counsel at the trial specifically put it to the complainant in cross-examination – “that the blood that was on the bed because when you were sleeping there, *that you started your period and as a result of that, there was blood on the bed*”, to which she replied “*I didn't*”. This was, in our view, a denial by the complainant that she was having her period at the time and it arose from a question by the defence (not the prosecution). Defence counsel then followed up with the question: “...you explain that to Mr [LM] and in fact you tried to clear it up and he said, oh don't worry about that and he cleared it up for you?”, to which she replied “that's a lie”. Thus, defence counsel was the first to raise the issue and give her an opportunity to comment. Further, defence counsel could have chosen to cross-examine her further at that point, including about her failure to mention this to Ms. Richardson; he could have suggested that this was a novel point that she had come up with for the first time at the trial. However, he did not.

**29.** In re-examination, prosecution counsel then posed the question: “Just in relation to the blood on the bed and it was suggested to you that you were having your period at the time, were you in fact having your period at that time” and received the clear answer “No”. But at this point, this was repetition. The denial of the blood on the bed being due to her period had *already* been elicited by defence counsel. The matter was not elicited for the first time by prosecution.

**30.** We cannot possibly see how the manner in which the evidence emerged caused any unfairness to the appellant in those circumstances. The reality is that counsel took a risk in asking the question of the complainant; undoubtedly, a calculated risk. However, there was no reason that he could not, having received a response that was unfavourable to his client, have immediately tasked the complainant with suggestions that she was making this up for the first time or pointing out that she had never mentioned this to Ms. Richardson (the matters he said, in his submission to the trial judge, that he wanted to cover on recall of the witness).

**31.** Nor can we see how the trial judge erred in failing to allow further cross-examination of the witness on the point; the defence already had such an opportunity when they themselves elicited her denial that the blood was due to her period. There was no reason, they having decided not to further cross-examine at that point, to be given a second opportunity to do so merely because the prosecution had traversed precisely the same ground in their re-examination. The trial judge was entitled to take the view that having regard to the totality of the complainant’s evidence as well as what had occurred at this particular point in time, the defence had received ample opportunity to cross-examine her and there would be no unfairness in refusing the application for her recall.

32. In the circumstances, it is entirely academic as to whether we allow the appellant formally to amend his notice of appeal to include additional ground. We have considered the ground of appeal and consider that there is no merit to it in any event and would not allow the appeal on this ground even if it were to be added.

### **The failure of the trial judge to withdraw the case from the jury (the PO'C ground)**

33. At the close of the prosecution case, counsel for the appellant made an application asking the trial judge to withdraw the case from the jury on the basis of *The People (DPP) v PO'C* [2006] 3 IR 238. It was submitted that in the first instance the appellant could not have a fair trial because of a loss of relevant evidence due to delay. It was submitted that the delayed complaint resulted in the loss of relevant evidence which might have clarified a number of matters, including: whether the blood was due to sexual injury or menstruation; whether the complainant's upset was caused by a sexual assault/rape or a recent dispute by her family; the street CCTV evidence; the contemporaneous state of the appellant's dwelling including whether or not there was a door handle on the bedroom door; the contemporaneous state of the bed and bed linen; a clinical examination by SATU of the complainant; and the regularity or otherwise of the complainant's menstrual cycle. It was further submitted that the unfairness of the trial was added to by the failure of the prosecution to put the appellant on notice of what the complainant would say in regard to her menstrual cycle and the way that the prosecution engaged in re-examination. The appellant also submitted that every element of the prosecution case capable of corroborating the complaint was equally consistent with the innocence of the accused.



**34.** On appeal the appellant refers to *The People (DPP) v O'Donoghue* [2024] IECA 74 for the proposition that the *PO'C* jurisdiction as outlined in *The People (DPP) v CC* [2019] IESC 94 requires trial judges to look at the overall circumstances of the case in assessing the impact of missing evidence. He submits that similar to *O'Donoghue* this case involved a direct conflict in the factual claims between the complainant and appellant which could have been resolved by missing evidence, for instance by a SATU examination had the complaint been earlier. He also submits that there was an 'unusual degree' of inconsistency in the evidence of the complainant which should have been taken into account by the trial judge when considering the fairness of the trial. He further submits that the trial judge's ruling did not address all of the points raised in the defence's *PO'C* application, including the blood issue. He submits that the trial judge erred in failing to withdraw the case from the jury.

**35.** The prosecution argued that the delay in reporting the incident must be viewed within the context of the experience of the courts in dealing with similar type sexual offending against children where there has been significant delays in reporting, including cases where there have been delays of up to multiple decades where trials have proceeded in accordance with law. The prosecution submitted that they did not have to prove factual matters such as whether the complainant was on her period or whether the door handle was broken beyond a reasonable doubt, but that they had to prove that the offences were committed by the appellant beyond a reasonable doubt and that they had produced sufficient evidence to do so. The prosecution further argued that there was 'ample corroboration' in the case, including the evidence of the complainant's distress following the incident, what were said to be lies in the appellant's account, and the fact of the blood on the mattress. The prosecution submitted that they were entitled to re-examine as they did.

**36.** On appeal the Director reiterates the submissions made by the prosecution at trial in relation to delay. She contends that the age and personal circumstances of the complainant in this case are of particular relevance when considering the context of the delay in the making of a formal complaint. The complainant was a 15 year old child at the time the sexual offending occurred, and the incident had taken place in circumstances where she had left the family home through the kitchen window in the early hours of the morning without permission, notwithstanding having been grounded by her parents earlier in the day for attending a party on the previous night. The prosecution contends that while the delay did render futile the conduct of a forensic clinical examination of the complainant, the absence of such a report in a case involving a 15 year old child ought not to prevent a trial proceeding.

**37.** The prosecution also contends that a thorough and expeditious Garda investigation took place on immediate receipt of the formal complaint and that there is no suggestion of culpable prosecutorial delay.

**38.** The prosecution submits that the absence of CCTV footage in the factual matrix of this case is of peripheral importance, in circumstances where there was no CCTV footage that would have captured the offending which occurred indoors, and therefore the only potentially relevant CCTV footage would have been from street cameras from local business premises in the town. The appellant accepted that he met the complainant in the street near the taxi office before going back to his home, and two independent civilian witnesses from the taxi office gave corroborative evidence as to the interaction between the appellant and the complainant outside the taxi office and nearby pharmacy at the relevant times. Any suggestion that CCTV footage may have been of assistance is purely speculative, and the absence of same has not deprived the appellant of a particular line of defence.

**39.** The DPP submits that the decision not to examine the mattress for semen was properly made by the forensic examiner in circumstances where the factual information received from the appellant was that he and his then girlfriend slept in the bed five nights per week at the time of the offending behaviour, and protocol and procedure dictates that testing is not advised in said circumstances.

**40.** The DPP submits that the door handle issue was the subject of evidence in the trial and was pursued ably by counsel for the appellant during his cross examination of witnesses.

**41.** The DPP refers to a number of cases including *The People (DPP) v P.C* [2002] 2 IR 285; *The People (DPP) v Boyce* [2005] IECCA 143; *DPP v Collins* (unreported, Court of Criminal Appeal, 22<sup>nd</sup> April 2002); and *DPP v M* [2015] IECA 65 and emphasises that the matter of the complainant's credibility was entirely for the jury.

**42.** In ruling on the application for the case to be withdrawn from the jury, the trial judge held that the delay of three months in making a complaint was not fatal to the case. He considered the issue of CCTV footage as being entirely speculative as to whether it would have assisted the appellant, noting that witnesses from the taxi company had given evidence and there was a great deal of agreement in terms of the movement from the locations and there was no indication that CCTV would have recorded any conversation between the parties. Witnesses such as the leasing agent and Gardaí who attended the scene gave evidence as to the state of the premises in the period after the alleged rape/sexual assault. The jury was in a position to assess and determine whether the issues such as the door handle, and windows being locked or otherwise, were important or not. He reiterated his ruling concerning the recalling of the complainant. He declined to withdraw the case from the jury, holding that the question of the complainant's credibility was a matter for the jury.

**43.** He said (inter alia):

*“The central issues in this case come down to something that happened between the two, if it happened and that is a matter in respect of which evidence has been given by the complainant and she has been cross-examined extensively in relation to the materials which emerged from her in respect of every word that she spoke or uttered in respect of these events. Whether from the intimacy of the encounters with counsellors in respect of virtually every aspect of her young life, every detail of which has been handed over to strangers and lawyers in the case. And that full opportunity has been availed of quite properly in the course of the case. And there has been a full determination of all central issues in terms -- or exploration of all the central issues in this case with the relevant witnesses who have been called to give evidence.*

*So I'm satisfied in relation to all of the matters which have been advanced as indicating reasons why a fair trial is not possible. That there is no substance in that proposition, and I am satisfied that the trial should proceed. Insofar as there is missing evidence, it's -- it occurs in circumstances which to a degree involves speculation as to what it might have been and also in relation to which the -- I'm not satisfied as to the -- that the materiality insofar as it -- there is some relevance of materiality or might have been, is of such a central nature, or such an important nature that it gives rise proportionately in the circumstances of this case to a finding, a necessary finding that the trial as it has proceeded, and as I've heard could be regarded as in any way unfair.*

*Insofar as I'm concerned, every single issue has been very professionally pursued to the appropriate level, with conspicuous professionalism and skill and it seems to me that the accused has been very well served in the presentation of*

*the defence which he has to this case, that these things did not happen and did not occur. And all of the material relevant evidence which has come about and been put together and indeed, some of it which did not form part of the prosecution case has been marshalled with effect to ensure the fairness of this trial, and to ensure that all of those relevant issues have been appropriately explored.”*

**44.** The trial judge did give a corroboration warning during his charge to the effect that it was dangerous to convict on uncorroborated evidence of a complainant. The matters identified by the prosecution as being corroborative of the accusations made were the complainant’s emotional upset on the train on the evening of the alleged crimes and the “lies” of the accused in his accounts of the encounter with the girl, firstly to his flatmate and then to Gardaí. The court described the complainant’s upset as being a weak form of corroboration in law. He told the jury it was a matter for them as to whether lies were in fact told and what the effect of that might be.

**45.** The Court is of the view that the failure of the trial judge to withdraw the case from the jury did not result in the appellant having an unfair trial. The scale of the delay by the complainant in reporting the alleged rape to her teacher (and to the Gardaí thereafter) was of a much lesser order than that often encountered in sexual offence cases. The complainant was only 15 years old at the time and appears to have been in the bad graces of her parents at the time because of having left the family home in the middle of the night, having been grounded the previous day for having arrived home drunk from a party. Her brother had been involved in confronting and assaulting the appellant and she said that she did not want to get him into trouble. We are not persuaded that the absence of CCTV evidence in this case was of any great importance as nothing particularly turned on their interaction on the

street in the early hours of the morning. Insofar as there were inconsistencies in the complainant's accounts, these were thoroughly highlighted in cross-examination but were not of such an order that the matter warranted withdrawal from the jury. It is true that the delay in reporting led to a situation where a clinical examination of the complainant when she did complain would have been futile but, as is clear from our discussion earlier, we are not persuaded that the trial was unfair insofar as it concerned the trial judge's rulings on the evidence regarding the blood on the bed and its possible origin. The inability to examine the scene (and the door handle in particular) was also something of a loss. Taking matters in the round, we do not consider that the loss of opportunities to obtain contemporaneous evidence by reason of the delay in reporting in and of itself brought the situation into one of a real risk of an unfair trial. The delay in reporting was one of three months. To suggest that the case should not have proceeded by reason of those circumstances would be tantamount to introducing (or perhaps re-introducing) a requirement of immediate complaint, akin to the old and discredited requirement to raise the "hue and cry". We have no hesitation in rejecting such an approach and consider that the particular matters to which attention is drawn on behalf of the appellant were matters which could properly be considered by a jury appropriately directed. There has been no complaint as to how the jury was in fact charged and we note that the trial judge *inter alia* gave a warning as to the absence of corroboration.

**46.** We reject this ground of appeal also and the appeal is therefore dismissed.