THE COURT OF APPEAL

[2015 No. 229]

Birmingham J.
Sheehan J.
Mahon J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARTIN STOKES

APPELLANT

JUDGMENT of the Court delivered on the 20th day of December 2016 by

Mr. Justice Sheehan

1. On the 5th August, 2015, following a seventeen day trial the appellant was convicted by a unanimous jury verdict of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981, the defilement of a child under fifteen years contrary to s. 2 of the Criminal Law (Sexual Offences) Act 2006 and two counts of sexual assault contrary to the Criminal Law (Rape) (Amendment) Act 1990, as amended. He was sentenced to twelve years imprisonment with the final two years of that sentence suspended for a period of twelve years.

2. The offences were alleged to have occurred on the 3rd June, 2011, at the Old Tuam Road, Monksland, Co. Roscommon.

3. The appellant now challenges his conviction and sentence. This judgment is concerned solely with the appeal against conviction, in respect of which he relies on fourteen separate grounds set out in the following way in his notice of appeal:-

> "(a) The learned trial Judge erred in law in failing to hold that the memoranda or statements taken from the appellant were inadmissible in evidence having regard to the behaviour and conduct of the gardaí in the course of the interviews.
>
> (b) The learned trial Judge erred in law and in fact in ruling that the behaviour and conduct of the investigating gardaí in the course of the interviews of the accused whilst in custody was lawful and/or not in breach of the Treatment of Persons in Custody Regulations, 1987.
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> (c) The learned trial Judge erred in law and in principle in admitting into evidence sections of the videotapes of interview as chosen by the prosecution.
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> (d) The learned trial judge erred in law, having admitted memoranda or statements arising from interviews of the appellant by the gardaí and having regard to the selective contents of the interviews played to the jury failed to warn the jury adequately as to the inherent dangers of relying on such memoranda or statements in such circumstances or in circumstances where the full content was not played to the jury and could not be so played.
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> (e) The trial was unsafe and unsatisfactory in that material of a highly prejudicial nature suggesting that the appellant had threatened the complainant subsequent to the offence went before the jury even though it was inadmissible and so ruled by the trial judge.
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> (f) The learned trial judge erred in law and in the manner in which he directed the jury as to prosecution evidence by contrast to his directions to the jury with respect to the defence case.
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> (g) The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to properly or adequately direct the jury in relation to the credibility of the complainant CS and, in particular, the failure to address key matters relating to conflicts in the evidence which impacted on her credibility.
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> (h) The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to properly direct the jury as to how it should attach weight to answers given to questions asked in cross examination insofar as he told the jury that a failure to call evidence to prove the premise of the question meant that the jury were bound to accept the answer as accurate.
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> (i) The learned trial judge in so directing the jury at (h) above undermined the right to silence of the accused and suggested that the accused must prove certain matters in order for any answers to questions given in cross examination to be treated as anything other than factually true.
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> (j) The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to properly direct the jury in relation to the manner in which they should approach and consider the medical evidence in the case.
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> (k) The learned trial judge misdirected the jury as to the nature of the medical evidence given in terms of the probative value of the same and failed to properly address the issue after requisition.
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> (l) The learned trial judge erred in law in directing the jury as to the burden of proof and standard of proof in relation to the defence under s. 3(5) of the Criminal Law (Sexual Offences) Act 2006 and the evidence related thereto.

(m) The learned trial judge failed to properly direct the jury as to the defence of honest belief with respect to the age of a complainant with particular reference to his failure to draw the attention of the jury to such evidence as may have supported the defence.

(n) The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to adequately direct the jury in relation to the issue of corroboration by not giving an adequate or sufficiently adequate direction to the jury.

(o) The learned trial judge imposed a sentence which was disproportionate and excessive, having regard to the circumstances of the offence and the circumstances of the appellant."

4. In the course of his oral submissions before this Court, counsel on behalf of the appellant submitted that even if no particular ground of appeal was sustained then they should be looked at cumulatively and on that ground the appeal should be allowed.

5. In order to consider these grounds of appeal it is necessary to summarise the principal features of the case.

Background
6. The prosecution case was that sometime between 6.45 p.m. and 7.00 p.m. on the 3rd June, 2011, the complainant CS was on her way to a friend's home when she met the appellant. In the course of her evidence she told the Court how she had met the appellant on a previous occasion when she had chatted with him. She stated that she thought he was sixteen years old as he had told her so on a previous occasion. She told the Court that he asked her to go with him for a few minutes as they walked down the road. She stated he kept asking her and that he said that he was only going to be a couple of minutes and that she then climbed onto a fence and jumped into a field and he followed her and that following this he told her to sit down whereupon he started to touch her breasts and digitally penetrated her and had sexual intercourse with her.

7. The complainant's evidence was that she was asking the appellant to get off her, that she did not want to do it and she said she told him she was only fourteen. She kept asking him to stop. When it was over she said that he asked her not to tell anyone. CS went to a disco with some of her friends that evening. She spoke to them about her relationships and she also sent a number of texts. She told the Court that she had been at school with a younger brother of the appellant and that the appellant himself had done some work for her uncle.

8. The appellant was 20 years old at the time and the prosecution case was that the appellant was aware that the injured party was not consenting, that she was crying and saying no. The injured party also said that she was afraid of what the appellant might do.

9. The appellant was arrested twice in connection with these offences. Between the first and second arrest the appellant's DNA had been found on the underclothes of the complainant. It was the defence case that there was sexual contact between the appellant and CS, but that this was consensual. This case was made through cross examination. The appellant did not give evidence. There was evidence that when he had been arrested and detained for questioning in June 2011 and in November 2011, that he denied on each occasion that he had any sexual contact with CS and also denied knowing her.

10. When the results of forensic analysis were put to him in interview, he denied the allegation and again denied knowing the complainant. He was ultimately charged in relation to the offences and remanded on High Court bail pending trial. As a consequence of his non-compliance with the bail conditions, an application was made to revoke his bail and he was remanded in custody.

11. There were two previous trial dates fixed in this matter, namely one in March 2014 and subsequently in February 2015, wherein the issues of a challenge to the interview was made known at a late stage.

Grounds (a) and (b)
12. While the memorandum of interviews were used by the prosecution to undermine the defence case and establish the basis for a "Lucas" warning, it was clear from these memoranda that the appellant was someone who, notwithstanding raised voices and abusive language, was able to withstand the suggestion that he had committed a rape. He maintained throughout the interviews that he did not know the complainant and did not commit the offence that he was accused of.

13. In the course of submissions in support of grounds (a) and (b) counsel on behalf of the appellant submitted that even though the appellant's will had not been overborne, the behaviour of the gardaí was such that the memoranda of interview on that basis alone should have been excluded. It was pointed out that the appellant, who was a smoker, had not been allowed to smoke in the interview room, but that one of the interviewing gardaí smoked an e-cigarette in his presence during the course of the interview. Counsel for the appellant submitted that this constituted oppressive behaviour on the part of the gardaí. Counsel also submitted that the treatment of Persons in Custody Regulations had been further breached by the failure of the gardaí to bring two specific complaints of the appellant to the officer in charge of the garda station and he also submitted that the appellant's right to privacy had been breached by the recording of his medical consultation. Further complaints were made about the failure to grant access to a doctor, to his solicitor and to his family.

14. The specific complaints relied on were that the appellant had been visited in his cell by one of the team of gardaí who interviewed him and that in respect of another matter his words had been twisted.

15. In the course of lengthy written submissions the respondent readily conceded that the medical consultation ought not to have been recorded. With regard to the other complaints made by the appellant, the respondent pointed out that the appellant had a number of consultations with his own solicitor none of which resulted in a complaint being made at the time to the gardaí or to the station sergeant.

16. Counsel for the appellant also submitted that the gardaí should have informed the appellant about the different elements of the offences with which he was being accused. Counsel for the appellant submitted that the gardaí were obliged, for example, to tell the appellant in the course of interviews that his view of the age of the appellant and whether or not he thought the complainant was consenting were relevant to any defence that he might have. Counsel for the respondent rejected this latter submission and stated that such matters were for the appellant to be advised by his solicitor.

The Trial Judge's Ruling
17. The learned trial judge gave his ruling on the admissibility of the garda interview on Friday the 24th July, 2015 and said at the time he would give his reasons the following Monday which he duly did.

18. In the course of a lengthy ruling, the learned trial judge stated:-

"Well, the defence challenges the admissibility in evidence of the interviews of the accused by the gardaí. This challenge is based primarily on two submissions. First is the alleged inappropriate police interrogation, the use of abusive and inappropriate language, creating an environment of oppression during his detention? The second submission of concern relates to the lack of access to legal advice granted to Mr Stokes. It is the case put forward by the defence that these matters are in breach of the Criminal Justice Act 1984 Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987 and, in particular, of articles 3, 9.2, 12.12 and 12.10 therein.

To deal first with the second of these two points, that is the complaint as to the lack of access to a solicitor, in considering this point it is helpful to give a résumé of the chronology of the accused's detention. He was arrested at 9.10 a.m. on the 9th of June, 2011, was then brought to Athlone Garda Station, was interviewed by the gardaí and ultimately released the next day at 3.20 p.m. The accused was interviewed six times, covering a total period of about 11 hours. Mr. Stokes arrived in the garda station under arrest at about 9.22 a.m. He asked for a solicitor at 9.34. His solicitor was notified at 9.38, after which the solicitor called to the station and began the first consultation at 9.52, which lasted until 10.10 a.m. During the total period of detention, the accused had nine consultations with his solicitor, Mr. Owen Carty, seven face to face in the garda station and two on the telephone.

It is true that in the course of interviews Mr. Stokes frequently asked for a solicitor but in that regard it is to be noted that these requests were usually made at a point when the accused wished to terminate the interview. It seems that his wish to terminate the interviews was from a sense, by him, that the gardaí were not believing his persistent denials. However, at the times of these requests the accused did accept that the access to his solicitor could occur after the completion of the particular interview. These interviews were conducted in June 2011 at a time when it was not the practice for solicitors to attend such interviews, nor was there a legal expectation that they had a right so to be present.

In the light of this, there is no basis for holding that the accused was deprived of his right of access to a solicitor, either under the said regulations or under any issue of fairness to him. On any interpretation of the facts as were revealed in the evidence, it cannot be held that the accused was denied reasonable access to his solicitor.

The other of the two principle submissions is the alleged inappropriate interrogation, the use of abusive and inappropriate language creating an environment of oppression during the detention of the accused. During all of the six interviews the accused denied the allegations put to him. He denied knowing CS, the complainant. He denied having any sexual contact with her. He denied knowing where she lived or indeed ever having been there on the 3rd or 4th of June, 2011, the two days when, on the prosecution case, he was seen there.

The defence submissions concentrate particularly on the first three of these six interviews. At the request of the defence I watched here in court all of the first two of them and small parts of the third and fifth. The first three interviews were conducted by Garda John Quinn and Garda Bridget Byrne. Now, having viewed this footage it is clear that at times Garda Quinn used agricultural language, he shouted at Mr. Stokes and he refused to let Mr. Stokes finish his answers. It is not an acceptable explanation that the garda was only using the same profane language or colloquial language as it's quaintly described, using the same profane language as the suspect and only shouting in the same way as was Mr. Stokes. The gardaí are expected to rely on standards other than that with which they may have to deal with in other people.

Nonetheless, having said all that, I must take the following matters also into account; first, these unfortunate lapses occurred for a very small proportion of the whole, only for a matter of minutes in interviews which lasted a total of about 11 hours. The vast majority of the interviews at least that, which I viewed, were conducted in a calm and civilised atmosphere. Secondly, nothing new emerged from any of these heated exchanges. Mr. Stokes did not change his account as a result of any of the matters complained of. Thirdly, Mr. Stokes gave as good as he was being given. There's nothing at all in the video footage that I viewed to suggest that he was unduly perturbed by any of it or that his will was in any way over borne."

19. The learned trial judge went on to deal with a number of other complaints made by the appellant and concluded as follows:-

"Now, apart from considering the details of the individual complaints I must have regard to the generality of the facts and to the overall context to judge everything that was happening and in this regards I hold the following; first, the tapes were never stopped, so that everything that occurred is there for all to see, warts and all; secondly, there's no basis on the facts to find that there was any mal fides, lack of bad faith on the part of the investigating gardaí; thirdly, the actions of the accused on the video recording are not those of a man whose will was over borne. Indeed, at all times he remains robust, defiant, persistent with his account and at times important to him speaking into the camera.

The accused has waived his right to privacy in consenting to the introduction of evidence in the *voir dire* of what the doctor said to him at the medical consultation in the interview room."

20. Before proceeding to consider the above extracts from the trial judge's ruling it is necessary to point out that section 7(3) of the Criminal Justice Act 1984 provides:-

"A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him."

21. It is also important to note Regulation 3(1) of the Garda Síochána Custody Regulations of 1987 which provides:-

"In carrying out their functions under these regulations members shall act with due respect for personal rights of persons in custody and their dignity as human persons, and shall have regard for the special needs of any of them who may be under a physical or mental disability, while complying with the obligation to prevent escapes from custody and continuing to act with diligence and determination in the investigation of crime and the protection and vindication of the personal rights of other persons."

22. A clear implication of the trial judge's ruling is that he found a breach of regulation 3(1) of the Treatment of Persons in Custody Regulations 1987 and a further implication is that he found that breach not to be of such seriousness as to render inadmissible the denials made by the appellant, (see section 7(3) of the Criminal Justice Act 1984).

23. It is clear from the lengthy extracts taken from the judge's ruling in these matters that he gave them very careful consideration.

We endorse his comment concerning the standards of behaviour expected from members of An Garda Síochána. Had the improper behaviour of the gardaí resulted in the will of the appellant being overborne fully or in part then obviously very different matters would have arisen for consideration by the trial judge. In our view the trial judge dealt thoroughly with the submissions made on behalf of the appellant. It is clear from the transcript that he carefully analysed the garda interviews. We are satisfied that the learned trial judge was entirely justified in reaching the conclusions that he did especially taking into account the fact that he had heard the relevant garda witnesses give evidence during the course of the *voir dire*.

24. We are not persuaded by the appellant's submissions that the gardaí having accused the appellant of raping a fourteen year old girl should then inform the suspect of the defences that might be open to him. Such suggestion is fraught with difficulty and it is entirely within the remit of the suspect's legal advisers to deal with such matters. We agree with the respondent's submission that such an argument should be rejected out of hand. Accordingly, we reject the grounds of appeal at (a) and (b).

Ground (c) and (d)
25. During the course of the trial, counsel for the prosecution proposed to play certain extracts from the video recordings of the garda interviews with Martin Stokes. These extracts were admitted by the trial judge following submissions made on behalf of the appellant to the effect that it would be unfair to the appellant to play the extracts to the jury. Counsel based his opposition on a number of grounds. He submitted that each of the records of interviews and extracts contained materials which were not recorded in the memos of interview and thereby would cause confusion for the jury. The second reason was that the jury had the benefit of the knowledge of the contents of the memos of interview including the fact that the appellant had denied knowing the complainant or having had sexual intercourse with her. Thirdly, counsel submitted that there were sections of the interviews which the defence wished to have played but could not do so because of the reference to prejudicial and inadmissible evidence. Counsel further contended that this resulted in unfairness to the appellant and an inequality between prosecution and defence. Finally, counsel complained that some of the extracts included stopping and starting content mid-sentence and this did not provide any context to the statement and resulted in unfairness and prejudice to the appellant. Counsel submitted that the reason for showing these extracts was simply to show the appellant in a bad light. Counsel submitted that the prejudicial effect of the extracts on the appellant outweighed their probative value and consequently should not have been admitted by the trial judge.

Decision
26. It is important to note that prior to interviews being recorded, the appellant in this case was told that the video recording might be shown in evidence. Regulation 6(2)(a) of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 provides for the following caution:

> "You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence. As you are aware, this interview is being taped and may be used in evidence."

In the course of cross-examining witnesses in the case, counsel for the appellant challenged the manner in which the appellant had been interviewed by the gardaí. The video extracts were relevant to show the demeanour of the appellant at a particular time and were also relevant to the jury's consideration of the reasons for his telling lies at that point in the garda interviews. These interviews were relevant and admissible and the trial judge was entirely correct in his ruling on this matter.

27. While counsel for the appellant criticises the trial judge for failing to warn the jury adequately with regard to what he says are the inherent dangers of relying on such video extracts of the memoranda of interview, such a warning was unnecessary. Furthermore, this was not the subject of a specific requisition. The video extracts enabled the jury to assess the demeanour of the appellant at a particular point in the garda interviews and no more. Other evidence in the case had clearly demonstrated that the appellant had been arrested and detained in respect of an allegation of raping CS and there was no need for the trial judge to remind the jury of this. This ground of appeal is also dismissed.

Ground (e)
28. On two occasions, witnesses introduced inadmissible evidence to the effect that the appellant had communicated a threat against the complainant through two young girls who had called to her family home following the events that had occurred. These two children were not witnesses in the case. When this inadmissible evidence occurred, counsel for the appellant specifically told the trial judge that his instructions were to proceed with the trial. It is not now open to the appellant to advance this ground of appeal as a stand alone ground. This however, does not prevent counsel from the appellant asking us to consider these matters if we reach the point where we are obliged to consider all grounds of appeal in a cumulative way.

Grounds (f) and (g)
29. In the course of his submissions under these grounds of appeal, counsel for the appellant maintained that the charge to the jury was imbalanced; that the trial judge had spent more time on the prosecution case than the defence case. Counsel also submitted that the trial judge, when directing the jury in respect of the medical evidence, the appearance of the complainant, the presence of the fence and the lies told by the accused, failed to properly or adequately address the jury with regard to the details of the defence case in contrast to the manner in which he had addressed the prosecution case.

30. Counsel for the appellant in particular complained about the following passage from the trial judge's charge:

> "In all of what happened in the nightclub and in the exchange of phone texts, there was an unreal world. You know teenagers lie and they act with bravura when it comes to sexual claims. Ms. Walley (prosecution counsel) says 'it was always so'. I'll have to take her word for that. I don't know but she says 'it was always so, only that today it is more explicit'."

In support of his submissions in respect of these two grounds of appeal counsel relied in particular on the judgment of the Court of Criminal Appeal in *DPP v. JS* [2013] IECCA 41, in which MacMenamin J. had stated at para. 31 of his judgment:

> "A trial judge may in fact comment on evidence and arguments put forward but he cannot comment to a degree which imperils a fair and proper trial. The acid test is whether taken as a whole the summing up is balanced and fair. But that is not to say that when directing a jury a judge is disentitled to express his opinions on the facts of a case provided that he leaves the issues of fact to the jury to determine. A judge is, of course, not entitled to use language such as to lead a jury to lead them to think that they must find the facts in a particular manner."

Decision
31. It is true that the trial judge spent more time on the prosecution case, but this is hardly surprising. The appellant did not give

evidence. Nor did he make his case to the gardaí during the course of his garda interviews as is frequently the case. Rather, the defence case was made through questions of counsel in cross-examination.

32. The extract from the charge that counsel for the appellant complains of arose in circumstances where the trial judge was paraphrasing the arguments of both sides and also addressing the jury on the question of the credibility of the chief prosecution witness, namely, the complainant. While that passage, on its own, might attract adverse comment, it has to be seen in the context of the total charge. As MacMenamin J. stated "as always, the essential question is whether there was unfairness". This is the question that this Court must address. A careful analysis of the judge's charge and the recharging following requisitions discloses no unfairness to the accused and these two grounds of appeal must fail.

Ground (h) and (i)
33. These grounds of appeal arise following a request by prosecution counsel to the trial judge to explain to the jury that questions asked or scenarios posited by counsel are not evidence. In response to this request the trial judge addressed the jury as follows:-

> "The first matter to say this morning is that as I said yesterday, you try this case on the evidence and the evidence is what the witnesses say in the witness box and the exhibits and nothing else. And questions that are put by counsel in cross-examination which are denied by the witness are not evidence, so if a matter is put in cross-examination and the witness denies it and there's no further mention of that particular fact, nobody else gives evidence about it, then it's to be disregarded. It's not part of the evidence. It was put to Ms. CS in cross-examination that she and the accused had met earlier in the off-licence, that there had been some discussion about buying alcohol with an age card, that there had been an arrangement to meet later, all of which was denied by Ms. CS and none of which was referred to by any other witness. So they are not evidence and cannot be relied on as such. Similarly, it was put by counsel to Ms. CS that there was consensual sex and in that regard, that Ms. CS was on top of the accused and was urging him to come harder, I think was -- or to engage in harder sex. That was denied by Ms. CS and those matters, the position of the parties and Ms. CS asking for harder sex were not mentioned by anybody else so they are not part of the evidence and can't be relied on. Counsel is at liberty to ask these questions in cross-examination but counsel is bound by the answer, so if the answer is no, that's the end of the matter. And that's important, members of the jury, to remember that in considering matters that you are taking into account and which you are not taking into account."

34. Counsel complained that the manner in which the trial judge dealt with the question as to how the jury were to treat counsel's questions in cross examination suggested that by saying counsel is bound by the matter and that is the end of it, that this had the effect that when counsel suggested to the complainant that she had engaged in consensual sex and she said no, the jury was stuck with her answer and obliged to accept it as truthful.

35. It is correct to say that the manner in which the trial judge phrased his explanation is at best incomplete, but this explanation has to be seen in the context of the overall charge where the judge made it clear to the jury that the credibility of the complainant was a matter for them. Indeed if one were to take the interpretation of counsel for the appellant at face value then there would be nothing for the jury to consider. That this did not happen is demonstrated by the fact that in the course of their deliberations, the jury returned with a request that the trial judge remind them of the DNA evidence in the case.

36. Counsel for the appellant further submitted that this part of the trial judge's charge effectively undermined the appellant's right to silence as it is suggested that the appellant when instructing counsel to put the defence of consensual intercourse to a complainant as a defence to a rape must in effect give evidence in order for the defence to be considered by members of the jury. Again counsel for the appellant seeks to ring fence this part of the charge. The learned trial judge stated at least twice what the appellant's defence was. He spoke about the appellant's right to silence at the outset of his charge:-

> "And I'll go on now to the next principle, which is the -- I might describe as the right to silence, which really means that an accused person or a suspect in a criminal investigation is not obliged to say anything, has the entitlement to remain silent, and that relates in particular to questions -- being questioned in police custody, and also of course in the course of the trial itself."

37. He concluded by saying that in the majority of cases an accused person does not get into the witness box. He said there was nothing unusual about Mr. Stokes' stance on this particular point. He said that he was in fact following the norm and not the exception.

38. Accordingly we dismiss both of these grounds of appeal.

The Medical Evidence ground (j) and (k)
39. The appellant submits that the learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to properly direct the jury in relation to the manner in which they should approach and consider the medical evidence.

40. The complainant attended a Sexual Assault Treatment Unit some 24 hours after the incident. Counsel for the appellant submitted that the trial judge failed to properly direct the jury in relation to the evidence of Dr. Barbara Hynes of the Sexual Assault Treatment Unit and in particular to that part of her evidence where she stated that the redness or erythema that was present on the complainant was as consistent with consensual sexual intercourse as non consensual sexual intercourse. Counsel further submitted that the trial judge failed to properly direct the jury in relation to aspects of medical evidence in the case which was consistent with the defence case.

41. In the course of her examination in chief, Dr. Hynes told the Court that there was generalised erythema on genital examination which was consistent with the possibility of non consensual sexual intercourse. Dr. Hynes went on to say that it was consistent with non consensual sexual intercourse because in approximately 50% of cases there was no more definitive trauma. Apart from the generalised erythema, the complainant reported tenderness of the right arm but there was no bruising, scratches or otherwise obvious injury to her. Both the investigating garda who accompanied the complainant to the Sexual Assault Treatment Unit and Dr. Hynes gave evidence to the effect that the complainant told them that there had been no bleeding. In response to a question put in cross examination by counsel for the appellant, Dr. Hynes said that there was no report of bleeding at the time she examined the complainant and that she would have seen it unless the bleeding was "intermittent." However she never saw any bleeding.

42. Counsel submitted that the trial judge failed to make reference to the fact that Dr. Hynes accepted that the erythema was equally consistent with consensual sexual intercourse and further submitted that there was speculative evidence going to the jury which rendered the trial unfair. In particular, counsel placed emphasis on Dr. Hynes' reference to intermittent bleeding and her reference to the possibility that victims of sexual assault can often freeze in the moment. Counsel submitted that it was unfair and

unsafe to allow this evidence to go to the jury. Counsel said the reason that the reference to the freezing undermined the defence contention was that the defence case was that there was a physical struggle and consequently it would be reasonable to expect that there would be scratches or various other marks and injuries on the body of the complainant. Counsel argued that as the complainant did say that the accused was on top of her and she tried to push him off there had been a struggle.

43. Counsel on behalf of the respondent rejected these submissions that the trial judge had failed to adequately deal with the medical evidence in his charge to the jury. Counsel submitted that the jury were both correctly and properly charged with regard to this evidence and counsel said that the evidence had been set out fairly by the trial judge. Counsel further submitted that the evidence of Dr. Hynes was not speculation but an expert opinion. Counsel for the respondent further submitted that the evidence of Dr. Hynes needed to be looked at in the round to put the submissions into context. It was expert opinion that sometimes people freeze and this was given in response to a question in cross examination. Counsel also argued that the evidence that emerged at trial was not that there was an extensive struggle but that the complainant was pinned down by the appellant. The complainant also gave evidence that she stopped trying to fight him off early on in to the incident. Counsel also said the physique of the two parties was important in this context. The complainant was very small and slight in stature, whereas the appellant was big and strong. Counsel for the appellant submitted that it was not put to the jury strongly enough that there was no evidence of the complainant freezing or that there was no bleeding or other injury found when the complainant was examined by Dr. Hynes.

44. When the learned trial judge charged the jury with regard to the medical evidence, he omitted to point out to them that Dr. Hynes had conceded in cross examination that the redness of the external and internal genitalia was consistent to consensual sexual intercourse as well as non consensual sexual intercourse.

45. Counsel for the defence requisitioned the trial judge on this matter and on other matters related to the medical evidence maintaining *inter alia* that the trial judge should inform the jury that the doctor's evidence about the possibility of the complainant freezing and possibly bleeding intermittently was speculative. Counsel also expressed concerns about the judge's failure to deal with the issue of whether or not the complainant had been bleeding. It is noteworthy to point out at this stage that while the trial judge did not deal with the complainant's evidence that she had been bleeding in the context of the medical evidence, he nevertheless dealt with it when dealing with defence case and stated as follows at line 27, p. 80 on day 16:-

> "The case for the defence on this, on her reliability, is first of all the defence say it is incredible that she went into a field with a man she hardly knew and whom she thought was freaky. It's beyond belief that she went into the field with such a man and had no idea why he wanted her to be there, from a girl who may have been 14 but was sexually enough aware, if one has regards to the text messages which we've seen. The defence make the case that she said she was bleeding but no blood - after the incident, but there was no blood was found on her clothes, on her panties and she didn't - or on her panties, because her other clothes apparently haven't been part of the investigation. And she didn't tell the gardaí or the doctor that she had been bleeding."

46. The learned trial judge recharged the jury on the medical evidence and this appears at line 34, p.18 of the transcript on day 17, 5th August, where he states:-

> "I'd like to touch again on the medical evidence. Now, the medical evidence was that there was redness or erythema on the outer -- external and internal genital area of CS and this was consistent with trauma from unconsensual sex but the evidence of Dr Hynes was that it's also consistent with consensual sex. It's consistent with either. The doctor added that the absence of other injuries is not necessarily consistent -- inconsistent with unconsensual sex in that the -- in 50% of cases such absence of such injuries may happen in unconsented sexual cases. There were --so, I think the position is that the redness that was found is consistent with either consensual or unconsensual sex. There was tenderness on her forearm. There was stretch marks, which I think are called striae -- I hope I'm pronouncing that correctly -- but anyway they were stretch marks, not scratches but stretch marks on her buttocks and thighs, which could be consistent, according to the medical evidence, with adolescence -- growing up, adolescence. There is the absence of other marks evidence of injuries Dr Hynes said is not unusual, not unexpected, in that a victim can freeze in the experience. Now, the defence say there is no evidence that CS froze but on the other hand the prosecution says that on her evidence she gave evidence that she was pinned down by this man who was on top of her and that's the position of the prosecution on the point. She said in her evidence that she was bleeding. The doctor didn't find any evidence of bleeding, although she says she -- there could have been bleeding which was intermittent. The doctor didn't carry out any further invasive examination which might have revealed it in order to avoid aggravating the trauma but in any event on the defence case CS herself said it was -- that at the time she said that there had not been bleeding, whatever she said in her evidence in the case."

47. The question that arises for our consideration is whether or not the judge's charge resulted in unfairness to the appellant. In the first instance it was important that the trial judge effectively neutralised the main thrust of the medical evidence in his recharging of the jury and this he did. Following the recharge to the jury, counsel for the appellant stated:-

> "And then, critically, Judge, on the bleeding aspect of it, I respectfully submit that this is very, very important that the jury understand exactly what Ms. CS has presented to them. Ms. CS told the jury that she reported bleeding, but both the guards, both the guards who attended at the examination, and the doctor, were quite specific in saying that she reported that there was no bleeding."

48. The learned trial judge refused to charge the jury any further.

Decision

49. In considering the submissions under this heading, it is important to note what Coonan and Foley say at p. 21 of the *Judge's charge in Criminal Trials* under the subheading F. Standards expected in a summing up:-

> "It is unreasonable to expect perfection in the summing up. As was said by the Ontario Court of Appeal in *R. v. Baltovich*:-
>
> > 'Much has been said in recent years about the complexity of jury charges and the need to simplify them. Trial judges face a difficult task in this regard, especially when it comes to explaining complicated issues of law. In R. v. Jacquard, Chief Justice Lamer observed that while 'accused individuals are entitled to properly instructed juries', there is 'no requirement for perfectly instructed juries'. Those words are as true today as they were then. No one expects perfection in a jury charge. Mistakes are bound to occur.'" 2-15

50. It is clear from an examination of the trial judge's charge that he dealt fairly with the question of the medical evidence. Any unfairness that might have resulted from the original charge, in particular his failure to underline to the jury that the medical evidence was also consistent with consensual sexual intercourse, was adequately remedied in the recharge. We are satisfied therefore that these grounds of appeal must be rejected.

Ground (l) and (m)
51. These grounds of appeal relate to that part of the trial judge's charge where he dealt with the offence of defilement and the defence of honest belief. Counsel for the appellant maintained that the trial judge erred as to the standard or burden of proof in relation to this matter, and further that he failed to properly direct the jury as to the defence of honest belief with respect to the age of a complainant, with particular reference to his failure to draw the attention of the jury to such evidence as may have supported the defence.

52. In considering the appellant's submissions, it is necessary to have regard to s.2 of the Criminal Law (Sexual Offences) Act 2006 and the relevant parts of the trial judge's charge, again, bearing in mind that in this case, the defence case was put in the course of cross-examining witnesses. The material in the case on this matter as to the state of mind of the appellant at the relevant time was necessarily limited. Section 2 of the Criminal Law (Sexual Offences) Act 2006 provides:-

> "2(1) Any person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.
>
> (2) Any person who attempts to engage in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.
>
> (3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years.
>
> (4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.
>
> (5) It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted."

53. In the course of his submissions, the appellant relied on s. 2(4). In the course of his charge, the learned trial judge stated at p. 73 of the transcript for 4th August, line 23, the following:

> "Now, if I can just -- it's an offence to have sexual intercourse with a child who is under 15 years. That's the first point. Secondly, it is a defence to show that the defendant, the accused, honestly believed that at the time, the child had reached the age of 15 years. Now, if you, the jury have to consider whether or not he did honestly so believe, that the child had reached the age of 15 years, if you're assessing his belief, you shall have regard to the presence or absence of reasonable grounds for the accused so believing, and have regard to all other relevant circumstances. And then the last thing to say is, it is not a defence to say a complainant consented. So if I can just resume that as best I can. First of all, it is a crime to have sex with somebody who's under -- to have a sexual act with a girl under the age of 15. It is not a defence to say that the girl consented, so in that sense, it's an absolute crime. The consent or not of the complainant is irrelevant, that is not a defence. But if the accused -- it can be established that the accused honestly believed that she was over 15, then that would be a defence, but in assessing that belief, you can have regard, as I say, to the presence or absence of reasonable grounds for him so believing, and all other relevant circumstances. Now, the burden of proof is on the prosecution, and that burden never shifts to the defence. So the prosecution has to prove that he didn't know, or to be more accurate, the prosecution has to prove that there is not a reasonable doubt that he knew that the complainant was under the age of 15."

54. As is apparent from the transcript of 4th August, 2015, the learned trial judge went on to state:

> "The appearance of the complainant is another issue. Now, this has to do with whether or not she was -- the accused knew or should have known that she was over -- she was under 15. Now, it was the evidence of NM (a witness for the defence) that when she remembered from the time she was shown the photograph that was taken in the garda station of CS at the time and NM said that, 'when we went out she looked a lot older than she actually was. She doesn't look like she is around 15 or 16' and it's the defence case on this point that, first of all, there's that evidence of NM. The defence say that the photograph -- the garda photograph is of very poor quality. The defence case is that it's only a difference of a year but she was just past 14. She was 14 years and a month, which is only 11 months younger than 15, and the text messages suggest somebody who is older. That's the case for the defence. The case for the prosecution though on this point is -- and this was a point -- these were points which were accepted in cross examination by NM -- is that when a young girl is going out at night all dolled up that it's quite a different look to when she is wearing her trackies and going out during the day. NM agreed as well that schools, particularly for 12, 13 and 14 year olds but also for 16 and 17 year olds, do not allow make up on young girls. The prosecution case is that on the day of the incident she was wearing day to day clothes and was not made up. There is no -- the prosecution case is there is no reason to suppose that the appearance of the complainant was -- on the day was different from that in the photograph. There's no suggestion that the photograph was concocted or made up, and there's no reason to believe at the time that the complainant had any reason to anticipate that this was going to be an issue and accordingly doctored the photograph or doctored her appearance. The prosecution makes the point, finally, that anyway it's not what NM believed or anybody believed at the time. The law is what the accused believed at the time and we do not have any evidence as to what the accused knew at the time. In fact, there is the evidence of CS that she had told him a year earlier that she was 13 and told him at the time of the intercourse that she was 14, but that's what the prosecution says but what he knew, what he believed as a matter of fact is a matter for you, ladies and gentlemen, not for the prosecution but that's the point the prosecution makes, that there is no evidence from him on the point."

55. Counsel on behalf of the appellant requisitioned the learned trial judge on these matters and in the course of recharging the jury stated:-

> "Now, with regards to the belief by Mr. Stokes that CS was overage, was over the age of 15 -- because there are two issues in the case; the first was, was what happened done with CS's consent and secondly, with regards to counts two, three and four, there is the question, issue of whether or not he honestly believed that she was over 15. Now, in making an assessment on the second issue, his honest belief, you can of course take into account any evidence in the case, matters other than what might come from his own mouth, what other people said or the circumstances that other people describe. You may take those mattes into account but at the same time the question here is what he believed, not what anybody else believed or what anybody else might have believed. It's what he actually believed is what the issue is and you have to assess the evidence in making an assessment of what he honestly believed at the time, and in that regard you have the evidence about the fact that while she wore make up when she went to the -- when she went out at night to the Teen Kicks or wherever and that she did wear make up at times during the day, there is the evidence that the schools didn't allow it, that this was a school day and there's no evidence that she was wearing make up at the time, in addition to which there is a photograph which nobody suggests was concocted or doctored to meet the situation, which shows her as she was the following day, and of course there is as well the evidence of CS herself who says that she told him when this act was proceeding that she was 14 and she said that she had told him a year before at that time that she was 13. That's the evidence that CS gave. That's the evidence in the case and I'm emphasising somewhat what the evidence in the case is because it's the evidence on which you have to make a judgment and nothing else, members of the jury."

56. In our view the extracts from the judge's charge which we have referred to above demonstrate, if such demonstration be needed, that not only did the trial judge properly explain to the jury the burden of proof on this issue, but he also dealt fairly with the question of honest belief when he was directing the jury. Accordingly we reject both these grounds of appeal.

Ground (n)

57. Counsel submitted that the trial judge erred in law or in fact or in a mixed question of law and fact in failing to adequately direct the jury in relation to the issue of corroboration by not giving an adequate or a sufficiently adequate direction to the jury. This ground of appeal is linked with the issues regarding the Lucas warning discussed in an earlier part of this judgment. Counsel on behalf of the appellant submitted that the trial judge during his charge made reference to the issue of corroboration and in particular to lies told by the appellant in interview which the prosecution contended were corroborative of his guilt. Counsel was unhappy with the following paragraph of the trial judge's charge which he highlighted:-

> "To warn you to be careful in a case of a sexual allegation is not to tell you to acquit the accused. It is, as I say, just to tell you to be particularly careful. I'm not telling you to find the accused not guilty, I'm telling you to be careful, and I'm saying that if you are still satisfied beyond reasonable doubt that you can rely on the evidence of the complainant, then, you can convict the accused."

58. Counsel submitted that there was other evidence before the jury in this case that could have been considered by them in the context of the credibility of the complainant and that the trial judge erred in law and in fact in the manner in which he directed the jury with regard to these. Counsel in particular highlighted the fact that there was no corroboration for the complainant's testimony in the context of the medical evidence (for example the lack of bleeding and the lack of scratch marks). Counsel also submitted that the trial judge failed to adequately direct the jury with regard to the complainant's distressed state at the disco, the conversations she had with friends at the disco, the fact that the complaint emerged in the context of a family row in an emotionally charged atmosphere, the evidence of the relationships between the complainant and other boys in text messages and the evidence of NM, a former friend, regarding her appearance at the time.

59. Counsel submitted that the trial judge ought to have acceded to requisitions on these points and in failing to do so, had failed to properly address the jury in relation to the evidence regarding corroboration.

Decision

60. First of all it should be noted that the matters referred to by counsel in the latter part of the submission had all been mentioned by the trial judge in the course of his charge to the jury and in particular when he was putting the defence case. It is also important to note, as we have already indicated, that when dealing with the medical evidence in his original charge, the trial judge failed to tell the jury that the medical evidence was consistent with consensual sexual intercourse. However, as has already been pointed out, he dealt with this matter adequately when he re-charged the jury.

61. It is important to note that in the above extract relied on by counsel for the appellant the trial judge was at that point in the process of giving a "Lucas warning". The complaint of the appellant has to be seen not only in the light of that extract, but also in light of the charge as a whole and particularly in light of the following:-

> "Now experience has shown that complaints in sexual cases are sometimes made which are false and complaints in sexual cases can be a false story in a sexual allegation can be easy to fabricate, but difficult to refute. That is in the nature of the offence. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all and an allegation of sexual assault may be fabricated for a hidden motive and this has happened in the past. So this means that you must scrutinise the evidence with particular care. You must look to see if there is any independent evidence implicating the accused. In other words whether or not there is corroboration."

62. We are satisfied that an examination of the transcript discloses that the trial judge's charge on the issue of corroboration was adequate and accordingly we reject this ground of appeal.

63. Counsel for the appellant submitted that if this Court rejected each ground of appeal it should then look at all the grounds cumulatively and in light of the effect of the cumulative complaints of the appellant allow the appeal against conviction. We do not consider that any ground of appeal has been made out to such an extent that this would require us to look at the grounds of appeal in the manner that counsel suggests. Accordingly we reject this final ground of appeal and the appeal against conviction is dismissed.