



THE COURT OF APPEAL

Record Number: 50/17

Birmingham P.  
Edwards J.  
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

- AND -

RESPONDENT/

P.K.

APPELLANT

**JUDGMENT of the Court delivered on the 29th day of July 2019 by Ms. Justice Kennedy.**

1. This is an appeal against conviction. The appellant was convicted of three counts of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 before the Central Criminal Court on the 16th December 2017 and received a sentence of seven and a half years' imprisonment with the final two and a half years suspended on terms.

**Background**

2. By way of background, the appellant and the complainant were in a relationship from approximately 2011 to 2014. The complainant became pregnant by the appellant in early 2013 and gave birth to their daughter in November 2013. The complainant became pregnant again in March 2014 which was a considerable source of stress for her and the relationship between the parties continued to deteriorate. On St Stephen's Day in 2014, the complainant presented herself in a distressed state at Rathmines Garda Station, complaining that she had been anally raped by the appellant in the early hours of Christmas Eve 2014. During the garda investigation of that complaint, three incidents of sexual assault, the subject of the present conviction under appeal, came to light. The injured party gave evidence that the appellant told her that he had previously drugged her and that when she fell asleep he had done things to her and recorded them and had them all on video.

3. On the 26th December 2014, the Gardaí, who were in possession of a search warrant, searched the appellant's flat and seized, *inter alia*, a mobile phone belonging to the appellant which was found to contain three video clips dated the 5th, the 8th and the 10th November 2014. Each was recorded by torch light and each showed a male hand exploring the complainant's anal area with his fingers and on occasion digitally penetrating her anus. In two of the three videos, the complainant is wearing sanitary protection and she does not appear to move during the videos.

4. During his trial, the appellant rejected the assertion that he had drugged the complainant, arguing that the sleeping pills in his possession contained an anti-spike property which, it was argued would make it extremely difficult to drug somebody without their knowledge. Instead, he argued that the videos were taken with the complainant's consent and knowledge. The jury returned a unanimous verdict of guilty in relation to the counts of sexual assault.

5. The appellant was also tried for a count of rape and a count of anal rape. The jury disagreed on these counts in this trial and the appellant was ultimately found guilty of these counts after a re-trial.

**Grounds of Appeal**

6. The appellant puts forward a number of grounds of appeal in his notice of appeal, however on oral hearing the grounds were confined to grounds 1, 3 and 4. The terms of grounds 1 and 4 were modified in scope and thus the grounds pursued, as renumbered, are as follows:-

- (1) The Trial Judge erred in her charge;
- (2) The Trial Judge demonstrated objective bias;
- (3) Without prejudice to the foregoing the judge interjected excessively, made adverse comments and entered the arena to the detriment of the Appellant.

7. We will address the grounds in the order which they were argued before us.

**Ground 2 - Objective bias**

**Appellant**

8. Mr Bowman S.C. on behalf of the appellant first advanced his argument concerning objective bias on the part of the trial judge. He argues that objective bias was evident throughout the trial and refers to several specific instances including an occasion during the trial where it is argued that the trial judge advised the prosecution on issues of proof.

Mr Bowman contends that the trial judge's attitude towards the appellant became crystal clear at a point in the trial, when, during his direct testimony, following an answer by the appellant, an exchange took place in the absence of the jury. To place this exchange in context it is necessary, firstly to observe that the trial judge had refused leave to cross-examine the complainant on certain aspects of the relationship and secondly, to refer to the question and answer which preceded the trial judge requesting the jury to retire.

"Q. And whose idea was it to make love in that fashion?

A. I would say just it just became part of our relationship, like, our sexual relationship. It just it was just there. It was never it was never an issue. It was never talked about or anything, like. There was aspects of our sex life that was odd but we would discuss them and I kind of understood what sorry, your honour, I can't explain it without going into things I'm not allowed talk about so but there was aspects of our relationship that was odd, like, you know, that

JUDGE: I think if I'll ask the jury to retire for a moment, thank you."

There then followed an exchange in the absence of the jury. Mr Bowman argues that the approach on the part of the trial judge clearly demonstrated that she held a negative attitude towards the appellant.

"JUDGE: Well, how clever, Mr O'Carroll.

MR O'CARROLL: That just took me completely by surprise, Judge.

JUDGE: Well, indeed, me too. You have sat in this courtroom for two weeks now.

WITNESS: Well, I can't explain myself, your honour, unless I explain myself, you know.

MR O'CARROLL: But the Court gave permission to deal with all of these matters and A was cross examined about as well, so there's no impediment on you talking about those matters.

WITNESS: Well, I can't I can't explain why A had a problem with me touching certain parts of her body and she did have a problem and it used to upset her and everything and all and

JUDGE: Clearly not if you were having sex with her four and five days a week.

WITNESS: Well, that's presumptuous of you, your honour but

JUDGE: I beg your pardon.

WITNESS: That's your presumption.

JUDGE: No, sorry, that was your evidence to the guards.

WITNESS: My I can't explain honestly how our sex life went without explaining, I need to explain and it was a major part of our sex life, yes, it was. It was very upsetting for A, she discussed it with me quite often, she would cry about it, she would want me to do certain things and just couldn't cope with it and all and she found it very upsetting and it was spoken about in our relationship, it was spoken about with the staff at The Coombe Hospital. She got special treatment in The Coombe Hospital when she was pregnant and all because of it and all. She had a major problem with one of her medical examinations and that's where it cropped up and it was brought up with the staff of The Coombe Hospital and all, her problem and what the problem was, you know. I can be blunt about it, if you want.

JUDGE: Mr K, you sat here, you listened to the rulings of this Court.

WITNESS: I haven't said a word

JUDGE: And then you get in here and you try to derail this trial, that's what I consider your behaviour is.

WITNESS: I'm not trying to disrail this trial. I'm being asked to answer a question and I'm asking

JUDGE: Mr O'Carroll, I wonder if we'll argue this in the absence of your client who's in the witness box, I just want him to stand outside the door briefly.

MR O'CARROLL: Yes, Judge.

[...]

JUDGE: However, it appears to me that this is calculated behaviour on the part of your client and I am now asking you what you propose that the Court should do about this, that's all I'm asking you, I'm not going to go any further than that."

9. The appellant contends that the trial judge indicated that she believed that the appellant deliberately sought to allude to excluded issues in the presence of the jury, in direct conflict with a ruling of the Court. It is submitted that the commentary on the part of the trial judge was reflective of her overall disapproval of the appellant and would have been readily apparent to any independent spectator present at the trial. Mr Bowman also seeks to rely on the exchanges between the prosecution counsel and the trial judge on this issue as follows: –

"JUDGE: Ms O'Leary, what do you say?

MS O'LEARY: Well, maybe I'm becoming cynical in my old age, but I think this accused knows exactly what he's doing.

JUDGE: That's my impression as well, I have to say.

MS O'LEARY: Yes. And, I mean, I have been watching him in court all through the last two weeks, he seems to be running the show. I mean, you could see that he's giving directions to everybody all around him, taking notes, keeping little cards. I mean, it's obvious to me that this man knows exactly what he's doing. Now, I do not want the jury discharged.

JUDGE: That is the Court's impression as well, Ms O'Leary.

MS O'LEARY: Yes. I don't want the jury discharged at all, I mean that's I definitely do not want that, but it's not just that, what he came out with. He's been allowed to give evidence of a number of matters that have not been put

JUDGE: Matters which were never put to the complainant.

MS O'LEARY: Yes. I mean, that is just shocking. In my respectful submission, the Court is going to have to tell the jury that they have to disregard every single thing that he said that hasn't been put to the complainant. You know, he shouldn't be

[ ]

[ ]

[ ]

[ ]

JUDGE: No, no, no, because then Mr K is creating an impression with the jury that there are some material things that could be said in his defence that he's not being allowed to say, Ms O'Leary, and I'm not going to have that. That is my view of the matter that and I'm open to this is a pretty unprecedented situation but consistent with the kind of controlling behaviour that has been alleged against this man, but the fact that it would be wrong for the jury to get the impression, Ms O'Leary, that somehow Mr K was being prohibited or restrained from by the Court from defending himself, I don't want to that impression to be created before the jury. It's a very unusual and unfortunate circumstance that has arisen here. Very well."

10. Mr Bowman submits that the above comments and the exchanges, in particular those between the trial judge and prosecution counsel, demonstrated an absence of objectivity on the part of the trial judge and an assumption on her part that the appellant was acting in bad faith. In this regard, the appellant relies on the following exchanges between counsel for the appellant and the trial judge:-

"JUDGE: He has created an impression with the jury that he's not being allowed properly to defend himself .

[ ]

JUDGE: And I've got a real issue with that, Mr O'Carroll, as you can understand.

MR O'CARROLL: I certainly understand, Judge, and I completely agree with the Court's attitude that the effect of what he's said, but does he I know the Court has taken the view that it is conscious and deliberate. I

JUDGE: That's my impression certainly, Mr O'Carroll, I have to say."

11. It is further argued that the trial judge intervened and in effect directed the prosecution's proofs concerning discrepancies in text messages apparent from the mobile phone downloads which had been extracted from the complainant and the appellant's mobile phones. The trial judge addressed counsel in the absence of the jury in relation to evidence concerning the text messages and highlighted the discrepancies between the transcript of messages on the appellant's phone and the complainant's phone and that no explanation for this had been given in evidence. Counsel for the DPP acknowledged that she was aware of the discrepancy and intended to address it. The trial judge expressed her concern that a trial had collapsed the previous week concerning CCTV footage and stated that the issue should be addressed as follows: -

"JUDGE: You'd better call evidence, Ms O'Leary, that's all I'm saying.

MS O'LEARY: No, no, well I don't I don't know if he deleted them. I don't know, you know.

JUDGE: Sorry, sorry, you'd better call evidence to explain the gaps.

MS O'LEARY: Oh, I'll explain when they were taken and I had intended to do that and I had spoken to the guard about that this morning but I wanted to check obviously I have to check that my friend doesn't mind Garda Harte giving that evidence rather than the expert.

JUDGE: Well, I think you'd better call an expert, Ms O'Leary.

MS O'LEARY: Yes.

JUDGE: I'm just I'm not advising the DPP's proofs. What my concern is I do not want exhibits going in to the jury that are going to raise questions with them which have not been answered in the course of the trial.

MS O'LEARY: Yes.

JUDGE: It's a matter for the DPP how they deal with that. It's not for the Court to advise the DPP's proofs but the Court has spotted a difference.

MS O'LEARY: Yes.

JUDGE: That may give rise to questions in the jury's mind and that should be dealt with before the evidence is finished.

MS O'LEARY: Very good, Judge.

JUDGE: That's as much as the Court is saying. Do you have anything to say, Mr Kelly?

MR KELLY: Well, I suppose it's the DPP's function to present the evidence and such evidence as the DPP chooses to present, I'd have thought, was the matter for the DPP and at the conclusion of the prosecution case, the defence could

make whatever submissions they deemed appropriate. I don't know if it is perhaps appropriate for the Court to suggest

JUDGE: Well, I'm just adverting to what happened last week, Mr Kelly, and it's unfortunate that an issue arose that gave rise to a question in the jury's mind which hadn't been dealt with in the course of the case and the case collapsed. This is a similar situation, it appears to me, where there is where the messages on her phone don't tally with the messages on his phone and I am just adverting to that at this juncture in the trial so that we don't have a similar issue arising."

12. The appellant argues that the judge's comments in this respect were entirely inappropriate and that the Court not only identified evidential absences in the prosecution's case but also provided advice on proofs and directed that expert testimony be called. It is argued that the trial judge was demonstrably lacking in impartiality.

13. The appellant also relies upon the trial judge's remarks concerning CCTV footage from Tesco where, when the issue arose in the course of the trial, the judge cautioned defence counsel that should the contention proffered by the defence that the complainant and the appellant had gone shopping and a number of hours after the second alleged rape incidents transpire to be untrue, it would be the subject of comments by the Court.

14. The appellant refers to the test for objective bias set out in *Bula Ltd v. Tara Mines Ltd* (No. 6) [2000] 4 IR 412 and *Dublin Wellwoman Centre Ltd v. Ireland* [1995] 1 IRLM 408 and submits that there is extensive evidence throughout the trial which indicates a lack of impartiality on behalf of the trial judge.

### **Respondent**

15. The respondent submits that the any assertion of objective bias cannot be sustained in the context of the trial and that the trial judge repeatedly admonished counsel for the prosecution throughout the cross-examination of the appellant.

16. Moreover, the respondent submits that on a proper reading, the instances referred to by the appellant do not support a claim of bias. In relation to the text messages, the respondent submits that the trial judge was merely ensuring the integrity of the trial. The respondent says that many of the comments referred to by the appellant as instances of bias are in fact merely robust refusals to allow the trial to proceed in any fashion the appellant determined was most beneficial to him.

17. The respondent makes the point that the judge's interventions by comment or by interjecting in the course of evidence, must be seen against the background of a determined and concerted effort by the appellant to take over the trial and to derail it, leading to a discharge of the jury.

### **Ground 3 - Adverse comments and interruptions**

18. In summary Mr Bowman submits that the trial judge interjected and interrupted the appellant's testimony in a manner which was disparaging to him and made many comments adverse to him, thus demonstrating objective bias and rendering the trial unfair.

### **Appellant**

19. Mr Bowman contends that the trial judge made repeated adverse comments, interjected excessively, particularly during the appellant's testimony and entered the arena to his detriment, thus rendering the trial unsatisfactory.

20. The appellant submits that it is a well-established requirement that a trial judge conduct proceedings fairly without unwarranted interruptions or prejudicial comment. The appellant refers to *The People (DPP) v. McGuinness* [1978] IR 189 where the Court of Criminal Appeal held that the intervention of the trial judge in the cross-examination of the complainant rendered it impossible for the defence to conduct an effective cross-examination and may have affected the jury's opinion of the credibility of the complainant.

21. Accordingly, the appellant submits that the adverse comments made by the trial judge were inconsistent with her obligation to ensure a fair and balanced trial.

22. In this context, Mr Bowman refers us to several instances where he contends the trial judge intervened unfairly and excessively during the appellant's testimony. On occasion the trial judge queried with the appellant as to whether he had raised matters of which he gave evidence with his legal team; as to what was the significance of the absence of medical notes; the absence of a text message on his mobile phone and as to why he had not seen that message. In the latter regard the following exchange took place: –

"Q. It's not on the download from your phone?

A. I don't know, I never seen the download, so I wouldn't know.

JUDGE: But you Mr K, you left here last night with it.

[...]

JUDGE: You're Mr K, when you left here yesterday discussing discussing expressing the view to the jury it was a disgrace you didn't have this paper ?

A. And I got it last night and I'm willing to work off it your honour.

JUDGE: and you had and you had all night to go through it, did you find that text message in the download?

A. I'm going to answer you now if I can just flick through the files, I couldn't take it all in last night, your honour, I did study it, like, but I'll just asking can I just flick through it, that's all and answer the lady's

JUDGE: Very good Mr K, you flick through it."

Mr Bowman asserts that whilst the appellant was being cross-examined by counsel for the prosecution regarding deleted text messages, the trial judge intervened when the appellant responded that he did not recall deleting a particular message that: –

"JUDGE: That's not the evidence, Mr K ."

Shortly thereafter, again when the appellant was being questioned regarding deleted texts, the appellant contends that the judge

intervened again saying as follows: –

“JUDGE: No, he distinctly didn't say that Mr K.”

Finally, Mr Bowman points out that the judge took issue with terminology used by the appellant when he replied to a question as follows: –

“There's no bruising on her, there's no marks on her. For a girl that said she got her face bashed in, she was strangled, there's not

JUDGE: She didn't say that, Mr K, she didn't say she got her face bashed in.

A. Sorry?

JUDGE: She didn't say she got her face bashed in.”

23. The trial judge is criticised for taking issue on the occasions when the appellant gave evidence on matters which were not put to prosecution witnesses. It is contended on behalf of the appellant that in interjecting during the examination of the appellant, this emphasised the trial judge's attitude towards the appellant, and served also to demonstrate objective bias.

24. On day 11 of the trial, the complainant was recalled. This came about because of evidence given by the appellant on the previous day in respect of which the trial judge was of the view that Mr K had created the impression before the jury that he had been hampered in his defence. The trial judge had refused leave to cross-examine the complainant on certain aspects of her sexual history and in his evidence Mr K said as follows: –

“...I can't explain it without going into things I'm not allowed to talk about”

25. A discussion then took place in the absence of the jury which ultimately resulted in the complainant being recalled enabling matters to be put to her. Prior to doing so the trial judge sought to explain to the jury why the witness was being recalled at that point in the trial. In this respect, she quoted to the jury what had been said by Mr K the previous day and informed them that it gave the impression that he was being in some way restricted in his defence. She then proceeded to explain the procedure regarding cross-examination on sexual history and explained to the jury that all parties were bound by the rulings of the Court and then went on to say: –

“Mr K, I have to put it neutrally, doesn't apparently understand that and so he referred in his evidence to things that he wasn't allowed to talk about and what he's referring to is the fact that Ms B is a person who had suffered child sexual abuse”

26. Mr Bowman contends that the comment “I have to put it neutrally” demonstrated objective bias on the part of the trial judge and gave a clear indication of her negative attitude towards the appellant.

### **Respondent**

27. The respondent submits that the assertion by the appellant that the trial judge adversely interfered in the trial is incorrect and that it is clear the trial judge was careful from the outset to preserve the fairness and integrity of the trial.

28. Moreover, it is argued that the trial judge did not intervene consistently and in fact there were numerous occasions when the appellant was being argumentative and/or was refusing to answer the question asked of him and where the trial judge did not intervene. The respondent says there were many exchanges involving the appellant which highlight his conduct and says that the trial judge showed remarkable restraint throughout and intervened only when it was appropriate and necessary to do so.

29. Furthermore, by way of general observation, the respondent argues that the appellant cannot maintain his position with any force in circumstances where the jury were unable to agree regarding certain counts on the indictment. Therefore, the respondent contends that even if the trial judge's interventions were improper, as the appellant contends, such interjections did not have a detrimental impact on the trial.

30. The respondent argues that it is necessary to look at the context in which the judicial interventions were made and argues that the interventions by the trial judge were necessary because of the appellant's conduct in evidence. The respondent points to instances, such as the appellant alluding to the complainant's prior sexual history which had been specifically excluded by the trial judge, responding to questions by way of lengthy speeches, a marked reluctance to answer the question asked and commenting on matters in such a manner to give the impression that he was restricted or hampered in his defence. The respondent argues that the conduct of the appellant during his testimony indicated a disregard for the rulings of the Court and indeed an attempt to override those rulings, and that his evidence was peppered with repeated attempts to introduce material which had not been put to the witnesses. The respondent contends that whilst the appellant seeks to refer to extracts from the transcript to underline the significance of the trial judge's interventions, the extracts do not in fact reveal the entire picture and it is necessary to read significant extracts from the transcript to show why the judge intervened.

31. Moreover, the respondent argues that of 11 days of evidence, the issue of judicial intervention only came about during the appellant's evidence. The respondent points out that objection was raised by Ms. O'Leary S.C. for the prosecution during the cross-examination of Garda Harte where material which had not been put to the complainant was raised by defence. The trial judge acknowledged the objection was legitimate but did not intervene. The respondent submits that the judge only did so when it was just and necessary and in the interests of a fair trial.

32. The respondent submits that the first interruption of substance by the trial judge came about because of the appellant's evidence to which we have already referred where he indicated he was not able to explain the relationship that existed between the parties because of material to which he was not permitted to refer. After the complainant had been re-called, the respondent argues that the appellant continued to refer to matters which had not been put to Ms B. in cross-examination and where the trial judge did not intervene showing, it is contended, remarkable restraint.

33. It is argued that notwithstanding the appellant's attitude in evidence, the trial judge did not intervene and permitted the cross-examination to continue for a considerable period.

34. In support of the assertion that the trial judge conducted the trial in a manner which was fair and impartial, the respondent points to the issue of text messages. In this respect, in the course of his evidence, the appellant accepted that he had received a download of the text messages prior to trial but that he wasn't familiar with those messages, consequently the trial judge allowed time to enable the appellant's solicitor to provide him with a copy of the text messages. The respondent submits that the appellant then indicated that he had not had access to the entire download from his phone and in the presence of the jury indicated that this was disgraceful. It transpired that whilst the appellant's solicitor had been furnished with the material by way of a C D, the defence were unable to access the material and requested a hardcopy. The trial judge again allowed time to enable this to be done. The respondent says that the issue was explored by the trial judge in the absence of the jury and it was clarified that the entire download of the appellant's phone had been furnished to the appellant's solicitor prior to the trial. Time was permitted to enable an examination of the phone records. This, it is submitted, serves to underline the fair approach adopted by the trial judge.

### **Discussion**

35. The appellant contends that the trial judge's interventions and comments were damaging and unfair to the appellant and served to convey an impression that the appellant was not credible, thus rendering the trial unfair and unsatisfactory. Moreover, that the trial judge demonstrated objective bias through consistent interventions and adverse comments.

36. Mr Bowman contends that the trial judge's attitude towards the appellant became readily apparent on day 10 of the trial in the course of his direct testimony. In effect, he urges this Court to bear this in mind when scrutinising the matters which he contends amounted to unfair intervention, adverse comments and demonstrable objective bias.

37. We have set out the background, in some detail, to the judge's comments on day 10 which arose as a result of the appellant seeking to refer to matters of which, we are satisfied on a perusal of the transcript, he had knowledge. It is quite clear to us from the appellant's own remarks that an impression **could** have been conveyed to the jury that he was being unfairly restricted in his defence. The trial judge, in our view, quite properly requested the jury to retire to enable the matter to be properly explored and clarified. This is against the background of the earlier portion of the appellant's testimony when he gave evidence of matters which had not been put to prosecution witnesses. Such did not give rise to judicial intervention. Thus, to assert that the trial judge consistently intervened in the appellant's testimony does not withstand scrutiny. Mr Bowman quite properly does not rely on the remarks by the trial judge as being anything other than a presumed indication of the trial judge's attitude towards the appellant. He does not seek to argue that her remarks prejudice the appellant and indeed he could not do so as the comments were made in the absence of the jury. The appellant seeks to rely upon the trial judge's remarks as support for the contention that the judge took a negative view of his evidence and overall approach to the trial.

### **Conclusion on comments in the absence of the jury**

38. In our view, the trial judge was well within her remit to take the appellant to task for potentially breaching a ruling of the Court. Her comments to him must be viewed in light of the ruling made by the trial judge on the issue of leave to cross-examine the complainant on prior sexual history. We also note that prosecution counsel highlighted that the appellant appears to have fully engaged with the trial process: this is illustrated by the appellant maintaining notes and cards in the course of the trial. Even if this were not so, one can assume as he was present for the trial and was represented by a legal team that he was more than cognisant of the rulings of the trial judge. We find no error in the way the trial judge addressed the situation which had arisen, and we are satisfied that the trial judge properly expressed concern with the appellant's remarks and sought to ensure that the trial was a fair by the manner in which she dealt with the situation. We do not accept that her interaction with the appellant and/or with his counsel demonstrated a negative attitude towards the appellant. It is clear from a perusal of the transcript that the trial judge was justifiably unhappy and perhaps somewhat impatient with the appellant arising from his remarks but addressed the situation properly in asking the jury to retire in the immediate aftermath of his comments.

39. The trial judge then gave the appellant the opportunity to consult with his legal team, he apologised for his remarks through his senior counsel and an explanation was given that it was difficult for the appellant to explain the relationship with the complainant without revealing the entire story. The trial judge at this point indicated that that was not the basis of the application to cross-examine in the first instance and her concern in effect, was that he was informing the jury that he was hampered in his defence.

40. Ultimately, it appears that agreement was reached between the parties that the trial judge would advise the jury that Mr K said he was unable to properly explain his situation without referring to impermissible material and to inform the jury of the nature of an application for leave to cross-examine. The complainant would then be recalled, examined and cross-examined.

41. This course was followed by the trial judge and the appellant now takes issue with the manner in which she addressed the jury in that in the concluding remarks she stated: –

“Mr K, I have to put it neutrally, doesn't apparently understand that and so he referred in his evidence to things that he wasn't allowed to talk about and what he's referring to is the fact that Ms B is a person who had suffered child sexual abuse.”

### **Conclusion on comment in the presence of the jury**

42. The trial judge's intention in advising the jury as to what had transpired was in order to avoid the jury speculating in a manner which could have given rise to an unfairness to the prosecution or to the defence. In this regard, she quoted verbatim the remark made by the appellant the previous day and explained to the jury that such a remark gave rise to an impression that he had been hampered in his defence and she therefore explained the position regarding an application to cross-examine a complainant on previous sexual history. She then explained that everybody in court was subject and bound by the rulings of the trial judge and it was in that context that she then went on to indicate that Mr K did not apparently understand that position. To suggest that the trial judge was deprecating the stance adopted by the appellant or indeed taking any negative view of him whatsoever by her remarks does not withstand scrutiny. The trial judge clearly pointed out to the jury that everybody was bound by the trial judge's rulings and that included the appellant. She was anxious to ensure that the jury did not take the view that the appellant was hampered in his defence and we are satisfied she was justified in so doing. The use of the words “I have to put it neutrally”, rather than denoting negativity on the part of the judge can be seen as the careful use of language so as to ensure the jury did not take a negative view of the appellant as a consequence of him breaching the Court's ruling.

43. The appellant then in due course, continued with his oral testimony and during his oral testimony he on several occasions referred to matters which had not been put to prosecution witnesses. In the course of his direct testimony, issue was taken on four separate occasions by prosecution counsel in this regard and, without any intervention whatsoever by the judge. In the course of cross-examination an intervention by the trial judge arose as a result of a question asked by counsel for the prosecution which contained a number of different parts and where the judge cautioned counsel to permit the appellant to answer the question. No issue is taken

with this interruption. The cross-examination then continued at some length without interruption until counsel for the prosecution asked the appellant why it was not put to the complainant that the appellant got into bed on the evening in question and was rubbing the complainant's back as it was sore. The judge at this point said the following: –

"Q. JUDGE: And Mr K, you told your legal team this; is that right? All of these details?

A. Sorry.

Q. JUDGE: You're telling the jury you told your legal team all of these details?

A. I believe I did, yes.

JUDGE: Okay, very good."

44. It is clear that the trial judge was concerned that the appellant was referring to matters which had not been put to the complainant and wished to clarify whether the information had been conveyed to the appellant's legal team. It is difficult to see how this was not favourable to the appellant in that, by indicating that he believed he had informed his legal team, the issue could not be construed as a recent invention on the part of the appellant.

45. The cross-examination then continued for a considerable period. At one point the trial judge intervened and urged Mr K to focus on the question asked. We can fully understand why the trial judge so urged the appellant as on an examination of the transcript both in direct and cross-examination, the appellant tended towards extraordinarily lengthy answers. On one occasion the answer extended to some 34 lines of transcript, on other occasions an answer extended to some 21 lines and therefore it could not be said that Mr K was succinct or focused in his answers. He tended towards lengthy and unfocused responses and did not in every instance answer the questions asked.

46. The appellant asserts that in asking the appellant to clarify the significance of a comment which he made specifically, that medical practitioners did not have an official note of complaints made by the complainant, was an unfair intervention. We are satisfied the trial judge was entitled to ask the question in order to resolve ambiguity and ensure clarity.

47. Shortly thereafter, the appellant asserted that he didn't have any knowledge of the complaint, the subject of the trial until the Gardaí called to his door. The trial judge then indicated that she understood that he had received a text message. Prosecution counsel continued with cross-examination and an exchange then ensued during which the appellant asserted that he had not had access to the entirety of the material downloaded from his phone. The witness asserted that it was disgraceful, that he was being questioned on matters that had only been furnished to the defence that morning. It transpired that the material was furnished to the defence in advance of the trial and that the facility to inspect them was also made available. However, the defence were unable to access the material. The defence were given an opportunity to examine a printout of the material and the cross-examination resumed on day 13.

Shortly after the commencement of cross-examination the following exchange took place:-

"Q. sorry, Mr K, what the phone expert said as far as I understood it was that a text message has to be deleted first, it goes into a storage area and then eventually the phone overrides it, it doesn't delete it in the first place?

A. And I I don't recall deleting it and it may automatically deleted itself."

The trial judge then intervened and informed the appellant that that was not the evidence. Prosecution counsel continued cross-examination utilising the phone records to do so. The issue which the prosecution sought to highlight concerned messages from the complainant to the appellant which appear not to have been retained on the appellant's phone. The appellant contended that the messages may have automatically been deleted as his phone had limited memory. The appellant gave evidence that he had not seen the printout of the downloaded material from his phone. At this point the judge interjected and reminded him that he had the opportunity to go through that material. Mr K stated in effect that he had not been able to absorb the material and requested that he be permitted to go through it in order to answer prosecution counsel's questions.

48. The cross-examination continued, and the appellant contends that the judge continued to intervene in a manner which was unfair to the appellant. On the issue of messages which were not retained on his phone the following took place:

"Q. You did hear the telephone expert saying that texts had to be deleted to disappear off the phone initially; isn't that right?

A. I I heard him saying that and he said they automatically delete too when the storage space is getting crowded on the phone

JUDGE: No, he distinctly didn't say that Mr K."

However, this extract must again be viewed in context and arose from a question asked by prosecution counsel at an earlier stage in the cross-examination as follows: –

"Q. No. I'm asking you why they're all still there and the two that incriminate you are gone ?"

This was a question which was posed with clarity, however, Mr K was, at best unfocused in his answer until the judge urged him to answer the question he was asked. The judge then sought to clarify for him the question he was asked by counsel and again urged him to answer the question. That was the background to the impugned remark by the trial judge that the expert had not given evidence in terms as asserted by Mr K.

49. The appellant submits that the judge again and unfairly intervened when he indicated in response to a question that in effect the complainant's injuries were not in accordance with the girl who said that 'she had got her face bashed in.' The trial judge intervened and informed him that the complainant had not given that evidence.

50. There can in our view, be no suggestion that the previous intervention was for any purpose other than to clarify the evidence given and ensure accuracy.

### **Conclusions on alleged unfair interventions.**

51. On a careful perusal of the transcript it is quite clear that the issue of discrepancies on the parties' mobile phones was an issue of some significance. It is also quite apparent that the appellant was reluctant to provide a focused answer to these questions. The trial judge's interventions can only be seen as justified and restrained.

52. Mr Bowman argues that the cumulative interventions by the trial judge rendered the trial unfair and unsatisfactory. When one examines each of the impugned interventions separately and collectively, we are satisfied that the trial judge acted in a fair and proper manner and her interventions were restrained and justified. The trial must be viewed as a whole and each intervention by the trial judge must be viewed in context. We are satisfied that the interventions were confined to seeking clarification of answers given by the appellant or to request him to answer the question asked or were to resolve ambiguities and/or inaccuracies. We are satisfied that the interventions made by the trial judge did not render the trial unfair or interfere with his defence or amount to objective bias.

### **Criticisms specific to objective bias**

53. Whilst the appellant contends that the interventions by the trial judge amounted to demonstrable objective bias, he further argues that four specific instances took place during the trial which indicated the trial judge's lack of impartiality.

54. In this respect, he relies on the judge's disapproval of the appellant's evidence on day 10 which gave rise to comments made by the judge in the absence of the jury. We have already addressed this issue in some detail and reject the appellant's criticism in this respect.

55. Secondly, the appellant submits that the judge made adverse comments regarding CCTV footage from a supermarket. It appears that the prosecution had in error believed that this footage did not show any images of the complainant and the appellant entering and exiting the store a number of hours after an alleged rape. In this regard, the judge remarked that should the CCTV footage fail to show what the defence contended, it would be the subject of comment by the judge.

56. We are satisfied that the trial judge was entirely within her remit to indicate to the defence that if the CCTV footage did not materialise and contain the anticipated material, she would then comment on this in her charge to the jury. It is trite to say that a trial judge is fully entitled to comment on the evidence if he or she deems such to be necessary. In the course of her charge the trial judge, in the usual manner, advised the jury that if she did comment on the evidence, the jury were free to accept those comments if they agreed with them and equally free to reject her comments if they disagreed with them. We find no error in this respect.

57. The third matter concerned the issue of the discrepancy between text messages depicted on the downloads of the appellant's phone and the complainant's phone. The contention in this instance is that the judge directed the prosecution on the issue of proofs and urged the prosecution to call expert testimony.

58. The trial judge prefaced her remarks concerning this issue by indicating a recent trial had collapsed and she was concerned to ensure insofar as it was possible the same situation did not occur in the present trial. The trial judge's intention in this respect was to seek to preserve the integrity of the trial process. On a careful reading of the transcript, it is clear that the trial judge repeatedly indicated to prosecution counsel that the manner in which the matter was addressed was for the prosecution. It is also the position that earlier in the trial the trial judge pointed out that there were text messages on the complainant's phone which did not appear on the appellant's phone. Prosecution counsel indicated that she was intending to address that issue. This exchange took place on day 6 of the trial. It is clear that it was always the intention of the respondent to address the disparity in the telephone data. Whilst the trial judge certainly made clear her concerns, she left the matter in the hands of prosecution to decide how to proceed.

59. The fourth and final instance of alleged bias again concerns the CCTV footage from the supermarket but in this instance, the appellant contends that the trial judge expressed her displeasure in the absence of the jury regarding the defence delay in arranging the technical facilities for showing the CCTV footage. Obviously, the argument is not made that this rendered the trial unfair. Rather, the appellant contends that the judge commented in an unfair manner in the presence of the jury in explaining to the jury the reason for the delay. It is contended that this commentary was strongly reflective of the trial judge's overall disapproval of the appellant and would have been obvious to any independent spectator present at the trial.

60. When explaining the reason for the delay to the jury, the judge certainly explained the position in strong terms and was clearly dissatisfied with the waste of court time. However, the fact that she explained the position in that manner to the jury does not in the view of this Court even approach the concept of objective bias.

### **Conclusions**

61. The issue for this Court is whether a reasonable objective person present at the trial would reasonably apprehend that the judge was not impartial. To assess the issue of bias, one must examine the overall situation as presented at the trial. It is important to assess whether the language used by the judge was indicative of bias in favour of the prosecution or against the appellant.

62. We have examined the transcript to assess the complaints made by the appellant both as regards the interjections by the trial judge and the contention of demonstrable objective bias. We reject the argument that the interventions by the judge and her comments in the context of the case demonstrated a lack of impartiality on her part. The language used by the trial judge was prudent and appropriate and whilst she may have made remarks in strong terms on occasion, her comments are not indicative of objective bias. Indeed, it may be said that a reasonable objective bystander present in court may well have concluded that the trial judge was restrained in her approach and comments, given the appellant's conduct. The judge carefully chose her words and in the view of this Court, her comments and interjections, rather than rendering the trial unfair or demonstrating objective bias, were on the contrary, calculated to ensure a fair trial.

### **Errors in the charge**

#### **Appellant**

63. The appellant submits that the judge's charge was highly prejudicial to him and unbalanced and that the trial judge sought to cast the complainant in a more favourable light in the eyes of the jury.

64. The appellant further submits in his written submissions that the trial judge did not properly present the appellant's defence to the three sexual assault charges, where the appellant contended that the videos were made with the complainant's full consent and he denied ever drugging her. However, this was not pursued in the oral hearing.

65. The appellant argues that the trial judge unfairly criticised the defence during her charge for failing to put certain evidential issues to the complainant and/or other prosecution witnesses.



66. By way of background, during her charge, the trial judge remarked that the appellant had referred to matters which were not put to the prosecution witnesses. The trial judge then proceeded to give examples of such references.

67. The appellant submits that the trial judge's approach was erroneous in law, disproportionate in criticism and prejudicial to the appellant. The appellant argues that the evidential issues referred to by the trial judge were secondary to the core issue at trial and the core issues had been put in detailed terms to the prosecution witnesses and submits that the trial judge should have explained that such failures effected the weight of the evidence, but to describe it as "tainted with impropriety" was entirely prejudicial. It is on this aspect of the charge that Mr Bowman places the most emphasis. The appellant refers to *The People (DPP) v. Rattigan* [2017] IESC 72 where the Supreme Court recited the observations of O'Donnell J. in the Court of Criminal Appeal:-

"The function of a trial judge in this regard is to attempt to present to the jury the issue which it has to decide in a clear and comprehensible way. In a simple case this may involve no more than identifying what has been said on each side but in more complex cases it will necessarily involve a degree of analysis of the evidence if only to focus on the central issues, and to present what is to be considered by the jury, in an ordered, comprehensible and intelligible way."

68. The appellant submits that it is well-established that there is a requirement to deliver a fair and balanced charge regardless of the trial judge's view of the defence and says that the importance of judicial neutrality cannot be overemphasised. Reference is made, *inter alia*, to the comments of O'Malley J. in *The People (DPP) v. Rattigan* [2017] IESC 72: -

"It may well be true that some jurors, having been told that they are the judges of fact, dislike any apparent pressure to yield that status. It is however also possible that some will feel inclined to follow what appears to be a strong indication by the judge as to the decision they should make. For some considerable period of time it has been the practice of most trial judges to guard against seeming to give such an indication, and in my view this should continue to be the practice."

69. The appellant argues that the trial judge's sole reminder to the jury that they were free to disregard her comments at the beginning of her charge was insufficient and a further reminder may not have remedied the prejudice suffered by the appellant as a result of the trial judge's failure to provide an accurate and balanced summary of the defence case.

### **Respondent**

70. The respondent submits that the full text of the charge shows that the comments of the trial judge were restrained and proportionate given the conduct of the appellant throughout the trial. The respondent accepts the contention of the appellant that not every contested fact needs to be put to a witness however, it is submitted that important facts must be put and a failure to do so will lead to comment. It is submitted that in the circumstances the comment of the trial judge was wholly proportionate.

71. Finally, the respondent submits that there was nothing wrong with the trial judge leavening her summary of the defence case with reminders of the prosecution case provided it was balanced. The respondent submits that such balance is found when one considers the charge in its entirety.

### **Discussion**

72. The appellant accepts that the trial judge in her charge correctly identified the core issue in the case concerning the true nature of the relationship between the complainant and the appellant, but that in undertaking the summary of the defence case cast the complainant in a more favourable light and diluted the significance of aspects of the appellant's evidence.

73. Concerning the allegation that the trial judge delivered an unbalanced charge the appellant refers to a portion of the charge of the jury trial judge stated as follows when summarising points made by the defence: -

"They say that the allegations she is making don't fit the relationship, and I think I have said to you on a number of occasions, really that is the core of this case: What was the relationship between Mr K and Ms B, and you have seen them both give evidence over the course of the trial. They suggest that Mr K is a loving father, and Ms B is a bad mother. And Ms B has answered every questions she was asked; do you accept her evidence? She doesn't put herself before you as a model mother, but a mother doing the best that she can."

It is difficult to see how the argument that this portion of the charge was unbalanced can be sustained. It is also important to examine the balance of that paragraph in the judge's charge where the trial judge continued: -

"So, Mr O'Carroll suggests to you that Mr K is a loving, caring sort of person, and that contrasts seriously with her account of his being a controlling, domineering person, drugging her and having sex with her when she is asleep. And he asks does her account of that ring true? He asks you to consider why would he rape her on Christmas morning when everything was in place for Christmas dinner? He asks you to consider that the behaviour described by Ms B would represent a change of character for Mr K. Now, again, you have seen him give evidence, you have seen her give evidence; that is a matter for you to assess. He points to the fact that there were no marks or injuries, and he says there is no basis in reality to the allegations that are being made by him. He said the fact that she was tender in the anal area, that you should consider that in the light of the fact that she had agreed that on occasion they had anal sex."

74. It is very clear from the extract from the charge that the trial judge highlighted the points made on behalf of the appellant and specifically, instructed the jury that the assessment of the complainant's evidence and the appellant's evidence were a matter for their assessment. The contention that this aspect of the charge was unbalanced is simply not sustainable.

75. Mr Bowman in his oral submissions referred to further extracts from the judge's charge and argues that the charge favoured the prosecution and that, when putting the defence case, the judge put forward the counter argument, thus, in effect, reducing the impact of the defence assertions. In this respect, he refers to the portion of the charge where in commencing her summary of the appellant's case, the judge referred the jury to the question posed on behalf of the appellant as to whether the Gardaí had viewed the CCTV footage from the supermarket impartially as the Gardaí had failed to locate the appellant on the footage. Issue is taken with the fact that the judge then informed the jury that the Gardaí had 18 hours of footage and it was correct that they had not seen this portion and they were clearly wrong in that respect.

76. There are other aspects of the charge to which we have been referred where the same point is made on behalf of the appellant that the trial judge added a counter argument on every occasion from the prosecution perspective. Having considered the entirety of the charge we are satisfied that there is no merit in the argument. The charge concerning the case made for the prosecution and that of the defence was a fair and balanced one.

77. The appellant highlights the way the trial judge addressed the failure of the defence to put the defence case to prosecution witnesses. In this respect Mr Bowman refers to the following portion of the charge: –

“This requirement, that the defence case be put to a witness, is clearly a matter of fairness. If the defence isn't put to a witness, then the jury is deprived of hearing the witness's response to the defendant's case. Secondly, the requirement that the defence case be put to prosecution witnesses, is to prevent a situation arising where an accused just sits back, says nothing, listens to all the evidence against him, and then gets into the witness box and gives, for the first time, an account favourable to himself which might explain away elements of the prosecution's case. This is not permitted. Unfortunately, in this case, Mr K repeatedly gave evidence of matters which had never been put to Ms B and other prosecution witnesses.”

78. Mr Bowman contends that this aspect of the charge was unfair to the appellant and again placed him in an unfavourable light in the eyes of the jury.

79. It is clear that all of the above paragraph except for the last sentence puts forward the general proposition concerning the requirement that a defence case be put to prosecution witnesses in order to ensure a fair trial. It is only in the last sentence that the trial judge specifically refers to Mr K and says that he repeatedly gave evidence of matters which had not been put to prosecution witnesses. In this regard, the appellant can have no complaints. It is clear from an examination of the trial that Mr K did indeed repeatedly give evidence of matters which had not been put to prosecution witnesses. The judge properly set out the general proposition and then referred specifically to the factual situation concerning Mr K.

80. Perhaps the criticism in respect of which Mr Bowman places most emphasis arose after the trial judge had provided examples of the occasions when Mr K had given evidence of matters which had not been put to prosecution witnesses. She said as follows:-

“So, the question arises as to what you do about evidence given by Mr K which was not put to prosecution witnesses. You have the option of simply disregarding it, ignoring it completely. Now, I am not directing you to do that as a matter of law but you are entitled to do so if you so choose.

Now, even though much of that evidence has been improperly put before you, I do recognise that it is impossible to unring the bell that has already been rung but if, in the course of your deliberations, in the course, you find yourself weighing the evidence given by Mr K which was not put to prosecution witnesses, **I would ask you to please proceed with great caution in deciding to act on any such evidence because that evidence is, in fact, in the Court's view, tainted with impropriety in that it was not put to prosecution witnesses.**” (Our emphasis)

81. Mr Bowman takes issue with the highlighted sentence and says the words used by the trial judge invited the jury to conclude that the appellant's evidence was tainted with impropriety. Certainly, if this were, in fact correct, the trial judge would have disparaged and discredited the appellant's evidence. A trial judge is not entitled to do so as the credibility of the evidence is entirely a matter for the jury and not for the trial judge. However, this assertion is not correct. Whilst this Court deprecates the parsing and analysis of each and every word uttered by a trial judge and has repeatedly stated that the charge must be viewed as a whole, nonetheless it is important to carefully scrutinise the impugned sentence. It is important to note that when the trial judge urged the jury to proceed with caution in considering evidence which had not been put to prosecution witnesses, but had been given in evidence by the appellant, she said that in her view the evidence was tainted with impropriety in that the various propositions had not been put to prosecution witnesses. In other words, any rational, reasonable juror would have clearly understood that the judge was of the view that evidence given under those circumstances was tainted with impropriety because it had not been put to prosecution witnesses.

## Conclusions

82. In conclusion therefore, we are satisfied that the judge's charge when considered as a whole was a fair and balanced charge. We reject the appellant's interpretation of the use of the words “tainted with impropriety” by the trial judge. This ground of appeal therefore fails.

83. Having come to our conclusions on each of the grounds advanced, we observe that the jury were unable to agree on certain counts. This does not support the appellant's arguments. Indeed, as the jury did not return verdicts of guilty on all counts, this lends force to the respondent's submission that the trial judge's conduct was fair and impartial and did not constitute objective bias. Accordingly, the appeal against conviction is dismissed.