THE COURT OF APPEAL

[83/2019]

Birmingham P.
McCarthy J.
Ní Raifeartaigh J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
RESPONDENT

AND

V.H.

APPELLANT

JUDGMENT of the Court delivered on the 23rd day of July, 2020 by Ms. Justice Ní Raifeartaigh

Introduction

1. This is an appeal against conviction for attempted rape and s.4 rape. The appellant is the father of the complainant and was convicted of the offences following a trial by jury. The complainant was in her early teens at the time of the alleged offences.

2. The most distinctive factual feature of this case is that the appellant had implants in his penis which were visible to the eye; however, the complainant gave evidence that they were not there at the time of the offences. It is a matter of undisputed fact that the implants were not only present and visible at the time of the offences. Many of the appellant's submissions were built around this issue, which the appellant described as a fundamental inconsistency or discrepancy in the evidence. These submissions included the submission that the case should have been withdrawn from jury, as well as submissions that the conviction was unsafe in circumstances where other evidence was admitted which (the appellant submits) was more prejudicial than probative in a case which was 'on a knife-edge' because of this central inconsistency in the evidence.

The evidence at the trial

3. The trial was conducted over eight days in the month of November 2018. The prosecution case was that the appellant had repeatedly and regularly orally raped his teenage daughter. It was also alleged that the appellant created an aggressive and intimidating atmosphere in the family home and that he was violent to his wife (the complainant's mother).

4. More particularly, the complainant gave evidence in relation to the alleged offences as follows. She said that the appellant required her to stimulate his penis with her hands so that it became erect, and then put his erect penis in her mouth of the complainant. She said that this happened on various dates between October 2009 and December 2010, beginning when she was thirteen years old. She also gave evidence that on one occasion

in 2010, the appellant attempted to penetrate the complainant's vagina and that he only desisted once the complainant started screaming and pushed him away. In this regard, the evidence was as follows:

> "Q. Okay. I'll come on to that in a minute. Was there any other incident which was different from what you've described to us?
> A. There was one incident when I had to get into bed with him. It started again, me rubbing his penis and him putting his penis in my mouth. Then we went into the bedroom, got undressed, we got onto the bed, but this time I was lying on my back and he was on top but on his knees and my legs were up on his shoulders, and I do remember he tried to put his penis, just the tip of his penis inside my vagina, and it really hurt and I told him to stop twice and I started screaming and then I just pushed him away.
> Q. Can you say when that incident happened? Well, perhaps -- was it before or after your stepbrother came?
> A. It would have been before.
> Q. Before that, and he came then in September of 2010?
> A. Yes. So, it would have happened between June and September.
> Q. In 2010?
> A. Yes.
> Q. And you'd screamed at him to stop --
> A. Yes.
> Q. -- and then he did stop?
> A. Yes.
> Q. Was that the only time he ever tried anything like that?
> A. Yes.
> Q. Did he say anything to you about any of this?
> A. He was very sarcastic when I told him to stop, he kind of said, "What?" in a sarcastic way. And then I just went to the end of the bed and then he kept rubbing his penis and then he just ejaculated by him rubbing himself onto my body.
> Q. Did he say anything else to you about what had happened?
> A. Yes, after we got dressed, he just said to me that, "Do you realise you lost half of your virginity now."
> Q. And at this stage I think if that was between June and September 2010 --
> A. Yes.
> Q. -- you were 14?
> A. Yes.
> Q. Did that hurt you in any way?
> A. Yes, it hurt a little bit, only at that moment, but it didn't hurt afterwards."
> (D2, P22, L16 onwards)

5. She also said that the appellant had threatened to kill both the complainant and her mother if she ever told anyone about the alleged offences. The complainant went on to say that she told her mother of the instances of alleged touching and oral rape but not of

the attempted rape following her summer exams in 2011 and that she did not tell anyone else until she spoke to her school counsellor in 2013.

6. The complainant's mother gave evidence that when the complainant informed her of the alleged offences sometime in June 2011, she asked her if she had been raped, orally or otherwise, by the appellant, to which the complainant replied that she had not and that it had only involved touching. She gave evidence that she and the complainant then fled to Glasgow, via Belfast, before travelling on to Cork and then eventually returning home to their apartment. She said that she had to return because she had been unable to secure work and she wanted her daughter to return to school in September.

7. In cross-examination, the complainant's mother then gave evidence that three hard plastic objects, of approximately 1 cubic cm in size, had been surgically implanted under the foreskin of the appellant's penis and that those were both present and obvious during the period of the alleged offences. The following exchange took place:

> "Q. Yes. So, you were having sex with him through 2008, 2009, 2010, 2011; isn't that correct?
> A. Yes.
> Q. And those plastic objects were there during that period; isn't that correct?
> A. Yes.
> Q. And obviously when the penis was erect it was even more obvious. Because the penis was erect, these plastic objects were sticking out; isn't that correct?
> A. Yes."
> (D2, P59, L25 onwards)

8. However, in the cross-examination of the complainant, she had given evidence contradicting this, positively asserting that those objects were not present during the period of the alleged offences. The following exchange took place:

> "Q. And the reason I'm putting that to you is because nowhere, in any of your statements, did you ever make any reference to something very, very unusual and strange about his penis, because his penis has a number of objects, hard, plastic objects, underneath the skin of his penis. They are hard. They are approximately one centimetre. One of them is slightly under one centimetre raised from the penis. The others are a centimetre, approximately, raised. There's three of them. They're hard. They're obvious to look at. You could not have missed them, and you could not have left them out of your statements if these things were true?
> A. He didn't have any plastic objects when he was abusing me.
> Q. Yes?
> A. I'm a hundred per cent sure of that.
> Q. Well, now, your mother has actually made a statement to say that he did have objects under his penis?
> A. I don't know what my mum says.

Q. And I'm going to suggest to you that these objects were could not be removed other than by a procedure of actually cutting into his skin and cutting these plastic objects out of his the skin on his penis.

A. I am positive he didn't have any objects when I was touching his penis."

(D2, P33, L19 onwards.)

9. Photographs of the appearance of the appellant's penis were put before the jury so that they might have an opportunity to assess the degree of visibility of the implants in question.

10. Based on this contradiction in the evidence, the defence made the case that it was impossible that the offences could have occurred without the complainant being aware of the implanted objects and therefore maintained that her account was not reliable. The prosecution maintained that the complainant's account was reliable despite this contradiction in the evidence.

11. The appellant denied all the allegations of sexual offences in interviews with the Gardaí and suggested that the complainant's mother had encouraged her to make false allegations in order to enable both of them to escape from him.

12. Evidence was given by Detective Garda Reynolds that in reply to the caution given to the appellant upon his arrest, the appellant said "*oh f… her*". The admissibility of this piece of evidence was hotly contested by the defence and a *voir dire* was held. The appellant had asserted in subsequent Garda interview that he had not used that phrase, but had said "*f…ing hell*". The trial judge ruled the evidence admissible.

13. When the evidence was given by the Garda in front of the jury and cross-examination had been completed, the prosecution counsel engaged in the following exchange in re-examination:

"Q. And one of the things, and again I am saying this for the transcript and it will be for the Court to assess it but you might comment on it, when Mr [V.H.], having exchanged or had an exchange with his interpreter, then spoke first about what he had said at arrest, he took issue with saying "Oh fuck her" and he said, "I said fuck hell" or "Fucking hell"?

A. Yes.

Q. So, he said it both ways?

A. He did, yes.

Q. And clearly again there's a difference between "Fuck hell" which is perhaps not an expression that many people hear and "Fucking hell"?

A. Yes.

Q. And then the latter expression he then repeated a number of times?

A. Yes.

Q. Perhaps would it be fair that when he was arrested did he say, "Fuck hell"?

A. No. I was standing right in front of him. I made the note as clear you know. He said, "Oh fuck her". If he said, "Oh fucking hell" or "Oh fuck hell" or

whatever I would have made that note. I am obliged to take a note of what his reply to caution and I did it.

Q. Thank you, Detective. Unless the Court has any questions."

(Day 4, P26, L21 onwards)

14. Concerning the matter of the implants in the accused's penis and the complainant's evidence, in his closing speech, counsel for the prosecution said the following:

> "To a child those additional lumps and bumps might not have seemed actually like man-made additions but rather simply as part of the only penis that she had ever seen and that, I suggest to you, is the only credible explanation for her saying they weren't there."
>
> (D6, P30, L14 onwards)

15. The appellant was found guilty by majority verdicts of twenty-two of the twenty-nine counts with which he had been charged. The trial judge had been given a direction of not guilty on the remaining seven counts. The appellant was sentenced to twelve years imprisonment on count 17 for an offence of attempted rape contrary to common law with the final six months of the sentence conditionally suspended. The sentence was imposed concurrently with the sentences for various other counts, the greatest of which was ten years for the offence of s. 4 oral rape.

The grounds of appeal

16. A notice of appeal was filed on 31st January, 2020 listing the following grounds of appeal against the appellant's convictions:

1) The trial was unsatisfactory and the verdicts are unsafe, in particular having regard to the various applications, submissions and requisitions made on behalf of the appellant and the adverse rulings made by the trial judge in respect of same.

2) The trial judge erred in refusing to exclude the alleged reply to caution of the appellant on the occasion of his arrest by Detective Garda Reynolds and the appellant was wrongly prejudiced by the admission of such evidence in circumstances where the Garda asserted that the appellant had said "*oh f… her*" and the appellant asserted in subsequent garda interview that he had not used that phrase but had said "*f…ing hell*".

3) The trial judge erred in refusing the defence application that various parts of the Garda memos of interview with the appellant be excluded, including that the line "*I told you that I rape her (sentences misunderstood)"* be excised from the memo of interview on the grounds that this wholly misrepresented the meaning of the words used by the appellant, was prejudicial and of no probative value; and directing instead that if the defence had concerns in respect of same, the exact words used in the interview and the DVD of interview should be put in evidence. The appellant was wrongly prejudiced by the admission of such evidence, including by giving rise

to the necessity for the jury to hear and see the appellant speaking in the DVD of interview.

4) The trial judge erred in refusing to discharge the jury in circumstances where the prosecution wrongly adduced prejudicial evidence from Detective Garda Reynolds on re-examination, including inadmissible opinion evidence in relation to the said alleged reply to caution. Having regard to the particular circumstances in which these events occurred and the impact which this is likely to have had on the jury, the appellant was wrongly prejudiced; the trial was unsatisfactory, the verdicts are unsafe and the appellant was convicted in an unfair trial in circumstances in which justice was not seen to be done.

5) The trial judge erred in refusing to direct verdicts of not guilty at the close of the prosecution case on the grounds that the evidence was insufficient to ground a conviction and, in all the circumstances, that it would be unfair to allow the case to be considered by the jury and in particular, that no evidence had been put forward to explain how the offences could have occurred as alleged having regard to the demonstrably contradictory evidence given by the prosecution witnesses; and the Garda investigation had not sought to test whether there was a rational explanation for such apparently contradictory evidence.

6) Having regard to all the circumstances relating to the trial judge's charge to the jury, including that the defence case was not adequately put, the trial was unsatisfactory and the verdict unsafe.

7) The trial judge erred in refusing to charge the jury sufficiently as to the presumption of innocence and the fundamental importance of same in the context of a criminal trial, in particular in the context of the current public debate as to the requirement to believe those who say they are the victims of sexual offences and the prosecution closing speech which appeared to suggest that the criteria for convicting was whether the members of the jury believe that the complainant was telling the truth as to her allegations, and which further included reliance on a variety of prejudicial pieces of evidence which were of no legitimate probative value.

8) The trial judge erred in refusing to recharge the jury as to the fact that the prosecution had not adduced evidence, and no evidence was available to explain how the offences could have occurred as alleged given the contradictory evidence given by the prosecution witnesses.

9) The trial judge erred in refusing to give a sufficiently clear and emphatic corroborative warning which was properly contextualised including by reference to specific relevant matters which the defence contended gave rise to concerns and which made clear that a corroboration warning was not given merely because a sex offence was alleged in the absence of corroboration.

10) The trial judge refused to give an adequate warning arising from the delay in making the complaints.

11) The trial judge erred in refusing to give a direction to the jury to the effect that members of the jury should not feel under pressure to subscribe to a verdict with which they did not agree in the independent exercise of their judgment in accordance with the conscience of each member, and having regard to the particular circumstances of the giving of the verdicts in this case, the trial was unsatisfactory and the verdicts are unsafe.

17. The following grounds of appeal were also listed against the sentence imposed for rape count 18:

12) The trial judge erred in fact and in law in imposing the sentence of twelve years imprisonment in respect of the offence of attempted rape. The trial court erred in failing to suspend a sufficient portion of the latter part of the sentence imposed. The trial judge further erred by not taking into account the fact that the appellant had served another 20 months on remand in custody on unrelated charges in respect of which he had been found not guilty, at a time when the prosecuting authorities had sufficient evidence to charge the appellant in respect of the said offence of attempted rape, together with the associated offences.

13) In all the circumstances, the sentence imposed was excessive and the trial judge erred in law in imposing same.

14) The trial judge erred in failing to take into account adequately the public interest in encouraging rehabilitation and providing an incentive not to commit offences into the future.

The discrepancy between the appellant's evidence and the objective facts concerning the implants

18. The appellant submits that the case was 'truly exceptional' by reason of the inconsistency between the objective facts (the presence of visible implants in the appellant's penis) and the complainant's evidence (that nothing visible was there at the time of the offences). The submissions contained a number of complaints flowing from this state of affairs. First, it is submitted that the Gardaí should have investigated this matter before trial; they were on notice of the issue from the mother's statement (which contained the information as to the objective factual position) and should have gone back to the complainant to take a further statement from her about it. The mother's statement had made it patently obvious that there was an issue to be further investigated and the appellant should not have been 'on the hazard' by having to question the complainant about it for the first time at trial without knowing what she might say and with the associated delicacies of probing unpleasant details in front of the jury 'on the blind'. Secondly, it is submitted that the case should have been withdrawn from the jury on the basis of this fundamental inconsistency in the evidence. Thirdly, it is submitted that prosecution counsel had in his closing speech wrongly invited the jury to speculate when he made his comments about a possible reason for the discrepancy (set out earlier in this judgment). Related to this

submission is the complaint that the trial judge had failed to direct the jury to correct the problem created by prosecution counsel in his closing speech, despite being asked to do so on requisition.

19. Counsel for the DPP submits that, despite the reference in the mother's statement to the visible implants in the appellant's penis, the prosecution were not 'alive' to this issue prior to the trial and that it had only come into focus during the trial as a result of the cross-examination of the complainant. This was why it had not been further investigated prior to the trial. Further, it is submitted that, as matters turned out, no amount of investigation before the trial would have improved the position of the appellant. The position at trial, as the evidence emerged, was as good as it could have been for the appellant because the complainant did not merely say that she did not remember seeing the implants but asserted that they were not there at all. This was a conflict in the evidence which could only have benefitted the appellant's case. As to the suggestion that the case should have been withdrawn from the jury, it is submitted that the issue was a matter of assessing the evidence which was quintessentially for jury to do.

Decision

20. In the first instance, the Court is not persuaded by the appellant's submission that the trial was unfair or the verdict unsafe on the basis that the Gardaí should have investigated this matter further by re-interviewing the complainant prior to the trial. Hypothetically, a failure to investigate an inconsistency within a prosecution case could lead to an injustice, depending on the facts of a case. However, we are dealing with this case in reality and the reality is that the answers given by the complainant during the trial were as beneficial to the appellant's case as they possibly could have been. Therefore, no injustice was actually created in this case by the failure of the Gardaí to take a further statement from the complainant on the issue prior to the trial.

21. The Court does not accept, either, that the case should have been withdrawn from the jury because of this conflict in the evidence. The contrast between the objective reality and what the complainant said was indeed present; but its significance was quintessentially a jury matter. Further, the obvious explanation that would present itself to the mind of any ordinary objective person was that a child, who was seeing a male adult penis for the first time in the stressful context of being abused (if her account were reliable), would not have been aware of differences between it and a penis which did not have such implants. The Court pauses to observe that it has examined the photos in question to make an assessment of the degree to which the implants were visible, and is satisfied that the matter certainly fell within the range of jury determination and did not require withdrawal of the case from the jury. Further, the Court is not persuaded that the prosecution overstepped the mark by suggesting the explanation that it did to the jury; there is a distinction between the jury speculating on a matter of fact about which there is no evidence, on the one hand, and the jury using their common sense and experience of life in forming opinions about the evidence which was adduced before them and why there might be discrepancies in it, on the other. The Court accepts that the discrepancy was a feature of the evidence; but the trial judge very clearly directed the jury on the

matter, and gave a corroboration warning (which is somewhat unusual these days). The jury can have been left in no doubt whatsoever that this was a central issue for them to carefully consider and that it constituted an important matter in their consideration of the complainant's overall reliability. Nevertheless, the jury convicted. It would be wrong for this Court to substitute its view for the jury, which had the opportunity to hear from all the witnesses and in particular the complainant, on the core issues of fact in the case.

22. Furthermore, it is well established that the withdrawal of the case from the jury is one which should only arise as an exceptional measure, and that the judge in deciding whether or not to withdraw the case from the jury must examine the case and withdraw it if, and only if, the evidence is so unsatisfactory, contradictory or unreliable that no jury, properly charged could convict upon it. In the seminal case of *R v. Galbraith* [1981] 1 WLR 1039, Lord Lane C.J. made the following comment on how a trial judge should approach such a decision:

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence, (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

23. Commenting on the above, Edwards J. in *DPP v. M* [2015] IECA 65 stated:

> "47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.
>
> 48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even *if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it*. Accordingly, what Galbraith is in fact concerned with is fairness." (emphasis added)

24. The Court is satisfied that, having regard to those legal parameters, the trial judge in this case was well within discretion in leaving the case to the jury.

The attempted rape conviction

25. It is submitted on behalf of the appellant that the evidence was insufficient to ground a conviction for rape. Counsel accepted that there had been no requisition in relation to this point at trial and suggested that it may have been overlooked in a context where the defence was one of denial that any of the misconduct alleged had taken place. The submission is that, even taking the complainant's evidence at its height, the evidence was insufficient; the complainant had said that the appellant had "immediately stopped" when the complainant protested or screamed; this was evidence from which it could be inferred that there was never any intention to put his penis in her vagina *without her consent*. Counsel referred to the Law Reform Commission's Consultation Paper on Inchoate Offences (LRCCP 48-2008) which discussed the issue of abandonment, saying that it would be possible to argue on behalf of a defendant that evidence of subsequent abandonment cast doubt on whether he had the requisite intention to complete the crime in the first place.

26. The prosecution drew the Court's attention to the transcript of day two at page 22 (lines 22-24), where the complainant said:

> "A. […] Then we went into the bedroom, got undressed, we got onto the bed, but this time I was lying on my back and he was on top but on his knees and my legs were up on his shoulders, and I do remember he tried to put his penis, just the tip of his penis inside my vagina, and it really hurt and I told him to stop twice and I started screaming and then I just pushed him away."
>
> (Day 2, P22, L20-24)

27. The prosecution submits that if the jury accepted that evidence, this was sufficient evidence of attempted rape because it was not merely a situation of her saying 'stop' and the appellant immediately desisting. Further, the trial judge gave a very clear charge in relation to the elements of the offence of attempted rape (see day 7, p.12). It had never been part of the defence case, no requisition had been made at the time, nor was the point even dealt with in the written submissions for the appeal. The appellant was also faced with the decision in *DPP v Cronin (No. 2)* [2006] 4 IR 329.

28. The trial judge's direction on the ingredients of attempted rape was as follows:

> "Now, the allegation in this case is not one of rape. It's one of an attempted rape and therefore there are four elements to the alleged offence of attempted rape which the prosecution must prove to you beyond reasonable doubt. You must be satisfied beyond reasonable doubt that there was an attempt by the accused to insert his penis into the complainant's vagina. You must be satisfied beyond reasonable doubt that the accused intended to complete that act of insertion of his penis into her vagina. You must be satisfied beyond reasonable doubt that at the time of the attempt the complainant did not consent to the sexual intercourse. And

then lastly you must be satisfied beyond reasonable doubt that the accused knew at the time that she was not consenting or was reckless as to whether she was consenting or not."

The trial judge went on to say:

> "Now, I have already directed you in relation to consent in a sexual case. So, I will just repeat it. To consent to sexual intercourse, that consent must be freely and voluntarily given. The failure or omission to offer resistance to the sexual intercourse does not of itself constitute consent to the sexual intercourse. A female does not consent if she submits to that act as a result of threats of force or fear. If you are satisfied beyond a reasonable doubt that the accused attempted to insert his penis and intended to complete that act, in terms of inserting his penis into the complainant's vagina, and that she did not consent to this occurring, you must then proceed to determine whether the accused's state of mind or, sorry, you must then proceed to determine what the accused's state of mind was in relation to his knowledge that the complainant was not consenting to sexual intercourse. If you are satisfied beyond reasonable doubt that he knew that she was not consenting or that he was reckless as to whether she was consenting or not, then you must convict him of the offence."

29. This was a clear, precise and entirely accurate direction in relation to the offence of attempted rape. Further, the Court's view is that the evidence was not such that the failure to deal explicitly with an issue of abandonment arose. The appellant clearly persisted when the complainant made her lack of consent clear verbally, and it was only when she physically pushed him away that he desisted. Further, the overall circumstances of the conduct between the parties were relevant. This was not a case where the issue of abandonment arose sufficiently for the trial judge to have to supplement the very clear charge on the ingredients of attempted rape with an additional and explicit direction on abandonment, not to mention the problem that the appellant faces by reason of the *Cronin* decision in having to failed to raise the point at trial in the first place.

The judge's charge on the presumption of innocence

30. The appellant submits that the trial judge should have acceded to the defence requisition to give a particular direction in relation to the presumption of innocence by reason of what counsel described as the prevailing 'culture of belief' which was in society at large at the time of the trial. This request was expressed in the following terms to the trial judge:

> "And, Judge, I am going to ask you in this context to also give a more expanded direction to the jury with regard to the presumption of innocence. I know you have covered it but there is certainly authority for the proposition that something more is required just to explain to the jury that the presumption of innocence is a fundamental, constitutional protection, not just in this country but it recognised internationally in various human rights covenants and also recognised in jurisdictions throughout the world, that it is the bedrock of the criminal justice system and in the context of the prosecution case essentially suggesting that

believing the complainant is enough for a conviction in this case. In my respectful submission we're living in a society now which is changing and where society and very strong powerful and righteous and well intentioned voices in society are demanding that persons who allege sexual offences against them be believed and that is an imperative, as it were, in the community and there are all kinds of good policy reasons for that to be applied in the community but that in the context of a criminal trial the question is not whether or not you actually believe. The question is whether or not the prosecution's case has been proved beyond a reasonable doubt and in the criminal context, for good reason, the presumption of innocence applies, not a presumption of guilt and I do ask that the Court emphasises –".

(Day 7, page 38-39)

31. It is difficult to resist the conclusion that counsel was making this request having regard to what is generally known as the "Me Too" movement in society at large.

32. Counsel refers to the decision in *DPP v. D. O'T* [2003] 4 IR 286 where the Court of Criminal Appeal quashed a conviction and ordered a retrial in circumstances where it found that the charge to the jury, which simply set out that the presumption of innocence exists and that it is a serious presumption, was inadequate.

33. The prosecution submits that, unlike the position in *D. O'T*, the trial judge had given a clear direction on the presumption of innocence, and had indicated that it was a cornerstone of the law in a criminal trial, and had explained how the burden of proof beyond all reasonable doubt flowed from it. This was on all fours with what was required in the *D. O'T* case. Counsel for the appellant disputes that the trial judge had told the jury that it was a 'cornerstone' of the criminal law.

34. The trial judge's direction on the presumption of innocence was as follows:

"So, turning then to the legal principles that I am directing you in relation to. These are the legal principles that apply in a criminal trial and they have already been referred to by counsel. These are the principles which must be applied by you when making your determinations in relation to the matter. So, starting first with the presumption of innocence. Every accused person is presumed to be innocent of the charge which he faces. Right at this moment the accused is presumed innocent of the charges before you. That presumption is only rebutted if you, having heard and considered the evidence, are satisfied of his guilt on the charges preferred beyond reasonable doubt.

The burden of proving the accused's guilt to you, the person who the burden is placed on to rebut the presumption of innocence, is the DPP, the Director of Public Prosecutions. The DPP is the accuser. She must prove his guilt to you. The accused has to do nothing. There is no burden on him to prove his innocence to you. In fact the accused and his legal team could sit here and not ask a single question and still assert that the case had not been made out against him. There is absolutely no

burden on the accused to prove anything to you. The burden rests entirely on the shoulders of the Director of Public Prosecutions.

So, it flows from that principle that there is no requirement for the accused to say anything regarding these allegations. He has the right to silence throughout the process, both during the investigation and at the trial itself…"

(D7, P5-6)

35. In the Court's view, the trial judge's charge in this regard was correct and sufficiently stressed the importance of the presumption of innocence. No valid comparison can be drawn with the charge which had been given in the *D. O'T* case where the trial judge failed initially to refer to the presumption of innocence at all, and later returned to the issue, saying only:

> "Hopefully to finish my charge to you there are a couple of individual things I want to raise and a longer thing I want to read you, a chunk of evidence. The individual things are as follows: -
>
> I referred to the onus of proof and I thought I said onus of proof being on the prosecution at every stage of the case. I thought I referred to the fact that there was a presumption of innocence in favour of the accused. I still think I did. In case I did not, there is a presumption of innocence and it's a very serious presumption. The onus is on the prosecution to prove, to rebut that presumption and that at every stage, not just on the simple question of guilt or innocence but on every question you are asking yourself in the case, where there is a difference, the onus of proof is on the prosecution."

36. The Court is not persuaded that the explanation in the present case was anything like as sparse as that in the *D. O'T* case. While it might be that some trial judges like to use language such as the presumption being a 'cornerstone' of the criminal law and that it has wide international recognition as a principle, the failure to use this language is not fatal in circumstances where the essential principles to be applied by the jury, and the causal connection between the rules of evidence and the presumption of innocence, are sufficiently explained to the jury, as they were in this case.

The admissibility of the (disputed) comment by the accused upon arrest

37. The prosecution alleged that when the appellant was arrested, he made the comment "*f... her*", referring to the complainant. The appellant maintains that what he actually said was "*f…ing hell*". He is a foreign national and suggests that, because of his accent when speaking English, the Garda misheard or misinterpreted what he said. The appellant submitted at trial that to admit the comment into evidence would be: (i) in contravention of Rule 9 of the Judge's Rules as the alleged reply to caution had not been read back to the appellant until the following day; and (ii) grossly prejudicial, the effect of which would outweigh any legitimate probative value it might have.

38. A *voir dire* was held in connection with the issue. The comment had been read over to the appellant during a Garda interview and he denied that the comment had been made. Instead, he said that he had said "*f…ing hell*". The trial judge viewed the videotape of this interview, and ultimately ruled admissible the evidence of the Garda as to what he had said. This was entirely within the discretion of the trial judge and the Court does not propose to interfere with that decision.

39. Regarding the admission of the evidence in before the jury, the appellant submits that he was in an invidious position because, by reason of the bad language he used during interview, he could not place the videotape of interview before the jury for them to adjudicate the issue of the accuracy of his comment because the effect of seeing his demeanour and language would have been disproportionately prejudicial. In those circumstances, the appellant says, counsel reached an agreement concerning how the comment would be admitted into evidence without the videotape being played, by having the Garda describe the comment. The appellant complains, however, that counsel for the prosecution did not confine himself to this evidence but went on to ask the Garda a further question and thereby elicit the Garda's opinion on the matter. When complaint was made about this, the trial judge held that the potential impact on the jury not sufficient to warrant their discharge. The appellant submits that because the case was finely balanced, every small piece of potential prejudice was highly significant.

40. Counsel for the prosecution submits that the comment did have some probative value insofar as it indicated the appellant's attitude towards his daughter, although it could not be said that it was central to the prosecution case (and this could be seen from the closing speech). Even if the Court took the view that the question eliciting the Garda opinion should not have been asked, any prejudice thereby caused was not of such a magnitude as to warrant the discharge of the jury or the upsetting of the conviction in all of the circumstances. Indeed, it paled in comparison to the prejudicial effect of other matters before the jury, including considerable evidence concerning the appellant's violence and threats.

41. The Court is firmly of the view that the trial judge acted within discretion in deciding to admit the disputed comment and let the jury decide whether it had been said or not, and it must be recalled that the trial judge watched the videotape of interview. There was probative value in the comment; it was (if uttered by the appellant) indicative of a dismissive and hostile attitude of a father towards his daughter which would be all of a piece with the alleged sexual misconduct. As to the practical difficulties caused to his defence strategy at trial by reason of his use of bad language throughout the interview, the appellant had only himself to blame. The 'invidious position' in which he found himself arose because of words that came out of his own mouth. The interests of justice and what is useful from a defence strategic point of view are not identical. The Court is of the view that it would have been better if prosecution counsel had not addressed the issue in the manner in which it was done in the re-examination, in circumstances where the videotape would not be viewed by the jury. However, the Court agrees with the decision of the trial judge that this was not a matter of such magnitude that it warranted a discharge of the

jury, particularly in circumstances where the trial judge had actually viewed the videotape and must have considered that the potential for injustice arising from this additional question and answer was insufficient to warrant a discharge.

The admissibility of a particular line in the memorandum of interview

42. The appellant submits that the trial judge should not have permitted to go to the jury a particular line in one of the memoranda of interview; which the record the following: "*I told you that I rape her (sentences misunderstood)*". Counsel submits that this had no probative value and was prejudicial and should not have been allowed to remain in the memorandum.

43. The prosecution submits that the trial judge had watched the videotape and admitted the line in question; and that while there was some lack of clarity as to what precisely the appellant was saying, what *was* clear to everyone was that whatever he was saying. he was not making admission to rape but rather was speaking sarcastically or ironically. The trial judge had gone through each of the objections to make sure each got separate consideration but correctly ruled that this particular line had a probative value and could be put in context by counsel. Further, the defence were allowed to submit a transcript of what they thought was said at that point in the interview. The videotape of interview was admitted (in part) to show his demeanour and there was nothing prejudicial in this portion of it.

44. The Court is of the view that this matter fell within the discretion of the trial judge and that every effort was made to enable the appellant's legal team to adduce such evidence as it wished in order to put it in context. Further, there was never any doubt but that the appellant was vigorously denying the allegations during the Garda interviews and the admission of this line in the memorandum could not possibly have confused the jury or led them to believe that he was making an admission. The Court rejects this ground of appeal.

The decision of the trial judge not to accede to a defence requisition in relation to the corroboration warning

45. The trial judge decided to give a corroboration warning and did so. This, in itself, is more unusual than usual these days, but the Court does not disagree with the trial judge's decision in this regard. However, the appellant complains of the manner in which the corroboration warning was given. He submits that the trial judge's comments 'gave the impression' that a corroboration warning is given in every case and that she failed to accede to a defence requisition that she should specifically tell the jury that such a warning is not given in every case and that she had exercised her discretion to do so in the present case.

46. The prosecution submits that the corroboration warning was entirely correct and that it would be entirely inappropriate for a trial judge to direct a jury in the manner suggested by the defence, because it would in effect be a trespass on the jury's own fact-finding function. Judges, it is said, do not usually give explanations to the jury as to the reason they have decided to give particular directions.

47. The Court rejects this ground of appeal and takes the view that the course of action suggested on behalf of the appellant would not be appropriate and would overstep the appropriate line as between judge and jury, because to explain why the direction was given would inevitably draw the judge into commenting on the evidence in the case and might communicate to the jury that the judge thought the case was weak, when the strength or weakness of the evidence was entirely a matter for the jury itself.

The decision of the trial judge not to direct the jury as to the possibility of disagreeing

48. Counsel for the appellant submits that the trial judge erred in refusing to give a direction to the jury to the effect that members of the jury should not feel under pressure to subscribe to a verdict with which they did not agree in the independent exercise of their judgment. Counsel submits that while this court has previously rejected this argument in other cases, there was a "particular need" for the direction sought in the present case. Counsel submits that the purpose of such a direction is not to convey to the jury that a disagreement is a form of a verdict but rather to ensure that a minority of jurors, who tended towards a verdict of not guilty, would not be under the impression that since a verdict was expected and there was no prospect of a verdict of not guilty, the only acceptable result was a guilty verdict.

49. Counsel relies in this regard upon *R v. Watson* [1988] Q.B. 690. This was a decision handed down in respect of seven appeals, each concerned with whether pressure was exerted on the jury to reach a verdict by the judge giving the so-called 'Walhein direction'. The UK Court of Appeal held that since a jury had to be free to deliberate without any form of pressure being imposed on them, they should – at the judge's direction – be directed in terms that made it clear that no pressure was being exerted. In his judgment, Lord Land C.J. commented on the discretion of a trial judge to give such a direction in the following way:

> "It is a matter for the discretion of the judge as to whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. Where the words are thought to be necessary or desirable, they are probably best included as part of the summing up or given or repeated after the jury have had time to consider the majority direction."

50. The Court is of the view that no circumstances arose to warrant this particular direction being given in the present case, even if it were to form part of Irish law. At best, such a direction might be required when certain indications come from the jury themselves or from certain particular circumstances surrounding their deliberations; it is not the case that such a direction should be given simply because there is a conflict within the prosecution evidence. The Court rejects this ground of appeal.

Decision

51. In all of the circumstances, the Court is not persuaded by any of the grounds of appeal and will dismiss the appeal.