



**THE COURT OF APPEAL**

**Neutral Citation No. [2020] IECA 130**

**[19/2019]**

**Birmingham P.  
McCarthy J.  
Ní Raifeartaigh J.**

**BETWEEN**

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

**RESPONDENT**

**AND**

**G.H.**

**APPELLANT**

**JUDGMENT (*ex tempore*) of the Court delivered on the 8th day of May 2020 by Mr. Justice McCarthy**

1. On 21st November 2018, following a seven-day trial in the Central Criminal Court, the appellant was convicted in respect of one count of rape and four counts of sexual assault by majority jury verdicts. The appellant had pleaded not guilty to four counts of sexual assault, contrary to s.2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended by s.37 of the Sex Offenders Act, 2001, and three counts of rape, contrary to s.2 of the Criminal Law (Rape) Act, 1981, as amended by s.21 of the Criminal Law (Rape) Act, 1990. The appellant was sentenced to a term of seven years' imprisonment with the final eighteen months of the sentence suspended for a period of three years in respect of count three, for the offence of rape, and to a term of five years' imprisonment for the remaining counts of sexual assault. Those sentences were to run concurrently and backdated to 21st November, 2018. The appellant lodged an appeal against conviction and sentence, but the sentence appeal has not been pursued.

**General Background**

2. The complainant and the appellant lived in the same part of the country and shared a keen interest in horses and ponies and equestrian matters generally. The written submissions of the appellant summarise the narrative of the complainant and the allegations made by her against the appellant. It was accepted by the Director that the appellant's account in that regard is an accurate one, and so we draw on it in providing a background to the issues raised on this appeal. In order to protect the complainant's right to anonymity, we have referred to the complainant and appellant by initials. We have done likewise in the case of witnesses who gave evidence at trial, to the extent that it is necessary to refer to their evidence. Almost all witnesses would have had some involvement with horses and ponies. Because the equestrian community is a small one, we have avoided references to specific geographical areas. More unusually, to the extent that references will be made to particular horses and ponies, for reasons which will

emerge, we have changed the names of the horses and ponies in question. We do so because we feel that to refer to a number of horses and ponies by name could lead to the identification of a particular stables and livery service, and, by extension, to identification of the complainant.

3. The appellant had a farm and stable yard where he stabled horses and offered a livery service. The complainant lived in the same area, in a neighbouring village. The complainant's family and the appellant's family knew each other very well, sharing a common interest in horses and ponies, and moving in the same circles. The appellant was a family friend of the complainant's family and they would see each other at pony clubs and showjumping events.
4. It is important to appreciate that each of the seven counts that appeared on the indictment related to specific incidents and specific allegations. Unlike many cases with multiple counts on the indictments, these were not sample counts or representative counts. Five of the seven counts on the indictment resulted in convictions by majority verdicts and two counts gave rise to disagreements among the jury. Subsequently *nolle prosequis* were entered in respect of those two latter counts.
5. The complainant, Ms O.C, gave evidence that from the age of twelve onwards, one of her ponies was named "Maisie". When she rode Maisie at competitions, her uncle asked her to ride a pony for the appellant, Mr. H, who would also attend these competitions with his son. When Ms. O.C turned 16 years in June 2010, her godmother gave her a horse called "Pirate" as a gift. The horse was brought to the farm and yard of the appellant in August or September, where it was trained by a man called K. The arrangement was that the horse was stabled at the yard of Mr. H and also that he was trained there. Ms. O.C would come to the premises to groom, wash, and ride the horse, as well as muck out the stables. Ms. O.C stated that she tried to get to the yard most evenings and weekends, but it would depend on what was happening at school. Normally, her mother or older sister would bring her to the stables, but sometimes, the appellant, Mr. H, would collect her from school. Ms O.C's mother gave evidence to say that she used to bring O.C to the farm but when her own mother became ill and was dying, the appellant would pick up O.C from school.
6. The first alleged incident of sexual assault, Count 1 on the indictment, occurred in approximately November 2010. Ms. O.C's evidence was that in "maybe November ---", when she would have been 16 years of age, she went to the premises to ride Pirate. As she was in the stable preparing, she left to get the tack, when Mr. H followed her out. Ms. O.C said that Mr. H pinned her against the wall, attempted to kiss her, and put his hands up her top, underneath her clothes, touching her sides and breasts. She said she asked him to stop and that she pushed him away and pinched him. She said that the appellant asked her not to pinch him because his partner C would see the marks. The complainant did not tell anyone about this incident at the time.
7. Ms. O.C. said that the second incident, which was the subject of Count 2 of the indictment, took place a short time after the first, "a few days or a week following". The

complainant had returned to the yard and had finished riding her horse when the incident occurred. She noted that she was in the tack room, sitting on the edge of the tack box, while waiting for the horses to cool down in order to be clipped when the appellant entered. Together she and Mr. H had "a few bottles of Miller". He then pushed her backwards in an attempt to kiss her. She said she could feel the weight of Mr. H's stomach on her and that he touched her sides, inside her clothing. She said that Mr. H later brought her home and she told no one about the incident.

8. In respect of the third count on the indictment, a rape count, Ms. O.C described the offence taking place in late Winter 2010 when she was sixteen years old. The circumstances behind the offending were that, early one morning, Mr. H had collected the complainant from her parents' house so that the two of them could train the horses. Ms O.C said that Mr. H brought her into the kitchen of the house on the farm, and they had a few drinks. She said that she wanted to smoke, and the appellant suggested going upstairs so that they could smoke out the bedroom window. The complainant said they did go upstairs, where she was raped. She described the incident as follows:-

*"[s]o, I was just sitting at the edge of the window, kind of half sitting, and I was smoking the cigarette out the window and G was standing and he was smoking as well. And when he threw his cigarette out the window, kind of, he kind of half lifted me over to the bed. He laid me down on the bed. And he placed my two legs up and he came in between me. And I asked him to stop, I told him I was only 17. His answer was 'I was 17, but I was years above my age'. He took off one leg of my pants and he'd been touching me. I just froze. I was sick. He placed his penis inside me. And I could just feel him going up and down. Then I just remember he walked out and into the bathroom and I just put on my pants. He came back in and he told me he had stained his top, that he'd have to change it. I was so hurt."*

9. Insofar as the fourth incident is concerned, the complainant said that this occurred at a pony club meeting on a Friday night at the showgrounds of the county town in the first three months of 2011, when the complainant was still sixteen. She gave evidence that there was a pony club that ran from September to March, which they attended. The complainant described that on a particular Friday, she had gone into a horsebox to take off a tail bandage when Mr. H came in. She said that he put his hands around her, inside her clothing, put his hands in her pants, and digitally penetrated her. She said she pushed him away and told him that he was a "prick".
10. Count 5 on the indictment, a rape count, was a count in respect of which the jury were unable to agree. The complainant described that in September 2012, she began her third-level education. She shared accommodation with her boyfriend and two others. She said that on one occasion, Mr. H rang her and asked could he collect her and bring her to the yard to "clip Maisie". She told Mr. H where to meet her and they made an arrangement. She describes that on the way to the yard from her accommodation, they had a few drinks in the car. The complainant describes Mr. H pulling into the house at the back of the yard and speaking to a person, a female, who also had horses and worked at the

yard. The complainant said she was told by Mr. H that there was drink inside the sitting room. When Ms. O.C went inside to look, she saw that there was drink on the floor, behind a couch. She described that as she knelt down, she was then raped by Mr. H. Subsequently, Mr. H brought the complainant back to her accommodation.

11. The other count, Count 6, on which the jury were unable to agree concerned an incident described by the complainant as follows. Mr. H is said to have collected Ms. O.C from where she was living and studying and brought her to the yard. When they got to the house, they went upstairs for a cigarette. There, Mr. H was alleged to have raped her once more, before again bringing her back to where she was living.
12. The final count on the indictment for which the appellant was convicted occurred in October 2013. At this stage, the complainant had a partner and was expecting twins. Sadly, she did not, in fact, ultimately deliver either twin. While at a horseshow at a showjumping venue in Munster during the pregnancy, she met Mr. H who was there with his sons. Mr. H had loaned her a jacket, and when she went to his caravan to return it, she describes that as she was leaving, he placed his two hands under her top and squeezed her breasts. She gave evidence that afterwards, she was crying and had an argument with her partner. He thought that she was emotional due to her pregnancy, but a few days later, the complainant told him what happened. In evidence, the complainant said that she later felt sick, and subsequently learned that she was no longer pregnant. She said that she told her partner and her godmother about that incident, and in July 2015, she told her parents.
13. The complainant made her first complaint to the Gardaí on 22nd July 2015. The appellant was arrested on 9th October 2015, and subsequently interviewed. He denied all charges. It may also be noted that he had no previous convictions.
14. In cross-examination at trial, the complainant accepted that she had difficulties involving cannabis and other drugs and had undergone treatment three years earlier.

#### **Grounds of Appeal**

15. The appellant submits the following grounds of appeal:-
  - (i) That the judge erred in failing to give the jury a corroboration warning when requested to so by counsel for the accused, now appellant;
  - (ii) That the judge erred in misdirecting the jury on the issue of consent and his instructions to the jury on this issue, insofar as it was relevant to the case, can only have served to have confused the jury;
  - (iii) That when an overall view is taken, the trial was unfair, unsafe, and unsatisfactory;  
  
And
  - (iv) That the judge erred in failing to give a so-called good character instruction.

Ground (iv) was, sensibly, we think, abandoned, and ground (iii) is essentially generic or formulaic, not requiring separate consideration. There are, therefore, two grounds that require consideration in this judgment.

### **Ground (i)**

#### **The trial judge erred in law in refusing counsel for the appellant's request to give a corroboration warning**

16. The appellant submits that a full corroboration warning should have been given by the trial judge in this case, and further, that the 'halfway' house, or partial warning adopted by the trial judge at the request of counsel did not meet what was required in this case.

When the prosecution case closed, as it did, on the afternoon of the third day of the trial, counsel on behalf of the accused, now appellant, addressed the Court and had three requests. He began by seeking a so-called 'good character direction' and a delay warning; focusing on the latter request. He then sought a corroboration warning. In seeking the delay warning, counsel placed particular attention on the two alleged incidents which were said to have involved Mr. H collecting the complainant and bringing her from where she was living and studying to the stables and yard. Counsel indicated that he was seeking what he described as a very full delay warning. The trial judge agreed to give a delay warning and that is not the subject of any controversy at this stage.

17. Counsel then turned to his third request in which he sought a corroboration warning and made the following submissions:-

*"[t]he next thing, Judge, I want to mention, is the question of corroboration and, if it's of any assistance to the Court, when this matter was previously litigated before your colleague, Mr. Justice Michael White, I applied and invited him to make and give a corroboration warning and he gave a very helpful and learned judgment on the law in this case. The law in this case is not favourable to my client, the Oireachtas having passed the relevant amendment in 1990. There is no doubt that such a charge in relation to the danger of convicting on uncorroborated evidence is, perhaps, in the decline rather than in the ascendant, and I can't complain of such a thing. But if I can come at it this way, there would certainly be something to be said for the Court particularly noting the difficulties around the two -- cases, if I can call them that way, which are towards the latter end of the indictment. [Reference was to the location where the complainant was living and studying while a third-level student]. But obviously, I appreciate the run of the case law. The Court will know, and Mr. Justice White I think, in particular, commended the relevant passages in McGrath on Evidence, and obviously, it's a matter for the Court. In my respectful submission, if there was one issue which would or should cause the Court to give such a warning, it would be the following. The complainant, maybe within her rights, was excessively cautious, if I can put it that way, in cross-examination in committing to any date at all, particularly in relation to [reference to location of third-level studies]. So that's the first point. Secondly, and this is a point which, one way or the other, I would traverse in front of the jury, the inherent unlikelihood that in the circumstances of the case, she would be going back to [reference was to*

*townland where the stables were located] on two occasions, and in particular, in the latter one, perhaps asking Mr. H to provide drink and weed. These, I think, are probably the only three points that can really be urged in support of a corroboration warning. But it may be that the Court, looking at that, considers that it's not sufficient to move the Court to give a corroboration warning. However, if that is the case, I would still ask that the Court might, from an abundance of caution, and not only on account of the two or three things I've mentioned there, but also on account of the delay, to nominate for the jury that there isn't evidence in this case which is capable of being corroborated. To some extent, the Court will have to do that, in any event, if the Court is dealing with the complaint evidence of MH [boyfriend of the complainant] because the Court always nominates that it goes to consistency, it isn't something else. My friend agrees, as do I, Judge, that there isn't evidence here capable of being corroboration, and if, therefore, the Court is against a corroboration warning, in, I might say, the full sense, the Court might consider it appropriate to simply nominate that there isn't evidence capable of being corroboration and I think Mr. Justice White did something similar to that, and I don't, of course, wish to spancel the Court in any way."*

He further submitted:-

*"[t]hirdly, I asked the Court for a corroboration warning, I appreciate that the tide is a bit against me, but if it is a situation that the Court decides not so to do, I would ask that the Court would tell the jury about the absence of corroboration in this case, and I do so against a background where there really isn't any evidence which ties any of these dates in, and there's a particular difficulty in the case about tying any dates in, and that actually enures to the benefit of the prosecution very much, and it does not enure to the benefit to the accused who therefore has no way of saying 'well, we should look at the CCTV or we should look at that or the other', so those are my submissions, Judge."*

18. Counsel on behalf of the prosecution responded in respect of the three requests made on behalf of the accused. So far as the request for a corroboration warning is concerned, she referred to a number of the leading cases in the area, including the English decision in *R v Makanjuola* [1995] 3 ALL ER 730, the decision of the Court of Criminal Appeal in *DPP v JEM* [2001] 4 IR 385, which approved it, and referred to the ruling on the matter by White J. in the previous inconclusive trial. Counsel for the DPP submitted that the evidence of the complainant did not give rise to a requirement for a warning. The judge adjourned ruling on the matter until the following morning. Having considered the matter overnight, a comprehensive ruling was given by the trial judge on the matters canvassed in which he reprised the main points of the arguments advanced in support, *inter alia*, of granting such corroboration warning in the following terms:-

*"[t]he rules relating to the requirement of corroboration required in the credibility of sexual assault complainants are special rules of evidence which apply in sexual trials. This rule continues to serve a function in modern sexual offence trials, but*

*they are rooted in historically-prejudicial attitudes about sexual offence complainants. Generally, all witnesses in criminal trials are deemed competent to testify to matters which are within their knowledge. The evidence of one witness, if believed, is sufficient to support a guilty verdict. Nonetheless, in certain circumstances, the evidence of a lone witness may be seen as potentially unreliable and, consequently, corroboration may be sought. Section 7.1 of the Criminal Law (Rape) (Amendment) Act 1990, which was enacted in the wake of the Law Reform Commission Report of 1990, provides that:*

*'Where at the trial on indictment of a person charged with the offence of a sexual nature, evidence is given by the person in relation to whom the offence is alleged to have been committed, and by reason only of the nature of the charge there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person. It shall be for the judge to decide, in his discretion, having regard to all the evidence given, whether or not the judge should give such a warning'.*

*In this case, the Court is satisfied that with regard to the changes brought about by Section 7 of the Criminal Law (Rape) (Amendment) Act 1990, and the jurisprudence flowing there from, the Court is satisfied not to give a corroboration warning; however, the Court is prepared to say to the jury that there is no independent evidence that supports the complainant's evidence."*

19. In the course of the ruling, the judge explicitly stated the legal basis upon which he was satisfied that he would not give such warning, although he did not reprise the evidence where that is concerned. He also agreed, as is apparent from the ruling, to accede to what might be described as counsel for the appellant's default submission that the judge should point out to the jury that there was in fact no corroboration. The judge clarified to the jury that there was no independent evidence other than the testimony of the complainant:-

*"I did say to you that there was no corroboration of [OC's] evidence. That is no independent evidence apart from what she says. And the comment, the evidence of her boyfriend [MH] that he had heard a complaint is not corroboration. It's just consistent with the fact, but it's not corroboration. Just in relation to my summary of the complainant's evidence, she did say, after I suppose the allegation of rape which was the first allegation which was said to have occurred in the yard rather than the house, she gave evidence that each time after that, either her sister or her mother brought her to Mr. H's yard and that they were there. And further, that this ties in with the mother's evidence that Mr. H collected the complainant by arrangement wherever he collected her."*

20. After the charge, in the course of their deliberations, the jury asked a question in relation to corroboration. The trial judge responded as follows:-

*“. . . where there are two conflicting versions of events, the jury must give the benefit of the doubt to the accused unless you are convinced beyond a reasonable doubt that the other version is true. So, that where there are two versions and you're not satisfied beyond a reasonable doubt that the version applicable to the version which benefits, so to speak, the prosecution, you must be satisfied beyond a reasonable doubt of that before you then decide not to give the conflicting versions of events.*

*The second thing is, there is no evidence to corroborate sexual assaults or the rapes, and that is true. On the other hand, that doesn't mean you can't convict, as long as you are satisfied beyond reasonable doubt that the accused is guilty of one or more of the offences. Is that of assistance to you?”*

21. The issues which arise in respect of corroboration are, accordingly, whether such a warning ought to have been given, and secondly, whether because of the grounds expressed by the judge as the basis for his refusal to do so, the ruling is in some sense bad, and thirdly, that what is submitted to be a so-called 'halfway house' or 'partial warning' given by the judge in the course of the his charge undermines its purpose. A number of authorities are cited by both parties to this appeal on aspects of the law pertaining to corroboration. We do not propose to deal with them all. The law is now well-settled and has repeatedly been stated by this Court in recent years. The core of the rule is encapsulated in the following extract from the judgment of Birmingham J. (as he then was), which has been quoted with approval on more than one occasion, in *DPP v K.C* [2016] IECA 155 at para.25:-

*"[t]he starting point for consideration of this issue is that the decision to issue a warning or not is a matter for the trial judge's discretion. The Court will be slow to intervene with the exercise of that discretion by a trial judge and a court will intervene only if it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact."*

Geoghegan J. put the matter in substantially the same terms, even if couched somewhat differently, in *DPP v Ryan* [2003] 3 IR 550, where he stated:-

*"[a]s in the case of all discretionary orders an appellant court may interfere if, on the facts of any particular case, a failure to give the warning were manifestly a wrong exercise of the discretion."*

22. The appellant says that if a decision had been made to give a warning (which it was not), the warning in the terms so given would clearly give rise to grounds for an appeal and, it is suggested, would be on all fours with *DPP v Gentleman* [2003] 4 IR 22. That is a proposition which, frankly, we find it difficult to understand in the present case. Counsel on behalf of the appellant made a request for a warning in restrained, tentative terms. He recognised, correctly, in our view, that modern jurisprudence did not assist him and, as a fall-back position, he had an alternative request for the trial court which was that the judge should point out that there was no corroboration evidence or independent evidence.



The judge, ruling on the matter, indicated that he was not going to give a corroboration warning, but that he was prepared and would say to the jury that there was no corroboration in the case.

23. This Court has, on a number of occasions, made the point that where a judge has decided not to give a warning, after proper consideration of the issue, the fact that on another occasion, he or she might have been disposed to give a warning, or that other judges in the circumstances might have considered a warning, or that members of an appellate court, if making the decision, might have considered a warning, is not a basis for intervention. This Court will intervene only if the decision to refuse to give a corroboration warning was an impermissible one. Accordingly, each case must depend on its own facts. While that is the clearly established general position, there have been cases where the Court has been prepared to hold that warnings were necessary. These were cases such as *DPP v. TOD* [2017] IECA 160, a case involving a single allegation of historic indecent assault by a priest at a boarding school, where the complaint was made after a delay of thirty years and after the accused in the case had pleaded guilty in relation to similar offences in respect of other complainants, a fact which had been reported in the media. It was also the case that it had been established that other staff members at the same school had also been involved in the sexual abuse of pupils. Another such case was that of *DPP v. Alan Hanley* [2018] IECA 175, where there was strong support for the suggestion that a complainant had modified or tailored her evidence to accord with forensic evidence in the context of a retrial. The judge at the first trial had given a corroboration warning, but at the retrial, no warning was given, though by that stage, the case for a warning was, for several reasons, stronger.
24. In the present case, we cannot see how it could be seriously suggested that the state of the evidence was such that there was only one way in which the judge's discretion could be exercised, which would have been in favour of giving a traditional warning. On the contrary, we believe that it was fully open to the judge to exercise his discretion in the way that he did. Indeed, we would add that we are not all surprised that neither the judge in the original trial, or the judge in the retrial giving rise to this appeal, were disposed to giving a corroboration warning. The complaint made here lacks merit in circumstances where the judge had decided not to give such a warning but instead used a form of words which perfectly pointed out that there was no corroboration. He did so at the behest of experienced counsel at trial. It may well be that cases may arise where a corroboration warning in those terms, the judge having decided to give such a warning, would be open to criticism, but this is not the case here since the judge decided *not* to give the corroboration warning.
25. Submissions were also made to the judge concerning a so-called delay warning, having regard to the lapse of time since the offences, as we have seen. The relevance of that to the present appeal is that it is sought on appeal to rely on the grounds advanced for seeking a delay warning as requiring a corroboration warning, something which was not done in the trial court. For the avoidance of doubt, the factors mentioned under the delay

head, either at trial or here, do not undermine the way in which the trial judge exercised his discretion.

26. In the course of the ruling, the judge explicitly stated the legal basis upon which he was satisfied that he would not give such warning, although he did not rehearse the evidence when doing so. Having regard to the care with which he addressed the issues canvassed, the correct statement of the law and the experience of all engaged in the debate, we cannot see that there was any deficiency in the ruling because of a failure to engage with the evidence in greater detail, nor can we see that there is any basis for suggesting that there was some erroneous application of established principles. The issue of corroboration warning is not a complex matter, on the facts of most cases, and certainly was not here. We cannot see any basis upon which the trial judge can be criticised for the manner in which he chose to exercise the wide discretion vested in him.
27. Accordingly, this ground of appeal must fail.

### **Ground (ii)**

#### **The trial judge erred in misdirecting the jury on the issue of consent and his instruction on this issue, *insofar as it was relevant to the case*, can only have served to have confused the jury**

28. At the outset, it is necessary to recall that the complainant's account, from which she never resiled, was that on the number of occasions that she referred to, she was either sexually assaulted or raped. The case put on behalf of the appellant was that none of these things happened. It is against that background that what the judge had to say in relation to the issue of consent has to be considered. It is against that background that the phrase "insofar as was relevant to the case" appears in this ground of appeal. A judge's charge on a particular issue must always be contextualised with reference to the issues in a particular case.
29. The trial judge dealt with the question of consent in the course of his charge to the jury. That he would address the subject is not at all surprising because the absence of consent is one of the constituent elements of both categories of offending that appeared on the indictment; the offences of rape and sexual assault respectively. However, in a situation where nobody was making the case that there had been sexual activity but that what occurred was consensual, it would not have been surprising if the judge had not found it necessary to address the issue in any great detail. In fact, he had quite an amount to say on that subject, regardless of the fact that a consent defence had not been advanced. He told the jury:-

*"[t]he legislature has provided in 2017 certain rules with regard to consent. The common law is the original basis, basic law in Ireland, is relevant as well, is to provide a legally valid consent to sexual assault, an individual must have attained the legal age of consent, that is 17 years, and must have the requisite capacity to legally consent. This really relates to capacity, that an individual must have attained 17 years of age. The common law says that consent to sexual activity must be freely given and for consent to sexual assault to be valid it must be fully informed.*

Now, section 48 of the Criminal Law (Sexual Offences) Act of 2017 provides as follows:

*'A person consents to a sexual assault if he or she' and this also relates to sexual assault where the complainant is over the age of 17 or is 17 or over. "A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act. A person does not consent to a sexual act if he or she permits the act to take place or submits to it because of the application of force by him or her or some other persons or because of the threat of the application of force to him or her or to some other persons, or because of well-founded fear that force may be applied to him or her or to some other person. (b) That a person does not consent if he or she is asleep or unconscious. A person does not consent if he or she is incapable of consenting because of the effect of alcohol or some other drug. (d) That he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act. A person does not consent if he or she is mistaken as to the nature and purpose of the Act.'*

And then there are a number of other matters which are not relevant to this case. And then the final one:

*'A person does not consent if the only expression or indication of consent or agreement to the act comes from someone other than the person themselves.'*

*In other words, what the legislature are providing is that intoxication may render a woman incapable of consenting. One who is asleep or otherwise unconscious lacks the capacity for consent. Mr Justice Carney, a well-known judge of this court, said that a person who is asleep cannot give consent to sexual assault with her during her sleep.*

*So one of the key issues you have to decide is what the complainant's mental state at the time when the sexual activity took place. This is a fact to be determined like all other facts and if you determine it in favour of the prosecution, they must satisfy you beyond a reasonable doubt that there was an absence of consent on her part. Sometimes, it is difficult to analyse because most cases of sexual offences happen in private and it is only the two people who are present. You have to try and determine what took place between the two people and if, in the context of consent, you have to determine what the complainant's state of mind is, you have to analyse the state of mind over a very limited time period."*

30. Counsel for the defence requisitioned the judge as follows:-

*"MR GAGEBY: The Court dealt with the 2017 Act which is of course a recent Act and constitutes an amendment by way of substitution for section 9 of the 1990 Act.*

JUDGE: Yes.

MR GAGEBY: *And in my respectful submission, leaving aside the fact that it doesn't appear that the section is retrospective, it is more likely to cloud rather than to clarify the jury's decision-making process on the law for this reason; there are obviously a number of factors which the Court in summarising section 9 alluded to and only one of them, in my respectful submission, has any direct relevance here and that is the question of drink or intoxication.*

JUDGE: Yes.

MR GAGEBY: *But, Judge, this is not a case in which the complainant is saying that she was so intoxicated as to be incapable of giving consent or not.*

JUDGE: Yes. No, no.

MR GAGEBY: *Nor is there any case made on the evidence that the accused was so intoxicated as to not know the nature and quality of the act of what he was doing and on each occasion, I understand the complainant to have said that she voiced objections and said stop.*

JUDGE: Yes.

MR GAGEBY: *So I wonder if it mightn't make the jury's task a little clearer to say that the provisions of the Act of 1990, apart from not having legal application, don't really have any real application to the facts in this case.*

JUDGE: Yes. Fine.

MR GAGEBY: *May it please the Court.*

JUDGE: *Very good. I think I'll accept that.*

MR GAGEBY: *I think the Court may have, when mentioning that matter, have inadvertently suggested the age of consent for sexual assault is 17 when in fact at the relevant time it was*

JUDGE: *Fifteen.*

MR GAGEBY: *the age of 15.*

JUDGE: Yes.

MR GAGEBY: *And if the Court is dealing with the question of either drink and consent, perhaps to clarify in the older words of the law on intoxication, where it is said that a drunken intent is still an intent but a drunken consent is still consent.*

JUDGE: Yes.

MR GAGEBY: *Unless it be to the great extremity.*

JUDGE: *Well, yes. Very good. Well, I'm reluctant enough about that one, Mr Gageby.*

MR GAGEBY: *Yes.*

JUDGE: *I'm certainly happy to deal with the question of the age of consent."*

Following this, the judge directed the jury as follows:-

*"[t]he second thing is that in relation to the 2017 Act. I read out the various parts of the 2017 Act. There's some suggestion that that may not have in fact had retrospective effect. I'm not convinced of that myself, but the important thing about the issue of drink and intoxication is the complainant was never arguing that she was unable to consent and I think that's particularly relevant to the issue of intoxication. She wasn't saying that she was incapable of consent. The age of consent for sexual assault at that stage was 15, so that it was open to [Ms C] to consent to being sexually assaulted, if that's an issue which is troubling your mind. So the issue of 15, her evidence is that she didn't consent and the defence case is that it never happened, so it's not terribly relevant, but at the same time, just in case."*

*I did say to you that there was no corroboration of [Ms C's] evidence. That is no independent evidence apart from what she says. And the comment, the evidence of her boyfriend [M] that he had heard a complaint is not corroboration. It's just consistent with the fact but it's not corroboration. Just in relation to my summary of [Ms C's] evidence, she did say after I suppose the allegation of rape which was the first allegation which was said to have occurred in the yard rather than the house, she gave evidence that each time after that, either her sister or her mother brought her to [Mr H's] yard and that they were there. And further, that this ties in with the mother's evidence that [Mr H] collected [O] by arrangement wherever he collected her.*

*And yes, in relation to the issue of drunken consent, it's not the prosecution's case that [Ms C] gave drunken consent. In other words, the whole issue in this case is not about her state of mind but much more what in terms of alcohol but whether or not, first of all, these things happened and if they did, did she consent. And her evidence is and the prosecution's case is that she did not consent and the defence case is that it never happened."*

31. While there was reference to the consumption of alcohol, beer, and "weed", there was no hint at any stage in the evidence that sexual activity had occurred in circumstances where the complainant was incapable of providing consent, and in particular, was incapable of providing consent because of the consumption of alcohol and/or the use of cannabis.

32. We agree with defence counsel that the judge's decision, though no doubt well-intentioned, to offer the jury an exposition of the law in this area, was not particularly helpful. Indeed, it must be said that the judge's charge in this regard was not a textbook one and could not be described as a model of clarity. It seems to us, though, that anyone hearing the charge and recharge, following requisition, could be left in no doubt that the jury was being asked to consider the case in circumstances where the complainant was saying that sexual activity had occurred, to which she had not consented and which was against her will, and the case for the defence was that no such activity had ever occurred. The second issue that would be clear to anyone hearing the charge and recharge is that an absence of consent was an ingredient of the offences before the Court, and that the case could result in a conviction only if the jury were satisfied beyond reasonable doubt that the sexual activity occurred without the consent of the complainant. While we accept that the judge's charge in relation to consent could certainly have been clearer, we do not believe that there was any confusion as to the central issues to be decided by the jury, nor was there any scope for confusion as to the constituent elements of the offences on the indictment. We think that the proposition that the jury might have been confused or misled or that there was any deficiency in the charge under this ground is unfounded.
33. This Court has not been persuaded to uphold either ground of appeal. We have not been persuaded that the trial was unsatisfactory, or the verdict unsafe.
34. Accordingly, the appeal is dismissed.