



THE COURT OF APPEAL

[96/2016]

Neutral Citation Number: [2021] IECA 90

Edwards J.

McCarthy J.

Ní Raifeartaigh J.

BETWEEN

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

RESPONDENT

AND

S.K

APPELLANT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 26th day of March 2021:

1. This is an appeal against conviction and sentence; this judgement deals with the issue of conviction only. On the 19th of January 2016 the appellant was convicted after a five-day trial in the Central Criminal Court of 49 counts of sexual assault, rape and rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990 between the years 1999 and 2005. The appellant was born on 17th November 1982 and his sister Ms V.K who was born on 29th October 1988 was the victim. Count number 32 on the indictment was withdrawn from the

jury the respondent having entered a *nolle prosequi* upon it at the end of the prosecution case.

The offences of which he was convicted are as follows:-

- (i) twelve counts of rape spanning a period commencing 1st January 2000 and ending on 28th October 2005;
- (ii) one count of rape on a date unknown between 1st January 2005 and 31st December 2005 at the appellant's own home (subsequent to his departure from his and the complainant's original family home);
- (iii) four counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 spanning a period between 1st January 1999 and 31st December 2000 and involving vaginal penetration with a screwdriver;
- (iv) fourteen counts of rape contrary to s. 4 of the same act of 1990 spanning the period between 1st January 1999 and 20th October 2005 involving oral penile penetration;
- (v) fourteen counts of sexual assault between 1 January 1999 spanning a period of between 1st January 1999 and 24th October 2005;
- (vi) one count of sexual assault on a date unknown between the 1st of January 2005 and 31st December 2005 at the appellant's then own home aforesaid;
- (vii) two counts of rape contrary to 4 of the 1990 Act on dates between the 29th of October 2001 and the 28th of October 2003 involving vaginal penetration with a vibrator.

2. The appellant was sentenced on 15th March, 2016 to eleven years imprisonment in respect of the rape and s. 4 rape offences, and to three a half years imprisonment in respect of

the sexual assault offences, to run concurrently. The appellant now appeals against both conviction and sentence.

3. According to the injured party, she was aged between ten and sixteen years during the period when the offences were committed and the appellant was aged between sixteen and twenty two. The abuse was prolonged, continuing for a period of some six years and, with the exception of Counts 13 and 47 (which occurred in the appellant's own home when he moved out), the incidents occurred in the family home of the victim and her brother when their parents were out; they went shopping from time to time and attended Mass every week. The offences which took place in the family home were perpetrated during the day, and once at night. That which took place in the appellant's home occurred at night. We shall deal with those which occurred in the original family home of the appellant and his victim, since they constitute the events giving rise to the overwhelming preponderance of the charges, and that which occurred at the appellant's home separately.

The evidence of the complainant

4. The evidence of the complainant at the trial was as follows. She says that the appellant began the sequence of offences by touching her neck; she didn't understand at the time what it was that he did to her but now understands that he gave her a 'love bite'. After that first incident he began touching her in a more overtly sexual way. He would touch her vagina with his hands and that he would use his tongue to lick the inside and the outside and insert his finger. He would ask her to touch him and to masturbate him and he also asked her to put his penis in her mouth, which she did. She said that these offences happened often though she could not remember if it was every week, and that it was always when there was nobody else in the house. The sequence was that the appellant stood in front of her when she was sitting and would put her hand around his penis and guide her mouth around it. He would then put

his hand at the back of her head and if she failed to perform the action to his satisfaction he would force her to put his penis into her mouth to a greater extent pushing her head in doing so.

5. She said that she was between the ages of ten and eleven years of age when he started putting his penis into her mouth. There was evidence of incidents in the course of which the appellant inserted a screwdriver into her vagina. He would use the red handle thereof and he also gave the screwdriver to her and told her that she needed to practice with that particular item. He also used vibrator upon her. The screwdriver use began in the early stages of the abuse and the vibrator was used when she was thirteen or fourteen years of age.

6. The complainant said the situation changed after she began menstruation at the age eleven or twelve; at that stage the appellant began putting his penis into her vagina. This occurred in her bedroom. She said that they lived in a four-bedroomed house and her bedroom was the smallest. At the time of the first such incident there was no one else in the house; her brother called her upstairs and told her to take off her clothing and lie back on the bed and her evidence was that he inserted his penis into her vagina. She described it as being very painful. She said she did not know at that stage what sexual intercourse was and that she was bleeding afterwards. She said that the appellant threatened her all the time to the effect that he would tell her parents that she had done something wrong, such as smoking or being out late. After the sexual penetration began the appellant would threaten the complainant that if she told anyone what occurred he would drive his car off a cliff or into a wall, that he could be killed and it would be her fault.

7. The complainant recalled her brother then moving into his own house in 2004 or 2005 when she was approximately fifteen years of age. She said that when he bought it there was no furniture at all in the house, other than a mattress which was up against the banisters

downstairs. She said that she was there with the appellant when he first moved into the house, that everybody in the family was giving him a hand because the house needed to be decorated and that she helped with cleaning. She said that they went to his house on a particular evening, the appellant and a friend were there, that they were carrying out electrical work and painting and that she was cleaning. She said that the appellant said to her that they would stay the night and they stayed the night on the mattress and she said that on that occasion the appellant put his penis into her mouth. She said that he then licked her vagina inside and out and that he then had full sexual intercourse with her and she said it would have gone on a lot longer because there was nobody there. She said that he also used a pink coloured vibrator in the shape of a penis and then a screwdriver.

8. She said that the last time she had any sexual contact with her brother was when she was sixteen. She said in her evidence that her parents had brought her to a family friend's birthday party. She was bored at the party and so either her father or herself rang her brother, the appellant, to take her home. The appellant did so, but there was nobody in the house when they arrived and the appellant said to her that he had done something for her so that she could now do something for him. The complainant said she recalled the clothing that she was wearing on this occasion and she said that this was the only incident where she actually remembered what she was wearing. She said she was wearing a white top and a yellow skirt and a pair of lemon and white shoes. She said that the appellant told her to take off all her clothes, that she then had nothing on and that he proceeded to have full sexual intercourse with her.

9. In late 2011, the complainant had a discussion with the appellant on an occasion when he came to the house one evening, that he was upset and annoyed and he asked her if she would go for a drive with him; she couldn't quite recall whether she had said that she would go for a drive with him but she went in any event. She said that they stopped for coffee and

that he told her he was stressed and having issues in his relationship. The complainant told him this was none of her business. She then said that the events which occurred years ago should never have happened, and he replied “*I don't regret it*”.

The evidence of their parents

Their parents gave evidence about a confrontation with the appellant about his wrongdoing on Monday the 7th of May 2012. Her mother, on the day before had had a discussion with her daughter about the issue, and as a result, she arranged to meet her son, the appellant, the following day, i.e., on that Monday. She said that the appellant arrived with his wife and his children before lunchtime and that she moved the appellant into the front room and invited the others to go into the general living area. Their father, Mr. K, gave evidence that when he confronted the appellant, the latter used words to the effect that they were only children and that he was experimenting. We set out below, verbatim, certain portions of the evidence of those witnesses when dealing with the relevant ground of appeal.

10. The appellant was charged with the offences at 00:15am on the 5th of April 2013. He was detained in custody and appeared before District Court later that morning.

The appeal

11. The appellant appeals his conviction on the following grounds:-

- i) The learned trial Judge erred in law and in fact in ruling that the jury should not be discharged after counsel for the prosecution led the witness, the complainant's mother, as to whether the accused had made any admission about experimenting with the alleged injured party;
- ii) The learned trial Judge erred in law and in fact in allowing the prosecution to adduce hearsay and/or opinion evidence from the complainant's father that the

appellant threatened the alleged injured party in order to keep her silent in circumstances where the learned trial Judge erred in ruling that same was necessary for the purposes of contextualising a confrontation between the complainant's father and the appellant;

- iii) The learned trial Judge erred in law and in fact in ruling that there was a case to answer in relation to counts of rape on the indictment and in ruling that there was sufficient evidence of lack of consent to allow such counts of rape to be left to the jury; and erred in law and in fact in failing to grant a direction at the close of the prosecution case;
- iv) The learned trial Judge erred in law in ruling that s. 14 of the Criminal Law Amendment Act, 1935, applied to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990;
- v) The learned trial Judge erred in law and in fact in failing to withdraw the case from the jury at the close of the prosecution case on foot of an application by the defence concerning delay in bringing the prosecution and the effects of that delay;
- vi) The learned trial Judge erred in law in failing to give a corroboration warning to the jury;
- vii) The learned trial Judge erred in law and in fact in failing to warn the jury properly or at all on delay and in failing to contextualise the delay warning in her charge.

Submissions

The learned trial Judge erred in law and in fact in ruling that the jury should not be discharged after Counsel for the prosecution led the witness, the mother of the complainant and the appellant, as to whether the accused had made any admission about experimenting with the alleged injured party.

12. It was part of the prosecution case that when confronted by his father as described above, the appellant made certain statements which were admissions. In particular, in the course of examination in chief Counsel for the respondent had the following exchange with Mrs K:-

“Q. All right. And as I say just tell the jury what you said and what [the appellant] said, not what anyone else said?”

A. I confronted him and asked him what he had to say about it.

Q. About what?

A. And he said, “we were just children.”

Q. Excuse me.

JUDGE: Sorry you asked a question about what?

Q. Mr. O’Kelly: About what? What did you confront [the appellant] with?

A. That he raped our daughter and sexually assaulted our daughter and he said that they were just children and they were just playing and I asked him how could he think they were just children, I said she was a child, you weren’t a child and I said—

Q. Was anything said about experimenting?

A. Pardon? He said that they were just trying like I suppose experimenting and I said how could you, she wouldn’t know anything”

Counsel for the appellant contended that his client was fatally prejudiced by what he contended was a leading question viz- “*was anything said about experimenting*” and this gave rise to an application to discharge the jury. Mr. Hartnett, at trial, had submitted that:-

“The whole question of experimentation was introduced by my friend, put into the mouth of the witness and I submit that that is objectionable, there could be no recovery from it and I would ask that the jury be discharged. It is a blatant breach of the rules of evidence.”

The trial judge ruled on the issue as follows:-

“... The second matter is that Mr Hartnett complains that Mr O’Kelly in effect led certain evidence in that Mr O’Kelly asked the question as to whether anything was said about experimenting, the reply was, and counsel’s note, that he said that both of them were experimenting; that’s the accused man and the complainant. However, prior to that piece of evidence, the witness Mrs [K] said that the accused man said to her that they were just children and they were just playing. And I’m not satisfied that the material he said that they were both experimenting – is material which permits the judge to discharge a jury, which is something which one would do as a very last resort. The question which was simply asked whether anything was said about experimenting. The reply given was that he said that they were both experimenting and are not satisfied that it is sufficient to withdraw... or to discharge the jury in any circumstances; I’m refusing the application Mr Hartnett.”

13. Here, the appellant complains that the words in question “obviously” suggested that some sexual activity between the complainant and the appellant took place. Had this piece of evidence developed organically, through examination in chief within the rules, such evidence would be properly before the jury. However, its elicitation by the respondent’s counsel

through a leading question was achieved in clear breach of the rules of evidence, resulting in unfairness and prejudice to the appellant's position. It should be noted that the evidence as to experimentation between the complainant and the appellant was denied by the appellant. The appellant disputed that he ever made such an admission. It is submitted the trial Judge erred in law in failing to discharge the jury due to the damage done to the appellant's right to a fair trial, and that as a result of the fact that "prejudicial" evidence was adduced through the use of leading questions.

14. The respondent submits that the judge committed no error when she refused to discharge the jury. While the appellant suggests that there had been no suggestion of experimentation prior to the question at issue being posed by counsel for the prosecution, the witness had in fact already given evidence to the effect that her son had told her, when confronted with the allegations by the complainant, that they were "*just playing*" and were "*just children*". Although the word experimentation had not been used prior to the question being posed, the flavour and tenor of the evidence already adduced by the witness was highly suggestive of her having been told that something akin to experimentation had taken place. When the complainant's father gave evidence during the trial (he was not present when the evidence of the complainant's mother was adduced), evidence to which we will turn below he used the word "experimenting" when he described the confrontation with his son on May 7th 2012. The reference to experimentation, therefore, was very much a feature of the trial, rather than a standalone comment made by one witness after a specific question was put. Further, the respondent submits that the discharge of a jury is a matter of last resort and should only be done if the circumstances are such that a prejudice has arisen that cannot be overcome and that there is a real risk of a wrongful conviction.

15. No one can doubt that juries should not be discharged except for a grave reason; this is certainly not such a case. We think that the fact that the evidence of the witness pertaining to

experimentation was elicited by the impugned question could not possibly fall into the category which would justify a discharge. This is to say nothing about the fact that we accept the proposition that the concept of experimentation was very much part of the case both because of the evidence of Mrs K which immediately preceded the question as to what the appellant said and also the subsequently given evidence of Mr K (to which we will return below). In terms of principle, a leading question is one which suggests the answer to the question asked, or which assumes a disputed fact. However, the dividing line between questions which are leading and those which are not can be unclear in practice. Certainly, it has always been the law that a witness may be directed to a particular topic and in the present instance an enquiry as to whether or not anything had been said about experimentation did not necessarily suggest that the witness would say that something about it was so said – we do not think it was a leading question in the context in question. Even if we are wrong in our view and the question falls on the wrong side of the line between permissible questions and those which are not permissible, any evidence given as a consequence of such a question is not *per se* inadmissible: the fact that evidence may have been elicited by a leading question merely goes to weight. See McGrath on Evidence, 2nd Ed, at para 3.74 to that effect, and confirming what we believe to be the law. What the appellant's proposition amounts to under this ground of appeal is that since admissible evidence was elicited by a leading question the jury should have been discharged, a proposition which we cannot accept. While we would not foreclose on the idea that in very rare cases a discharge might be justified on the basis that a leading question has elicited irredeemably prejudicial inadmissible evidence, it was certainly not justified in the circumstances of this case.

16. We accordingly reject this ground of appeal.

The learned trial Judge erred in law and in fact in allowing the prosecution to adduce hearsay and/or opinion evidence from the complainant's father that the appellant threatened the alleged injured party in order to keep her silent in circumstances where the learned trial Judge erred in ruling that same was contextualisation for a confrontation between the complainant's father and the appellant.

17. The immediately relevant evidence of Mr K as to his exchange with the appellant during the confrontation (evidence admitted over the appellant's objection) is as follows:-

“Q. Now Mr. K, before we rose, I was asking you about what took place on Monday the 7th May 2012 when your son [the appellant] came to your house and you had told us that you confronted him?”

A. Confronted him, yes.

Q. And that, in response, he used words to the effect that they were only children and that he was experimenting?”

A. Correct yes.

Q. Is that correct? Now, what was your response to that?”

A. Do you want my exact response to it?”

Q. Yes, please?”

A. Well, my exact response to it was I said to him, “experimenting my arse”, I said, “because you threatened [the complainant] to keep her silent”. That's exactly what I said to him.

Q. And what was his response when you said that to him?”

A. He then said to me that, okay, it was on him is what he said.”

18. The appellant submits that there was no “free-standing” basis upon which a part at least of such evidence (“*experimenting my arse*” and “*because you threatened [the complainant]*”

to keep her silent”) ought to have been admitted by the judge. There was no “probative evidence” to support the assertion that a threat had been made; the supposed absence of any original evidence to suggest the appellant threatened the complainant, rendered this portion of evidence hearsay or opinion evidence and consequently inadmissible. It is submitted that the judge erred in permitting the evidence to be admitted on the basis that it offered contextualisation of the confrontation. A reading of the transcript shows that this evidence was either the opinion of the witness or was hearsay evidence. In any event, it was consequentially inadmissible and should not have been led in evidence. It was submitted that to categorise this evidence as ‘contextualisation’ was an error in law and fact by the judge. In the absence of evidence, and in particular, the absence of evidence of the complainant that the appellant threatened her the evidence of the complainant’s father in that regard was inadmissible and highly prejudicial. The statement adduced by the witness was not relevant evidence and ought not to have been admitted; such evidence was no more than supposition or the opinion of the witness.

19. The respondent submits that contrary to that which the appellant contends as to the supposed absence of evidence to the effect in question since by the time the complainant’s father was called to give evidence, evidence had already been adduced before the jury of threats made by the appellant. The appellant’s contention as to the state of the evidence is accordingly just plain wrong. The evidence was therefore not adduced in a vacuum, but rather mirrored and reflected the evidence already before the jury of the complainant. The complainant had given the following evidence:-

“Yes, he threatened me all the time. He threatened me when the - - when the abuse was that it wasn't sexual penetration he used to threaten me and say oh, I'll tell Mam and Dad you done this or I'll tell Mam and Dad you done that if I done something,

say, wrong or like smoking or being out too late when I was supposed to be home early..”

and, later:-

“..but when the sexual penetration started it was - - his threat to me was if I ever told anybody that he would drive his car off a cliff or he'd drive his car into a wall and he'd be dead and it would be all my fault and I'd be the only one that would know.”

The judge permitted the receipt of the evidence and in that regard said as follows:-

“But the response to the confrontation is admissible in any event, and in order to contextualise the response given in the evidence which the prosecution seek to adduce, which was in relation to the material that he accepted the blame, can only be contextualised by virtue of the prosecution been permitted to give the evidence provided that which is in relation to the contention of a threat in order to keep silent and in those circumstances I'm satisfied that it is admissible.”

There was accordingly original evidence to the same effect as that which was said by Mr K as to the course of the confrontation. We see nothing wrong with the evidence being admitted in circumstances where, although even if it was hearsay evidence (which is debateable), there could have been no prejudicial effect in circumstances where the complainant had already given evidence of threats. The reference to the threats provided context for the rest of the father's response and our view the trial judge was correct to admit it.

20. We accordingly reject this ground of appeal.

The learned trial Judge erred in law and in fact in ruling that there was a case to answer in relation to counts of rape on the indictment and in ruling that there was

sufficient evidence of lack of consent to allow such counts of rape to be left to the jury and erred in law and in fact in failing to grant a direction at the close of the prosecution case.

21. At the close of the prosecution case Counsel on behalf of the appellant made an application for directed acquittals on Counts 18-31 on the basis that he had no case to answer. Central to the application was that the prosecution had failed to adduce any evidence to satisfy an essential proof in respect of all the allegations, and, in particular, the rape charges, that there was an absence of consent on the part of the complainant. “Peculiarly”, it was submitted, the prosecution did not question the complainant as to whether or not she consented to the alleged acts or whether the alleged acts were done without or against her consent. Counsel for the appellant drew the judge’s attention to the fact that the entirety of the complainant’s evidence in relation to the counts on the indictment, made no explicit reference to an absence of consent. On the contrary it was submitted on behalf of the appellant the acts were done voluntarily, without evidence of force or coercion to “vitiating voluntariness”. Evidence elicited in the course of examination of the complainant established that the complainant knew around the time she attained the age of twelve that the sexual acts were ‘not normal’, but engaged in them nonetheless. No reference was made, it was submitted, to coercion or threats. We might say at this stage that, again, the latter is simply factually incorrect.

22. In addition, it is submitted that the complainant alleged certain offences took place during the absence of other family members at church, after a birthday party, and during the renovation of the appellant’s home, when, it was submitted, the presence of the complainant in the company of the appellant was voluntary thus showing consent on her part. It is submitted that the judge erred in law and in fact in finding that there was evidence capable of amounting to a lack of consent and in ruling that the issue of consent was a matter for the

jury, as opposed to a legal issue in the manner in which it arose in the course of the trial. It is submitted that the judge erred in placing reliance on the complainant's evidence that she was threatened as a reason for refusing the application. This decision, it is said, is at variance with the evidence of the complainant which did not disclose threats at the time the alleged acts were committed, or that threats were a pre-cursor to the complainant engaging in such acts with the appellant; threats were not made at the actual time of the alleged acts, both penetrative and non-penetrative. The tone and tenor of the evidence was that these threats were made after the acts, not with a view to inducing consent to the acts temporally 'there and then'. It is submitted that vitiation of consent by threats or by fear only applies at the immediate time the threats are made and not in any way *ex post facto*. Furthermore, it is submitted the trial judge erred in failing to withdraw the rape allegations from the jury as it was the uncontroverted evidence of the complainant that she engaged in sexual acts because she thought she loved the appellant, and made concerted efforts to be in the company of the appellant alone, despite the allegations she made.

23. The respondent submits that there was ample evidence of lack of consent on the part of complainant to the sexual activity between herself and the appellant to allow the trial judge to conclude that the rape charges could proceed to the jury. The complainant made it abundantly clear that due to her tender years, she did not understand what was happening when the abuse began. In direct evidence, she stated that when the appellant had full penetrative sex with her for the first time, she "*didn't know*" what it was. She also gave evidence to the effect that after the first offence of rape she saw blood on a tissue but thought she was menstruating, such, it was submitted, was the lack of understanding on her part as to what had just occurred. Her evidence on that point was:-

"I can't describe the pain. It was so sore and horrific. I didn't - - I didn't know that that's what full sex was, to be honest with you, I didn't know. And then a little bit

later, say I was dressed again and he was downstairs and I'd gone to the toilet and when I wiped myself there was all blood on the tissue and I said - - I went down to him and I said what you did - - I think I got my period and he said something but I didn't know what it was but I now realise that I didn't get my period, that was my virginity."

When it was put to the complainant, also during the course of cross-examination, that she "allowed certain things happen", she clarified that she was led to believe that "it was normal". When asked whether she did it "voluntarily", she responded "no". She later told Counsel for the Defence, "I didn't choose to be raped". And later again, "Mr Hartnett I was in fear of [the appellant] and I was programmed to believe that this was okay and it was okay for a brother to do this"

24. The judge ruled on this matter and the associated application to withdraw the case from the jury in the exercise of the jurisdiction pursuant to what is commonly known as a "P. O'C application" the subject of Ground V (dealt with below) as follows:-

"Now, I'm satisfied that there is evidence regarding the issue of consent. It is an essential element of the offence of rape and it is a matter for the jury to assess the evidence. I'm not satisfied that the test in PO'C is met in relation to this particular ground, that is that there a real risk of unfair trial on this particular issue. I am satisfied that there is evidence that the issue of the absence of consent is a matter for the jury to assess the credibility and the reliability of the complainant being quintessentially matters within the remit of a jury. The jury must -- in so deciding I have considered the evidence as a whole and on this particular ground I refuse the application under POC and also I refuse to withdraw the case from the jury in relation to this particular issue of consent."

25. We think that this ground is without merit. The age of the victim of a sexual offence when prolonged, persistent abuse commences as well as the relationship of the victim to the wrongdoer, her lack of full understanding of what was occurring – including the fact that on any view her belief that she loved her brother or that what he persistently did to her was normal (something directly attributable to him), the fact that she was subjected to threats and thereby placed in fear and the pain she felt are all highly relevant to whether or not there was a true consent as opposed to a “consent” procured by threat or by reason of the history dating back to when she was a ten-year old child. This is to say nothing of her explicit evidence to the effect that she had not submitted voluntarily, had not chosen to be raped, was in fear of the appellant and was programmed to believe that what was being done to her was legitimate. Whilst no question may have been explicitly or expressly asked of her as to whether or not she consented, the unambiguous tenor and thrust of her evidence is incompatible with any other proposition or, at the very least, it was an inevitable inference from her evidence that she did not or could not so consent. In any event we should make it clear that it is not necessary in every case for a witness to say in terms that she did not consent in a formulaic manner. Whether or not there is consent will be a factual matter in every case and once, as here, there is *prima facie* evidence which would permit a jury to be satisfied, *inter alia*, of the want or lack of consent they would be entitled to convict; the judge should not of course usurp their function in that regard.

26. Points have been made on behalf of the appellant relying on a number of authorities on the topic of vitiation of consent by threats, and with special reference to *R v Olugboja* [1982] 1 QB 320. This case is not really in point where one is dealing with the absence of a true consent because of the myriad circumstances which classically arise, as here, in cases involving prolonged abuse of a child. We think, however, that there is no basis for suggesting on the basis of that authority that the judge approached the matter incorrectly.

27. We accordingly reject this ground of appeal.

The learned trial Judge erred in law in ruling that s. 14 of the Criminal Law Amendment Act, 1935, applied to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990;

28. The appellant submits that the trial judge erred in law in ruling that s. 14 of the 1935 Act applied “prospectively” (as the appellant characterises it) to offences under s. 4 of the 1990 Act. If s. 14 did not so apply consent would be relevant to all offences contrary to s. 4; though there is ample evidence capable of proving that the complainant did not consent in any event as discussed above.

29. Section 14 of the 1935 Act is as follows:-

“It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault.”

Section 4 of the 1990 Act is as follows: -

“(1) In this Act “rape under section 4” means a sexual assault that include:

(a) penetration (however slight) of the anus or mouth by the penis, or

(b) penetration (however slight) of the vagina by any object held or manipulated by another person.

(2) A person guilty of rape under section 4 shall be liable on conviction on indictment to imprisonment for life.

(3) Rape under section 4 shall be a felony.”

The judge held as follows: -

“The offence of rape, pursuant to section 4 of the 19—excuse me, indecent assault is known as sexual assault pursuant to the provisions of section 2 of the 1990 Act and the offence of rape pursuant to section 4 of the 1990 Act is defined as a type of sexual assault. Section 14, in my opinion, clearly applies to section 2 of the 1990 Act and the—being the offence of sexual assault and I’m satisfied that it also applies to the forms of sexual assault as set out under section 4 of the 1990 Act. It would be very strange indeed if section 14 applied to the offence of sexual assault simpliciter, but did not apply to the serious types of sexual assault set out in section 4 of the 1990 Act. Therefore, I am satisfied that where the charges relate to offences alleged when the complainant was under the age of 15 years, that consent is not a defence to those charges under section 2 or section 4 of the 1990 Act and I refuse the application, having considered the entirety of matters opened to me by Mr. Hartnett.”

30. The appellant submits that there appears to be considerable uncertainty surrounding the approach and ruling of the trial judge. It is far from clear, he submits, that s. 14 of the 1935 Act applies to limit or remove a defence of consent to s. 4 rape under the 1990 Act. Reliance was placed *The People (DPP) v Alan Doyle*, a judgement delivered *ex tempore* by Carney J., in the Central Criminal Court on the 3rd of October 2012 in which Carney J. characterised s.4 rape as “a new offence”, albeit one that took a sexual assault as the basic infrastructure. The appellant submits that s. 14 does not apply to what he describes in his written submissions as “the more serious offence of rape, which by definition must contain an absence of consent” and that “Mr Justice Carney seemed to adopt this position”. It was submitted, in such circumstances, the trial judge erred in law in holding that s. 14 of the Criminal Law Amendment Act, 1935, applied to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, which deprived the appellant of the defence of ‘consent of the complainant’ to the action.

31. The respondent submits that following the renaming of indecent assault as sexual assault, s.14 of the 1935 Act, which at its inception applied to indecent assaults, from 1990 onwards applied also to sexual assault assaults. It is further submitted that as rape contrary to s.4 of the 1990 Act is specifically defined as a “sexual assault” in particular circumstances, logic and reason dictate that s.14 of the 1935 Act is also applicable to an offence of “rape contrary to s.4”. It was submitted that the trial judge’s ruling in relation to the applicability of s.14 of the 1935 Act to the offence of s.4 rape was correct and in line with the view expressed by Carney J. Furthermore, the definition of rape under s.2 of the Criminal Law (Rape) Act, 1981 is very specific in its wording and encompasses the ingredient of consent. This is to be differentiated from the offence set out under s.4 of the 1990 Act, which does not overtly reference consent within its definition. The core elements of the offences of rape under the 1981 Act and rape under s.4 of the 1990 Act are therefore distinguishable; hence the applicability of s.14 of the 1935 Act to rape under s.4 of the 1990 Act but not to rape *simpliciter*.

32. We think that the trial judge was right in the conclusion she reached that s. 14 of the 1935 Act applied to offences under s. 4 of the 1990 Act. The first thing to be said is that the section itself defines “rape under section 4” as meaning “a sexual assault that includes.... [Certain types of conduct which, regardless of the section, would constitute sexual assaults]”. Even though the offence contrary to s.4 of the Act of 1990 carries the title ‘rape’, the legislation makes it clear that it is a form of sexual assault albeit a sexual assault in which the *actus reus* involves certain explicitly spelt out classes of conduct - conduct which was criminal under the heading of such an assault anyway. The offence of sexual assault, formerly indecent assault, could of course involve that class of conduct referred to in s. 4. Accordingly, the appellant’s position is that a person guilty of sexual assault involving such conduct is charged with sexual assault *simpliciter* s. 14 applies but if charged pursuant to s. 4 it has no

application; we cannot accept the rationality of that proposition. The first issue must be whether or not so-called “rape contrary to section 4” is not a sexual assault but rather a wholly new offence; we think it is not having regard to its plain definition even though the maximum penalty is higher if the conduct encompasses the identified ingredients. The latter fact does not, in our view, constitute it as a wholly separate offence. It is a separate but clearly related offence. If it were wholly separate that might or might not have a bearing on whether or not s. 14 of the 1935 act was applicable or relevant. We think that there is nothing to assist the appellant in *Doyle*. The appellant has clearly misinterpreted the decision. The conclusion of Carney J. was that s. 14 of the 1935 Act did apply to the offence of “rape contrary to section 4”, even though Carney J. had concluded that the offence was a new one. He traced the legislative history of the matter and put it as follows:-

“In creating the new offence the Oireachtas took a sexual assault as the basic infrastructure. To this basic component or infrastructure they added the superstructure or additions of penetration of the anus or mouth by the penis, and penetration of the vagina by an object held or manipulated by another. In utilising sexual assault, the successor to indecent assault, as the foundation of section 4 rape the Oireachtas must have been aware of the provisions of section 14 of the Criminal Law (Amendment) Act 1935 and these must be taken to apply to section 4 rape”.

To the extent that we disagree with Carney J. it is on a matter of nuance only, namely as to whether s. 4 rape is or is not an altogether new offence. Whether it is an offence that is not wholly separate from, but rather is related to, the offence of sexual assault (our view, because sexual assault is a component of s.4 rape); or a “new offence” distinct from but built on the foundation or infrastructure of sexual assault (Carney J.’s view), we are entirely in agreement with him that the Oireachtas must have been aware of the provisions of section 14 of the Criminal Law (Amendment) Act ,1935 and intended it to apply to s.4 rape. It would be

surprising indeed if the s.4 of the 1990 Act were interpreted in such a manner as to lead to the conclusion that the Oireachtas intended that a child under the age of 15 would not be capable in law of consenting to a kiss or a touching of a non-penetrative nature and yet would be capable of consenting to full penetrative vaginal or anal intercourse.

33. We therefore reject this ground of appeal.

The learned trial Judge erred in law and in fact in failing to withdraw the case from the jury at the close of the prosecution case on foot of an application by the defence concerning delay in bringing the prosecution and the effects of that delay.

34. The trial judge's long established and broad discretion, and, indeed duty to stop a trial was described in *DPP v P O'C* [2006] 3 IR 238 as follows:-

“In the course of the trial matters may arise, evidence may be given, which renders a trial unfair, or the process unfair. In these circumstances the trial judge retains the jurisdiction of preventing the trial from proceeding.”

An application was made to the judge to prevent the trial from continuing on the basis that real risks of unfairness existed. It was submitted that the complainant's evidence revealed inconsistencies and that there was a notable absence of precise particulars of the alleged offences. Counsel for the appellant characterised this lack of particularisation and detail in the following terms:-

“When could these acts have been carried out? Now, we have established, or it is established in evidence, that this was a strict household, that the complainant went from school to the house of [C] where she would be picked up at six o'clock and brought home. Her father would bring her home, her mother would be home in or

around the same time. That her parents very rarely went out, and that she said and she accepted that she told the social workers the following: that she was unsure how they were ever alone.”

35. Counsel for the appellant also submitted at trial that there was an absence of opportunity for the appellant to commit the alleged offences and indicated the clear evidence of the complainant as follows in respect of the commission of the alleged offences:-

“Mass was the only thing her parents did every week, and so she assumes that it was then that the abuse took place. So that was her view. Now, there’d been an earlier reference, there had been a reference to shopping at one stage, but this was put to her, that when asked how this could have occurred, or when this could have occurred, she was unaware how they were ever alone, but assumed it was when her parents were at mass. But the prosecution evidence is that she went to mass with her parents until she was sixteen, which is the final date of the indictment in this case.”

Here, the issue of Mass-going, it is said, was of central importance to the appellant’s case as it was said to expose a crucial contradiction in the complainant’s evidence. The complainant had stated in evidence that she stopped attending mass after her confirmation, but the complainant’s mother was clear that she attended mass until she was aged sixteen with both of her parents. Therefore, this conflict in evidence compromised the complainant’s evidence or memory or assumption of when the alleged offences occurred. The complainant’s evidence was that the only likely opportunity for the appellant to commit the alleged sexual offences was during the time when her parents were at mass, however, the evidence her mother was that the complainant would also have been at mass with her. All the offences were said to have occurred during this time, and the complainant stated that they must have occurred when her parents were at mass, meaning if she went to mass with her parents for the duration

of the time frame of the alleged offences, they could not have occurred at all. This was submitted as giving rise to a serious risk of an unfair trial for the appellant if the trial was to proceed and be put before the jury. The risk was further exacerbated by the historical nature of the allegations coupled with the internal contradiction in the prosecution evidence resulting in frailties giving rise to an unavoidable risk of a fair trial, not capable of being alleviated by appropriate rulings from the trial judge.

36. The respondent submitted that the inconsistencies alleged by the appellant are matters that are and were solely for the province of the jury, who as fact finders were best placed to engage in the assessment of the credibility and the reliability of the complainant, by reference to her own evidence as a whole and against the backdrop of the evidence given by the complainant's mother. In relation to the argument concerning the apparent lack of detail surrounding the allegations, it was submitted that the complainant was a child when the abuse commenced. Nevertheless, during the trial the complainant was able to describe the manner of the abuse, including references to certain implements being used, which implements were described in significant detail; the frequency of its occurrence; the locations the abuse occurred; and, certain pivotal conversations with her assailant. It is submitted that far from offering a scant or incomplete account of what occurred, the complainant provided significant detail during the course of both evidence-in-chief and cross-examination.

37. The judge's ruling was to the point, obviously based on the evidence and submissions made and is set out above, in an earlier context, at paragraph 24.

38. This exercise of this discretion by the trial judges was most recently addressed by this Court in *DPP v M.J.*, delivered on the 30th of July 2020. Whilst there the issue of lapse of time involved addressing the issue of lost evidence as have many old cases involving sexual offences, the relevant principles are the same in all cases (though this is not a case of lost

evidence). There, this Court considered and applied the principles elaborated by the Supreme Court in *DPP v C.C* [2019] IESC 94 - again a sexual offence case involving the loss of evidence. We do not elaborate here on those principles since the focus of it was that the approach which a court should take to such applications where evidence has been lost but the core principle remains, namely, that the trial judge must analyse the evidence for the purpose of deciding. The trial judge, of course, is in the best position to consider the evidence and decide accordingly; in the past it was conceived that the appropriate course when it is desired to stop a trial on grounds of delay was to do so by judicial review. The burden of proof, of course, on any such application remains on the moving party.

39. We think that the judge was right in refusing the application. The first thing to be said is that issues of credibility or reliability are matters for a jury. Applications of this kind cannot be used as a substitute for applications for a direction to acquit because of the state of the evidence on the merits. Here, the application was, at bottom, based on a supposed “crucial contradiction” in the complainant’s evidence centring on the circumstances in which the offences occurred and the accuracy or reliability of her evidence – particular emphasis is placed upon the issue of attendance of the complainant and family members at mass, for example. The fact that there were, in the defence view, infirmities in her evidence does not mean that any risk of an unfair trial arises- this is merely an issue on the merits in the ordinary course of any trial. We think that there is no reasonable possibility that in the present case any prejudice was caused to the appellant by the lapse of time which could not be remedied by an appropriate charge pertaining to the issue of delay (a topic to which we will refer again below). In particular, as pointed out by the respondent there is no confusion or difficulty as to the locations of the offences, the premises in question are in existence. All relevant or potentially relevant witnesses were alive and available. The height of any legitimate complaint by the appellant must accordingly be the potential for loss of memory

due to lapse of time or the difficulties which arise due to the want of specificity as to dates. The want of specificity, however, as cases of this kind go is not undue or significant and there is no bar to proceeding with prosecution such as the present alleging multiple offences over a lengthy period which are, with limited exceptions, legitimately charged as what are, in practice, samples (we do not use that word as a term of art). A higher degree of specificity, of course, would permit the appellant, as is now widely recognised, to attempt to pinpoint his precise movements at material times. The purpose of the so-called “delay warning” is, having regard to the facts or evidence in a given case, to remedy or remove any concerns which an accused could have and ensure that there was no real risk of an unfair trial because of delay. Furthermore, insofar as the application relied upon poor memory or conflicts within the evidence of the complainant these were jury matters. Indeed, in many respects this application appears to have been based upon the supposed weaknesses or demerits of the prosecution case being of course jury matters in general.

40. We accordingly reject this ground of appeal.

41. For the sake of completeness we refer to the fact that the appellant, under this ground raises a separate issue (the direct relevance of which we cannot see) about the fact that a *nolle prosequi* in respect of Count 32 was entered only after the jury, who were deliberating, had asked a question about it. It was submitted that the question posed indicated that the jury would acquit on the count in question due, the appellant contends, to “a dispute in the evidence that the accused did not reside there in the timeframe” contemplated by the count. Whether or not that is the case and not mere speculation, for some reason the appellant complains that he was deprived of what he characterises as “[the] momentum to the defence case at a crucial stage” by a direction to acquit on that count. We presume that what is meant here is that there might be some tactical advantage to the defence if the judge had directed the acquittal rather than disposing of the count by the entry of the *nolle*. The judge has no

discretion when a *nolle prosequi* is entered – the prosecution is simply at an end. In any event, we cannot see how a trial would be rendered unsatisfactory because of some speculative loss of a supposed tactical advantage.

The learned trial Judge erred in law in failing to give a corroboration warning to the jury.

42. The appellant submits that a corroboration warning ought to have been given by the trial judge to the jury. It is submitted a corroboration warning is required when a complainant's evidence is "proved" to be unreliable, by virtue of untruthfulness or external factors such as delay. Contradictions in a complainant's evidence, it is submitted, impose a requirement that it be given. The appellant submits that the nature of the evidence in this case required it. Further, delay in the making of a complaint or in its prosecution can also generally create the requirement for a warning regarding sexual offences. A lengthy lapse of time creates the possibility of vagueness surrounding certain material aspects of evidence; this can affect its reliability.

43. The respondent submits that a decision whether to give such a warning is entirely within the discretion of the trial judge, as enacted in s.7(1) of the Criminal Law (Rape) (Amendment) Act, 1990. The jurisprudence of this Court indicates that this Court is slow to interfere with this discretion. Further, the respondent submits that in the present case there was evidence capable of amounting to corroboration in the form of the admission made by the appellant to both his mother and father when they confronted him with the allegations. It is also submitted that the overall evidence in the case was not such as to take it out of the normal and so warrant a corroboration warning. The judge detailed exactly why she was not minded to give a corroboration warning, as follows:-

“...I’m satisfied that the evidence of the admission to the parents is capable in law of amounting to evidence of corroboration and I’ve considered the evidence as a whole and regarding the application to give a corroboration warning I have a discretion under section 7 of the 1990 Act and given the entirety of the evidence and also given that there is evidence, in my view, capable of amounting to corroboration, I am not satisfied to give a corroboration warning in this instance and I’m exercising my discretion in that particular fashion.”

44. The issue of whether or in what circumstances the discretion of the trial judge to grant or refuse a corroboration warning should be exercised in favour of such a warning has been discussed many times by this court. The foundational principles are elaborated in the leading authority of *DPP v JEM* [2001] 4 IR 385 by Denham J. (as she then was) where she put the matter as follows:-

“The law as to corroboration of evidence in proceedings in relation to offences of a sexual nature is to be found in section 7 of the Criminal Law (Rape) (Amendment) Act, which states:

85. 2 “7.-(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an 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 the jury should be given the warning; and accordingly

any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.

86. (2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so.”

87. This section is quite clear in stating that it is for the judge to decide in his discretion having regard to the evidence whether the jury should be given a warning about the danger of convicting the person on the uncorroborated evidence of the other person.”

...

104. The Irish legislation is clear. The Criminal Law (Rape) (Amendment) Act, states that in a trial, such as this, where evidence is given by the person in relation to whom the offence is alleged to have been committed, it is for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given a warning. This is a clear statement of principle and law.”

We are satisfied that in this case there is no basis for believing that the trial judge’s discretion was improperly exercised such as might justify our interference.

45. Accordingly we reject this ground of appeal.

The learned trial Judge erred in law and in fact in failing to warn the jury properly or at all on delay and in failing to contextualise the delay warning in her charge.

46. The trial judge in the charge gave a delay warning in the following terms:-

“Now, there is a special warning that I’m going to give you regarding this particular case and that special warning is on the issue of delay I must give this warning to you because this is a case which is an old case, that is that the offences are alleged to

have occurred between some 10 and 17 years ago and if the complainant...in this case had complained of the conduct that she alleges against the accused man, her brother, within a short time, it might have been possible for him to check on his diary or to check with his friends and associates or simply to check his memory and so produce material which might have indicated that he was not with the complainant on the occasion or the occasions that she alleges.”

47. Counsel requisitioned on the charge on the basis that the judge did not adequately address the jury on how to approach the necessary precautions they must take in their deliberations, considering the case was an old case with delayed complaint. The judge was further requisitioned on the fact that her charge failed to inform the jury of the prejudice suffered by an accused person when there is complainant delay. In re-charging the jury, the judge directed the jury as follows:-

“Now, I also, as you know, gave you what we term in law as a delay warning, which is given in cases which are old cases and I told you must take special care when you are considering the evidence in old cases and in that particular respect, as I told you but I repeat, you should consider in the context of this case is the evidence lacking in detail and also, it’s a matter for your consideration, and also consider the inconsistent evidence vis-à-vis the evidence of Mrs K and her daughter regarding the issue of attendance at mass.”

48. The appellant submits that the trial judge has a duty to contextualise the delay warning in the charge to the jury and failed to do so. In doing so, the judge must give the warning in a manner that takes into consideration any specific prejudice suffered by the accused. Here, the trial judge erred in failing to adequately contextualise the delay warning given to the jury, thereby depriving the jury of important instructions on how the issue of delay should impact

their deliberations. It is submitted that the failed to address the complainant's evidence wherein she answered "*I don't know*" in her cross examination regarding when the offences occurred.

49. The respondent submits that the trial judge described, in significant detail, the difficulties accused persons face in old cases due to missed opportunities to explore and counter the allegations and due to the lack of precision in the accounts given. The judge warned the jury that the prosecution was not entitled to take advantage of any such lack of detail and that there was a special need to exercise caution if they were minded to convict. The judge then proceeded to engage with the facts of the case in order to give context to the warning.

50. We think it right to say first that the appellant was first confronted with these allegations in 2012 and the offences occurred between 1999 and 2005. Accordingly, the extent to which lapse of time may have occasioned prejudice to him is perhaps to be regarded as open to debate- certainly very many cases have come before these courts where the lapse of time between the last of a series of offences and the first complaint to the prosecuting authorities is far greater. Certainly, no specific prejudice by virtue of delay has been identified in any meaningful way. We think that the judge correctly applied the principles applicable in the way in which she dealt with the topic; any such warning must of course be taken in the context of the charge as a whole, which comprehensively addressed the evidence. The charge proper was supplemented by what she said in response to the appellant's requisition insofar the might have been any concern. We are not persuaded that there was any infirmity in the charge.

51. We accordingly reject this ground of appeal also.

52. This appeal is accordingly dismissed.