



**THE COURT OF APPEAL**

**[118/20]**

The President

McCarthy J.

Ní Raifeartaigh J.

**BETWEEN**

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

**RESPONDENT**

**AND**

**GS**

**APPELLANT**

**JUDGMENT of the Court delivered (electronically) on the 8th day of February 2022 by Birmingham P.**

1. On 13th March 2020, the appellant was convicted of thirty counts of sexual assault. He now seeks to appeal his conviction on a number of grounds.
2. The counts on the indictment on which the appellant was convicted related to four separate complainants, listed hereunder:
  - (i) "A", where the offending was alleged to have occurred between May 1994 and May 2000, at a time when the complainant was aged eleven to seventeen (counts 5 to 10). The appellant was in loco parentis to A.
  - (ii) "B", where the offending was alleged to have occurred between 1996 and 2000, at a time when the complainant was aged nine to thirteen (counts 11 to 27).
  - (iii) "C", where the offending was alleged to have occurred in 2000, at a time when the complainant was aged thirteen (counts 29 to 34).
  - (iv) "D", an allegation involving a single incident in or about 2000 (count 36), when the complainant was aged thirteen.
3. Of note is the fact that the appellant had successfully moved an application to sever charges relating to a further complainant ("E", a male). Part of the argument advanced in favour of severance was that if E was to form part of a single trial, it would be necessary for the defence to cross-examine him about trips to England with the then accused, linked

to criminal activity involving crimes of dishonesty. E had denied committing those such crimes in conjunction with the appellant; the relevance of this to an issue on this appeal will become apparent. It should be further noted that the jury was directed to acquit in relation to counts 1 to 4 on the indictment, covering another complainant ("F").

4. A large number of issues are canvassed in the course of the appeal, including:
  - (i) the prejudicial effect of the jury hearing about the fact that the appellant had theft convictions in England;
  - (ii) complaints about missing evidence and delay;
  - (iii) a contention that there should have been a directed verdict of not guilty on count 36 (that involving D) on dual grounds that it would be unsafe to allow recognition evidence be considered, and that the appellant was prejudiced by the delay in the particular circumstances where it related to a single incident;
  - (iv) the identification warning, of particular relevance to count 36, is said to be inadequate;
  - (v) in relation to counts 9 and 10, a contention that there was no proof as to the absence of consent, in that A was over the age of fifteen at the time and it is said gave explicit evidence that she consented to digital penetration;
  - (vi) the delay warning is said to be unsatisfactory and inadequate;
  - (vii) it is said that the jury was misdirected in relation to reasonable doubt; and,
  - (viii) a point is raised about jury pressure and arrangements for social distancing, given that the jury was deliberating on 13th March 2020.
5. By way of background, it should be explained that, in 2002, the appellant pleaded guilty to multiple offences of sexual assault and unlawful carnal knowledge relating to ten separate complainants. A had declined to give a formal statement during the 2001 investigation. She had not made a complaint against the appellant, but rather, had informally communicated to Gardaí that she had not been sexually abused by him. B and C had given statements as part of the 2001 investigation to the effect that the appellant had never sexually abused them. The investigation in 2001, which ended with the conviction of the appellant in 2002, had been led by the late Detective Sergeant Matt Murphy. It appears that he was in contact with B and C. He died in 2007.

## **The complainants**

### **A**

6. The prosecution case was that A was sexually abused by the appellant over a number of years, commencing in 1994 when she was eleven years of age. The abuse included a period during which she was formally placed into the care of the appellant. The appellant is A's first cousin. The prosecution alleged multiple incidents of the appellant touching the chest and genital area of A, as well as touching by A of the appellant's genital area. It was alleged that this offending took place over a six-year period between May 1994 and May 2000. The defence contended that the allegations were false, and that the incidents had not taken place. It was suggested to this complainant that she had decided to make these allegations after a significant period of time had passed due to disagreements with other members of her family, and with D (another complainant). It was suggested that the allegations had been made in response to a perception that had developed that A had been covering up for the appellant by not coming forward with allegations against him, even when others were doing so.

#### **B**

7. The prosecution case in respect of B was that the appellant had sexually abused her over a number of years, beginning in 1996 when she was nine years of age. B is a niece of the appellant. The prosecution alleged multiple incidents of the appellant touching B's chest and genital area, and of B touching the appellant's genital area over the four years between 1996 and 2000. The defence case was that the allegations were false and that the incidents had not taken place as described, or at all. It was also suggested to this complainant that she had been pressurised into making complaints by another complainant in the case, C.

#### **C**

8. The prosecution case regarding C was that the appellant had sexually abused her a number of times during 2000 when she was thirteen years of age. C was a friend of B at that time. The prosecution alleged that the appellant had digitally penetrated her vagina on two occasions, and that on a number of other occasions, the appellant had touched her vagina and she had touched his penis. The prosecution case was that in the course of many of these incidents, B would also be there. The defence position was one of denial that the incidents had occurred and a contention that the allegations were false.

#### **D**

9. In respect of D, the prosecution case was that the appellant had sexually abused her on a single occasion in 2000 when she was thirteen years of age. At that time, D was a friend of A, and the prosecution case was that on an occasion when D was staying overnight in her friend's apartment (which was the appellant's apartment), she had awoken to find him in bed with his hand placed on her genital area. There was a single count in relation to this incident. The defence case was that while it was not disputed that D had been

sexually assaulted by an individual on the night that she had stayed over, that individual was not the appellant and her identification had been in error.

### **Application for a Discharge of the Jury**

10. This application relates to a situation that developed on 4th March 2020. A had given evidence on that day and on the previous day. When re-examined by prosecution counsel, she was asked a particular question in the context that a link had been suggested in cross-examination between the appellant and a relation of the witness at a particular time in 2012. A was asked in what country the appellant was living at that stage, and she responded: "I think he was locked up in England".
11. There followed an application for a discharge of the jury, which was resisted. It was said on behalf of the prosecution that this was not a case where a discharge of the jury was necessary, and that such a course of action would be disproportionate. In seeking a discharge, and now in pursuing the issue on appeal, the appellant makes the point that the prejudicial answer came in the course of a trial where the accused had already disclosed his prior convictions for sexual offences. The effect of the answer was to put him in an impossible position. If the matter was simply left there, jurors might assume that he had further convictions of a sexual nature in England. If steps were taken to inform the jury that the convictions in England, which led to his imprisonment there, were not related to sexual offences, they might speculate that he was guilty of even more heinous offences. If the jury was informed that he had convictions for dishonesty, it was said that this would undermine the defence, which involved a denial of wrongdoing. Jurors, knowing that the person on trial was someone with a background involving dishonesty leading to imprisonment, might take the view that they could not believe his denials or could discount his denials.
12. In ruling on the matter, the judge placed emphasis on the fact that the nature of the position of defence taken by the appellant was that he was not coming before the jury as a person of good character, and that a degree of prejudice had already emerged against the appellant by virtue of the jury being told that he had been convicted at an earlier stage of other sexual offences. The trial court felt that any prejudice caused by the answer to the question couched in careful terms by counsel for the prosecution was capable of being remedied in two ways: (i) the Gardaí could confirm in evidence that the appellant had not been incarcerated in England in relation to sexual offences, and (ii) the Court would direct the jury not to speculate any further on it. It would then be a matter for the defence whether they wanted to put the precise nature of the offences, for which the appellant was jailed in England, into evidence.
13. The appellant says that this approach was entirely unsatisfactory, and that the position in which he was placed – of either leaving the jury to speculate about what offences (possibly heinous offences) had resulted in imprisonment in England, or introducing

evidence that his imprisonment was linked to theft and dishonesty – meant that the prejudice created by the answer was not capable of being cured by any ruling of the trial judge, nor was it capable of being set at naught by any action that defence counsel might take. The damage had been done and the only appropriate course of action was to discharge the jury.

14. It is clear from the very careful ruling of the trial judge that she was acutely conscious of the fact that the overriding concern for her had to be to determine whether a fair trial could be achieved. She was conscious of the fact that it is not unheard of for inadmissible evidence to be introduced in trials (usually inadvertently) or for such evidence to slip into a trial, and that there is then a requirement for an assessment on a case-by-case basis as to what is required.
15. It is this Court's view that the trial judge's approach to this issue was the correct one. We are not at all persuaded that what occurred was of such gravity that it could be remedied only by discharging the jury. The appellant's position was different from that of many criminal defendants, in that the jury had learned, at the instigation of the defence, that he was not coming before the court as a person of good character. The trial judge was of the view that there was much that could be done to mitigate the effects of what had occurred: the jury could be told that the period of imprisonment did not relate to sexual offences and, thereafter, it could hear as much or as little as the defence wished it to hear about the nature of the offending and the circumstances of the incarceration.
16. We are not persuaded that a person who, to the knowledge of the jury, had been convicted of sexual offences involving ten complainants and sentenced to a lengthy term of imprisonment, would be significantly worsened in the eyes of jurors by them learning that he had one or more convictions for theft, if that were to happen. We are quite satisfied that it was open to the trial judge to deal with the matter in the way she proposed, and, for that reason, we are not prepared to uphold this ground of appeal.

## **Delay**

17. A complaint has been raised about prosecutorial delay, with a focus in particular on the delay between the point when the statements had been taken from the complainants and the point at which stage directions were received to prosecute. It is said that this delay was particularly unacceptable and significant, coming on top of the delay that had already occurred from the time of the alleged offending up to the time of the taking of statements of complaints.

(a) Complainant delay and the death of Detective Sergeant Matt Murphy

18. An unusual feature of the present case is that three of the four complainants had a degree of interaction with the 2001 investigation, with two stating formally (and one informally) that they had not been the subject of sexual abuse. Clearly, the fact that three

complainants had stated in the past that they had not been abused was a potentially fruitful area of cross-examination. It seems to us that it was an area where the trial judge, having heard their evidence and having witnessed them subjected to cross-examination, was particularly well placed to identify whether their actions in delaying their complaints had, either in isolation or in combination with other factors, meant that the appellant's trial would not be a fair one. The appellant has linked the involvement of the three complainants with the 2001 investigation with the death of the lead investigator, Detective Sergeant Matt Murphy, in 2007. In the course of her ruling on the matter on 12th March, the trial judge commented:

"How Sergeant Murphy could have assisted in any way the defence is really beyond me?

. . .

So, I don't see how the death of Sergeant Murphy can be of remote assistance to the defence and even if there was some very speculative matter that had been raised, it still would be mere speculation on [counsel's] part but in fairness to [counsel] he didn't go so far as to indicate that there was any particular area that Sergeant Murphy would have been able to assist the defence with and, as I have indicated, these are factual matters that need to be enquired into by the jury, not opinions of Sergeant Murphy in relation to why persons changed their stance."

For our part, we are disposed to echo the language of the trial judge and say that we cannot see how it can be suggested that the death of Detective Sergeant Murphy in 2007 has disadvantaged the defence.

#### **(b) Missing Facebook Messages**

19. A further issue relates to missing Facebook messages; this is a reference to the fact that two complainants, B and C, were in contact with each other at or shortly before the time when complaints were made by each. It does appear that the contact on Facebook between the two complainants was of a fairly limited nature. In ruling on the matter, the trial judge commented that one had to consider that if all this had been done orally, without text or Facebook messages, the defence would be in the position that they are now – that the individuals would give histories in relation to what was said, each to the other.
20. It seems to this Court that this is an example of a case where material can appear more interesting because it is unavailable. There is nothing strange or untoward about the fact that two young women should be in contact with each other. Indeed, there was contact between the two other complainants, A and D. In the course of his judgment in DPP v. CC [2019] IESC 94, O'Donnell J. (as he then was) commented:

“The logic of the decisions in PO’C v. DPP [2000] 3 IR 87] and SH [v. DPP [2006] IESC 55] that such assessment [of whether the absence of evidence and witnesses was such as to justify the prohibition of a trial] has some continuing validity here, and an appellate court, when reviewing such a decision, should have good reason to disturb the finding of the trial court, having regard to the limitation of the material available to the appellate court in respect of the adjudication which the trial court was obliged to make.”

This Court sees those remarks as very much on point. In this case, the trial judge addressed carefully and comprehensively each of the grounds identified in support of the application to halt the trial, including this issue about missing communications between two complainants. We can see no basis whatsoever for interfering with her conclusions in this regard.

### **(c) Application for directed acquittals on grounds relating to delay**

21. The application for a directed acquittal on all counts was advanced on four primary grounds:

- (i) the insufficiency of the explanations offered for the delay on the part of each of the complainants in making the allegations;
- (ii) the impact of the death of Detective Sergeant Murphy in 2007;
- (iii) the impact of the lapse of time on the ability of the appellant to explore the nature and extent of the communications that had taken place on various platforms between complainants; and,
- (iv) the absence of any notes or other means of verifying the nature of the communication between prosecuting Gardaí in the present case and the complainants in the present case.

We have already dealt with grounds (i) to (iii). So far as ground (iv) is concerned, it seems to us that while the fact that Gardaí had not taken notes of their interaction with the complainants might be the subject of legitimate comment, the fact that notes were not taken did not provide any basis for a directed acquittal or for the halting of the trial.

### **(d) Application to halt the trial on grounds relating to delay**

22. At the conclusion of the prosecution case, counsel for the defence advanced a PO’C-style application for a direction or the halting of the trial. Three issues which resulted in alleged prejudice were canvassed:

- (i) the inability to cross-examine Detective Sergeant Murphy;
- (ii) the unavailability of the relevant messages between B and C; and,
- (iii) the manner in which the present prosecution had been conducted and prosecutorial delay in bringing the matter to trial.

23. So far as (i) is concerned, the fact that none of the complainants had alleged sexual abuse on the part of the appellant during the course of the original investigation was not in dispute; indeed, quite the contrary. Complainants B and C had made statements denying that this had happened, and complainant A would also seem to have denied to Gardaí that she had been sexually abused. It does not appear there was any contact by complainant D with Gardaí. The respondent submits – in our view, correctly – that the appellant has not advanced any credible basis for asserting that the unavailability of Detective Sergeant Murphy was in any way materially relevant to the defence other than by way of a speculative and theoretical contention that he might have had something relevant to say.
24. In relation to (ii), there does not appear to be any evidence to support the view that the Facebook messages, had they been available, would have provided support for the contention that pressure had been brought to bear to bring forward the allegations.
25. In relation to (iii), the appellant also makes a number of criticisms of the investigation and the prosecution. However, we do not believe that these criticisms, either individually or cumulatively, could provide a basis for stopping the trial.
26. One ground of criticism under (iii) related to the Garda investigation and prosecutorial delay. The criticism begins with complaints about the fact that the investigating Garda did not take or retain notes of his communications with the complainants. In the course of the trial, the defence sought to canvass a suggestion that certain details referred to by the complainants might have been provided by the Gardaí; this was suggested at least by implication in relation to a description of the appellant's penis. That suggestion was refuted by Gardaí and by the complainant. The following exchange between defence counsel and complainant C, on 5th March 2020, is of interest in this context:
- “Q. So, you can't actually say it's not possible that the Gardaí didn't say anything to you about the freckles or a mole?
- A. No.
- Q. So, I just want to be clear now, because I don't want to be –
- A. They didn't tell me that, I told them.”
27. The fact that counsel said “I want to be clear now” is understandable, because it must be said that the original question, involving multiple negatives, was far from clear. On 11th March 2020, Garda Karol Sweeney (the investigating Garda) gave a detailed account of



how matters progressed once all the statements of complaints – initially six – had been taken. In the circumstances, it does not seem to us that there was any basis for suggesting that the nature of the Garda investigation and the circumstances in which the prosecution was initiated provided a basis for halting a trial in relation to the five complainants.

28. It is of some note that the judge directed a verdict of not guilty on the counts (1-4) in relation to a sixth complainant, F, in circumstances where the jury did not hear the evidence on those counts. This complainant had made a complaint at an earlier stage, but the file relating to it had been mislaid. This was, therefore, a situation where the accused was denied the opportunity to explore whether there were any inconsistencies between the first complaint taken and what the complainant had to say at a later stage.
29. Overall, we are quite satisfied that the judge acted correctly in concluding that this was not a case for halting the trial.

#### **Count 36 in respect of "D"**

30. One count on the indictment related to a complaint by D of a single incident involving touching in the year 2000 when she was thirteen years of age. Her evidence was that during the course of that year, she had stayed over on many occasions in the flat shared by the appellant, A and the brother of the appellant. She said that on the occasion when she first slept over, she had slept in the appellant's bed, at A's suggestion, as he was away. She awoke during the night to find the appellant in bed beside her with his hands down her shorts, touching her private area. She said that she saw him clearly walking out of the room, and that while the room was dark, the hall light had been on. She said it had definitely not been anybody else, and that it was definitely the appellant who she had found assaulting her in bed.
31. There was a specific and discrete application for a directed acquittal in relation to the count dealing with D's evidence (count 36). The application was based on grounds of fairness and on the basis of the inherent frailty of the identification evidence. One matter that featured in the application for a direction was that the complainant accepted that it was possible that she had been consuming significant amounts of alcohol before going to sleep and awakening.
32. The point is made on behalf of the appellant that as this was a single incident, if there had not been a delay in coming forward with the allegation, or if he had been taxed with it at an early stage, that he would or might have been in a position to produce an alibi. It is said that this is particularly relevant in a single incident case, where the unfairness of allowing a prosecution in relation to a historic event is particularly clear cut.
33. The defence contended that it would be unsafe to allow recognition evidence to go to the jury, and also argued that the appellant was prejudiced by the delay in making this

complaint, particularly in circumstances where it related to a single incident. One aspect of the issue was that the complainant was cross-examined on the basis that she had been drinking a good deal when she was aged twelve, and she was open to this suggestion. It was suggested that this meant that her identification evidence was unreliable. As a fall back, it was argued that this issue should have been dealt with specifically, and indeed, highlighted by the trial judge.

34. The prosecution points out that the complainant was very firm in her evidence and was quite emphatic that there was no room for doubt in her mind about who she had seen leaving the room having abused her. One should not lose sight of the circumstances in which the identification evidence was offered. The evidence was in relation to someone who was seen leaving the bedroom of the appellant, having interfered with the complainant in the appellant's bed. The incident occurred in the appellant's apartment and the jury had heard evidence about the manner in which the apartment was locked in a particular way, preventing access by others.
35. The point in relation to delay is somewhat undermined by – or certainly has to be seen in the context of – the fact that there was recent complaint evidence from a friend of the complainant who stated that on the day after it happened, D had told her that “[the appellant] came home and got into bed with her”. She further stated, “I don't think he fully raped her, but he got his hand down there”. It seems to the members of this Court that the arguments based on a contention that the recognition evidence was frail did not take fully into account the circumstances of the incident. This was not a question of recognising someone on a crowded street or in a shopping centre; this was a case of the complainant spending the night in the home of the appellant and in his bed. It seems to us that in those circumstances, when an individual entered the bed, that the complainant might be expected to have little difficulty in making an identification. We are quite satisfied that this is not and could never have been a case for a directed acquittal.
36. The judge then dealt with this issue in these terms:

“Now, you also heard evidence [recent complaint evidence] from [a friend of D], which in reality was just simply her statement read although she came. And she gave evidence of what [D] had said to her very shortly after the event, which is to the effect of very closely mirroring what [D] has said to you in evidence and what [defence counsel] has said with respect to that is the defence case is not that this didn't happen. They're saying that they don't know if this happened or not, but it has nothing to do with [the appellant] and that [D] was wrong in her identification of [the appellant] on the night in question. So the evidence against the accused with respect to this count is recognition evidence of [D] of the accused. Now, while the alleged act allegedly occurred in the accused's flat and specifically in his bed, in a flat where there has been evidence of a particular type of locking system on the door, nonetheless the evidence against the accused is recognition evidence of the accused.

Now, I have to say to you that there have been instances before the [c]ourts where responsible witnesses whose honesty wasn't in question and whose observations had been adequate made positive identification which subsequently proved to be erroneous, and we've all been in that situation that you have seen somebody, somebody that you may know relatively well, and you've saluted them and it turns out actually it's a wrong person, and we've been all in that situation where either somebody has saluted you and you haven't a clue who they are and so they in fact have got you wrong, or you've got them wrong. It of course happens and we all know that that happens and for that reason I'm instructing you to be cautious in relation to the evidence before accepting it as correct. However, if after careful consideration of the evidence, in light of the circumstances of the case, and with due regard to the other evidence in the case, if you are satisfied beyond a reasonable doubt of the correctness of [D's] identification of [the appellant], well then you are entitled to act on it. But I'm just asking you to it's a legal direction I'm giving you, but it's a legal direction that makes complete sense. We've all been in that situation. Sometimes you do get things wrong. Obviously you need to look at the evidence particularly in relation to this matter. There's no doubt that [D] was adamant that when that man, who she thought was [the appellant], when he got into the hall she knew it was [the appellant]. She recognised him there. That was her evidence. Be cautious and careful about it, because sometimes people, even if they know somebody, get things wrong. But there's a particular context in relation to it and obviously have regard to all of the evidence in relation to that matter."

37. At another point in her charge, the trial judge dealt specifically with the delay issue in the context of the single complaint made by D, making the point that if there had been a timely complaint, the accused might have been in a position to say that he was away for the night and did not return. She also made the point that at the time of the 2001 investigation, this incident was only about a year old, and had it emerged as part of that investigation, there was a possibility that the accused might have been in a position to deal with it by contending that at that particular time of the year, he was away, or something of that nature.
38. The defence requisitioned the trial judge in relation to what she had to say about identification and recognition. It was submitted that there was an obligation on the trial court to draw attention to particular features relevant to the warning and that included the opportunity for observation. In particular, the defence requested that the judge make a specific reference to the fact that D had accepted that, at the time when the incident was alleged to have occurred, she was drinking on a regular basis and that it was possible that she had done so on the night in question. It seems to us it was open to the judge to take the view that what she had said when charging the jury was adequate, and to decide not to accede to the requisition.

**Counts 9 and 10 in respect of "A"**

39. The particulars of offence in respect of each of these counts were as follows:

- Count 9: “[The appellant], on a date unknown between the 13th day of May 1998 and the 12th day of May 1999, both dates inclusive, at [a location in north Dublin] did sexually assault one [A], a female.
- Count 10: “[The appellant], on a date unknown between the 13th day of May 1999 and the 12th day of May 2000, both dates inclusive, at [a location in north Dublin] did sexually assault one [A], a female.”

What is significant here is that both of these counts were laid as having occurred after the complainant turned fifteen years of age, and therefore the question of consent or the absence of consent was relevant.

40. In the course of her evidence, the complainant referred to a particular incident that had occurred when she was “around fifteen, around that age”. Her evidence was that in order to help her practice or prepare for the time when she would have sexual intercourse, she and the appellant had agreed that she would be introduced to the activity by having the appellant insert his finger into her vagina. Her evidence was that the appellant stopped when she said that it hurt, and that she was relieved that the appellant had offered to do this as it meant that it would not hurt when she eventually came to have full sexual intercourse with someone.

41. The following exchange between the witness and counsel appears in the transcript:

“Q . . . and I have to ask you this, I do have to ask you this; you in terms of your being a virgin at the time?

A. Oh, yes, I was a virgin. I was like a virgin up until I was 18, but around you know, 15, 16, I was so embarrassed, it made me feel like it was a bad thing, you know, like you were a virgin and I used to pretend I wasn't to some people and so I couldn't wait to not be a virgin anymore so I was you know kind of relieved that [the appellant] was going to do it for me like so it didn't hurt.

Q. And if I can put it this way, was there any practice for the --

A. Oh. There was just one occasion. So, I'd never be -- I'd only ever had a kiss with a boy so [the appellant] -- after one of these conversations, we agreed to try and he started off by trying to finger me. He said, 'that's how you do it first and it won't hurt.' And he inserted his finger just a tiny bit in and it hurt so I tensed up and pulled back and then he was saying, 'Oh, I can get lube and stuff. That'll help.' But I wasn't willing to start again or to do it again. I was that was me done. And then he was a bit in the height of it at first but then he was then he just said, 'Thanks for letting me be your first and we'll try it again.' So he went from being in the height of it and cranky for a minute or so to changing his whole attitude and saying, 'Look, I'm really grateful that you let me be your first and I appreciated that

and we'll do it again when you're ready now you're after starting.' And that kind of talk."

42. The complainant confirmed that she had turned sixteen in 1999, and at that stage, was living at a particular location in north Dublin. She gave evidence in relation to other incidents that had happened at this time, including occasions when the appellant would slap her on the behind, when she would touch him, and when he would touch her on her chest or on her behind, or rub his penis off her behind.

43. The following exchange then took place:

"Q. [...] in terms of your being able to put a stop to it, or if you did say no, what would happen?

A. It just it would just be the like I'd get into trouble.

Q. And how would you get into trouble?

A. So I might get into trouble for saying a curse that I said the day before that I never would have got into trouble or like if I answered some way I might be told I was cheeky and have to I'd be grounded or I wouldn't get a meal, like I wouldn't be able to go to a curry shop with my friends at the end of the night for a curry tray or I mightn't get what I needed for school. I always worried about school, like you know like if a school trip was coming up or like I needed an extra book or I needed the cookery ingredients for home economics, they were the kind of things that I would have had to worry about. So this is why I get so mad because now I'm a mammy and I know that no child should ever have to feel like that.

Q. What was the way to ensure that you weren't grounded or you went on a school trip?

A. Don't say no, just go along with it.

Q. When you say go along with it?

A. Let him grope me or feel me or I touch him."

44. The trial judge dealt with the subjects of counts 9 and 10 in these terms:

"Now, she referred to one occasion when they agreed to try and he inserted his finger a little into her vagina. It hurt and she pulled back. He said [he had] lube but she said no. He was a bit annoyed initially but then he thanked her for letting him be the first and he said that they'll try again.

Now, in relation to that particular incident, ladies and gentlemen of the jury, my reading of it, but it's a matter for yourselves to consider this, but her evidence appeared to be that she was over the age of 15 when that particular incident occurred. And obviously the issue of consent needs to be considered by you in respect of her allegations when she's 15. In relation to that it's clear on [A's]

evidence that she agreed for this to occur. So if you're considering that particular matter with respect to counts 9 and 10, that is not a matter that you can consider that there was no consent for because her clear evidence was that this was an agreement between them. It isn't that she wasn't consenting to that. So if you think that that's something that you can consider I am directing you that you can't, because in fact it's clear that she consented to this. She agreed to it. It's something that, because of her own particular situation in relation to her concern about having sex, she agreed to that. She did however say that in relation to other touching events that if she tried to stop it, and as she got older, she'd get into trouble if she tried to stop it. He'd say that she was being cheeky and that she'd be grounded and she'd get no money. So she didn't say no. She just went along with it, because it made her life easier."

(Emphasis first provided by the appellant in the course of written submissions)

45. The trial proceeded on the basis of a common understanding, whether correct or not, that because the appellant had been returned from England on foot of a European Arrest Warrant, the indictment could not be amended by way of providing further particulars. As a result of this, there were two issues for consideration in relation to the sexual assault counts: was one count intended to refer to the act of digital penetration by way of introduction or preparation and the other to the more generalised untoward activity, and if that was the situation, what was the position in relation to lack of consent in each case?
46. This element of uncertainty surfaced again at the sentence stage when the trial judge took the view that because of the degree of uncertainty, she would not, to any extent, sentence by reference to the digital penetration incident, but rather, exclusively, by reference to the more general complaints. The trial judge commented as follows:

"Because of the manner in which the indictment was drafted it is impossible to know whether the jury's verdict is reflective of this in these counts. The counts could not be amended due to the fact that this was a prosecution grounded on a European arrest warrant. Further, I gave the jury a direction regarding this evidence which specifically raised the difficulty regarding the issue of consent which arose relating to these counts. Because it is impossible to know whether the jury's verdict on counts 9 and 10 is reflective of this evidence given by [A], I am not going to sentence the accused on the basis of that evidence..."
47. The situation that arose was an unusual one, and, it must be said, a less than satisfactory one. It seems to us that the judge's view of the evidence at the conclusion of the case was that it would not be possible for the jury to conclude that the digital penetration incident was non-consensual. For our part, on the run of the evidence, we can see how there could have been difficulties in that regard. It seems to us that, in those circumstances, there were two options open to the judge: one was to tell the jury that they should exclude from their consideration what they had heard about the digital penetration incident, and the other was to withdraw the count. However, it seems to us

that it was not satisfactory to leave it on the basis that the jury may or may not have decided that the digital penetration was non-consensual.

48. It seems to us that the appropriate way of dealing with this now is by way of quashing the conviction on one count, and, accordingly, we will do this in respect of count 9. This would not seem to have significant practical consequences because the judge specifically stated that she was not going to have regard to the digital penetration incident when sentencing.

### **The Judge's Charge**

49. Two further issues have been raised in respect of the judge's charge. First, there is criticism of the way in which the judge dealt with the issue of reasonable doubt. The defence contend that the judge, at different stages in her charge, had spoken about reasonable doubt in terms of the sort of doubt that would cause one to hesitate prior to making a decision, but at other stages, had spoken about the sort of doubt that would cause one to not make the decision contemplated. The judge is also criticised for not following sufficiently faithfully the delay direction crafted by Haugh J. which was approved by the Court of Criminal Appeal in DPP v. B(R) (Unreported, Court of Criminal Appeal, 12th February 2003).
50. As is so often the case, it seems to us that these criticisms cannot be assessed without reading the charge as a whole. Read as a whole, in our view, the charge is an admirable one. No juror could have been left in any doubt about the high standard of proof that was required if there was to be a conclusion that the accused was, beyond reasonable doubt, guilty of the offences charged. Likewise, we believe that the issue of delay was dealt with in a very comprehensive manner by the trial judge. In this judgment, we have already referred to the fact that, apart from dealing with the issue in general terms, the judge returned to the issue when dealing with the specific count referable to complainant D. Overall, we are not persuaded to uphold any criticisms of the trial judge's charge.

### **Covid-19 Situation**

51. This ground arises in circumstances where the jurors were sent to commence their deliberations at 12.45pm on Friday 13th March 2020, and returned with a verdict at 4.17pm. When the trial court sat on 12th March 2020, when the judge was due to deliver her ruling on foot of the PO'C application, she addressed the parties, commenting that while they might not be aware of it, apparently the Taoiseach was about to make an important announcement. She said that schools and public facilities would close, and that there was some reference to transport being shut down. The judge said that she had made enquiries within the building to see what the plans were for the CCJ, but she

thought people in the building were not aware of the situation. She thought that by lunchtime she might have further information as to what the intention was for the future. The judge commented that she was concerned about the jury, that she did not want the jury to be anxious, but the plan she was told as of the day before was that jury trials would continue, and certainly any trial with a jury close to deliberating should continue. She said she did not know whether that has an effect now, but in any event, they would proceed; she did not want anyone to think that she was unaware of what was happening.

52. Counsel on both sides proceeded to make their closing speeches and the judge sent the jury away with the usual advice not to discuss the case. She said, in relation to the next day, that once they began their deliberations, it was completely a matter for them as to how long they take; there was no time limit at all. The following day was a Friday and the courts would be open again for business on Monday. It was St. Patrick's Day on Tuesday, so the courts would be closed, but they would be open from Wednesday onwards so there was plenty of time for the jury to consider, and it was a matter for them as to how long they needed to take in relation to deliberations.
53. When the trial court sat on 13th March 2020, counsel on behalf of the defence was first on his feet to say that he had indicated to his friend that there was certain material which he wished to bring to the attention of the court regarding the issue of social distancing. The judge then dealt with certain submissions that prosecution counsel had to make. Having done so, she then addressed defence counsel asking whether, before he spoke, he had seen the Courts Service publication in relation to the business of the courts. Counsel said that he could not say that he had seen the most recent one, but that he had seen one. The judge indicated that one had been published the previous evening at 6.30pm. Counsel said he hoped he had read the original, or a report, but his understanding was that there was an indication that trials that were in progress were expected to continue and that there would be no new trials beginning. That was his understanding, but he did not know if he was out of date. The judge said that this was the situation not simply in relation to trials in the Central Criminal Court, but that all trials with juries presently at hearing were to continue. She said that as she had indicated to counsel the previous day, there were other trials where evidence had not concluded which would be continuing, meaning their trial was far ahead compared to some others. Counsel said he appreciated that, and he wanted to preface what he had to say by acknowledging that administrators in situations like this had to make all kinds of difficult decisions, and he was not purporting to replace them, but he had to represent his client. The judge indicated she understood that, and wanted to know what his application was. Counsel indicated that the situation was extremely urgent and the necessity now was for social distancing. The judge responded as follows:

"No, I'm not taking regard of any of that [...] I have my directions from the Courts Service that trials are to proceed, they've obviously considered the medical evidence in relation to it. Now, clearly, you want to make this application if it's a thing that there's a conviction in this case, obviously it'll be a matter that you will use in terms of an appeal, but I'm certainly not going to start engaging in a



consideration of medical evidence. We are where we are; I'm following the Courts Service direction and that's obviously been considered in light of the Taoiseach's notification yesterday. The Presidents of the [c]ourts met in relation to matters. As I understand it, there was a very long meeting with respect to matters. But I have my directions and I obviously don't have power to go beyond them, unless an unfairness arises with respect to the accused [...] nothing in this situation -- unless there's some particular matter that you can raise, but if it's going to be just general issues in relation to medical advice and medical professionals' utterances in relation to this matter, I won't discharge this jury in relation to those kind of matters."

54. Counsel responded to this by saying:

"Yes, and firstly, can I say, I'm not looking for a discharge of the jury, I'm looking for a postponement of the charge and consideration."

55. Counsel then asked whether he could have sixty seconds to articulate what his position was. Counsel indicated that he was asking the Court to receive an article which had been recommended by Mr. Sam McConkey, an infectious disease specialist and Head of the Department of International Health and Tropical Medicine at the Royal College of Surgeons. It was an article authored by Mr. Tomas Pueyo, which undertook a statistical analysis of the rapid exponential growth of diseases in other jurisdictions, and it included graphs and a detailed analysis of how quickly they spread. The point the article was making is that the only effective way of having an impact is to take serious action at social distancing. Counsel continued:

"And there are more details there, Judge, but essentially, what the article is saying is that many, many people are going to die and that the countries that have exercised radical action in locking down and limiting social interaction have had the most success, and those who do not face the prospect of many more people dying."

56. The trial judge indicated that if counsel wished to lodge the document, there was no point in lodging it with her because she had her directions to proceed, but she suggested the article should be given to the registrar to be forwarded to the CEO of the Courts Service and that future meetings, which she understood were occurring on a daily basis, would provide an opportunity for it to be considered. Having taken a moment to consult with his junior, counsel said he wished to reiterate that his underlying concern (apart from health concerns) was that the jury would feel under pressure to come back with a verdict, so it was in that context that he was making the submission. The judge responded by saying the jury would not be under pressure; this had already been made clear to them and it would be reiterated. At this remove, we cannot lose sight of the fact that the decision to permit trials that were at hearing to proceed would appear to have been in accordance with government and HSE guidelines. It was also the case that there was nothing to stop any juror, either on their own account or through the foreman, from raising an issue if unhappy or uncomfortable with what was happening.

57. In the course of the oral hearing on appeal, and arising from exchanges between counsel for the appellant and members of the Court, questions were asked designed to clarify what the level of awareness and concern was in relation to Covid-19 as of particular dates in March 2020. Arising from this, a motion was brought by the appellant, which appeared in the Management List, seeking to introduce further evidence on this topic. It does not seem to us that this was an appropriate response, but, in any event, it was indicated that the real object of the exercise was to highlight the fact that, as of 13th March 2020, there were media reports of panic-buying, and in consequence, shortages developing in stores.
58. It seems to us that the nub of this issue is whether there is a concern that the jury may not have deliberated conscientiously, and may have felt under pressure to agree a verdict. It is the case that the jury were told in the most explicit terms that they were under no pressure to reach a verdict and that they were perfectly free to continue their deliberations into the following week. It seems to us that there is no basis for concluding that jurors disregarded their oath, or did anything other than deliberate conscientiously, and it is clear that they rendered a true verdict in accordance with the evidence. Permitting the trial to continue was in accordance with government and public health guidelines at the time. Moreover, it was open to individual jurors, either on their own initiative, or through the foreman, to express discomfort with the situation, but no juror did that; at this stage we therefore see no basis for interfering with the jury's verdict.

## **Conclusion**

59. In summary, with the exception of the single count (count 9) which we have indicated that we will be quashing, we will dismiss the appeal.