UNAPPROVED

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 367

Edwards J.

McCarthy J.

Kennedy J.

Record No: 161/2019

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

M. A.

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 22nd of December 2020.

Introduction

1. On the 13th of May, 2019, the appellant came before the Circuit Criminal Court charged with one count of rape contrary to section 48 of the Offences Against the Person Act, 1861, and section 2 of the Criminal Law (Rape) Act, 1981; and one count of sexual assault

contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990. Both counts were alleged to have occurred on the 29th of October 2015, at Dollymount Beach, Clontarf, Dublin. The appellant pleaded not guilty to all charges.

2. On the 24th of May 2019, following a deliberation period of seven hours and three minutes, the jury returned an 11-1 verdict of guilty in respect of the count of rape, and a 'disagreement' in respect of the count of sexual assault. The DPP subsequently entered a *nolle prosequi* in respect of the sexual assault charge.

3. On the 11th of July 2019, the appellant was sentenced to 8 years' imprisonment, the final 18 months of which were suspended conditionally.

4. The appellant now appeals against his conviction.

Background to the Matter

5. The court heard evidence from the complainant "C", who detailed how she had met the appellant "A" by way of an online dating service, namely "*connectingsingles.com*". After messaging via the website, they began messaging on the messaging service "*WhatsApp*", and subsequently agreed to meet in person. They did so in 'Brown's Barn*'* in Citywest and had coffee. The parties again met twice for coffee over the following two weeks, and in late August 2015, spent a night together at the 'Parkwest Aspect' hotel, where they engaged in consensual sexual intercourse. The parties later met again in Naas, where C picked up the appellant in her car. At A's suggestion, C drove to Brittas Bay, where they engaged in protected consensual sexual intercourse in the C's car.

6. Subsequent to that (C was unsure as to precisely when), A travelled to America and stayed there for some time, informing C that his grandfather had died. A and C then stopped messaging, for the most part, for several weeks. On A's return (C thought it was possibly in the run up to the October Bank holiday) he resumed contact with C, and the parties agreed to

meet again. C expressed that she felt a degree of reservation as she was wary of the intentions of A, believing that she had been *"played"* by him previously.

7. C agreed initially to meet up with A on the 27th of October but cancelled as she had left her keys at the house of a friend and had to retrieve them. She stated that A was not happy about this, but the pair agreed to meet instead the following day.

8. On the 28th of October 2015, C drove her car to a car park near the coast at Clontarf, where she met with A. After a short walk together along the beach, C got in to A's car, and the pair travelled to Bull Island beach, at Dollymount. There A and C kissed each other in the front seat of the car. Eventually A suggested that the back-seat area would be more comfortable. The two parties then moved into the back seat of the car where they resumed kissing. A then began to put his hand under C's top and opened her bra, but this was objected to by C, who said "*no"*, and directed his hand away. C's evidence was that *"he listened – he just, sort of, he got up off me, and just said let's get back into the front seat then"*. Upon doing so, A then indicated that he needed to buy groceries from Tesco and invited C to join him. She did so, following which A dropped her back to her car and she drove home.

9. After the pair had gone their separate ways, they continued to communicate over text messages that evening and the following day, before agreeing to meet again on the 29th of October 2015. It is not necessary having regard to the issues raised on this appeal to refer to the text messages *in extenso*. However, some reference should be made to them as they provide context and were relied on in that regard by both sides. The defence maintained that they provide support for A's defence of perceived consent, while the prosecution maintained that it could be inferred from them that A well knew that C did not want to have sex with him, or at very least was reckless as whether C was or was not consenting.

10. During exchanges early on the morning of the 29th of October C can be found thanking A for *"last night"* and maintaining that she had had *"fun"*. In response A asserts

that he *"I didn't do anything, ha ha. I swear"*. He then thanks C for *"an amazing time"* and for being *"amazing company"*. At a certain point, he makes the request:

07:58:38 A: "So, I can text you any time?"

07:58: -- C: "Yeah."

07:59:00 A: "Thank you being so kind"

07:59:15 C: "How is that kind? Your [opinion] of me is too high."

07:59:48 A: "Cos it's yeah today, ha."

07:59:59 A: "Not like yesterday."

08:00:00 C: "What?"

08:00:21 A: "NO, NO ...I DON'T WANT IT."

08:00:26 A: "Ha ha."

[Emoji from A]".

11. C, when giving evidence at the trial, was asked about those exchanges:

"Q. Did you know what he was referring to when he said, "NO, NO ...I DON'T WANT IT."?

A. Because I said no in the car. He made reference to it in Tesco's as well. He asked me if I wanted anything, and I said no. He said: "It's all 'no' tonight."

12. The text messages continued:

"08:00:53 A: "Last night, it was all was all about NO..."

08:01:14 A "I said thanks cos today start with yeah."

08:01:23 C: "Ah, right."

08:01:40 A: "You're a bit slow this morning. Ha-ha."

08:01:55 C: "Ha-ha, thanks."

08:02:17 A: "Cos you're tired and it's my fault, ha-ha."

08:02:40 C: "I never said it was your fault."

08:04:44 *A:* *"I'm just taking the blame."*

08:04:59 *C:* *"No meed," ... "need."*

08:05:07 *C:* *"Not today anyway, lol,"*

08:07:16 *A:* *"I would any day for you.""*.

13. Later during the afternoon of the same date, further messages were exchanged between the parties, with C suggesting that she would prefer not to go out that evening and to have an early night. The following exchanges then ensued:

16:40:00 *C:* *"Well have fun tomorrow anyway" + Smiley face emoji*

16:42:00 *A:* *"Really"*

16:42:35 *C:* *"You don't think so? My manager just texting asking will I be in tomorrow. Would it be bad to write back with, "Haha, haha, hahs?"*

16:--:-- *A:* *"Ha ha, dead right"*

16:--:-- *C:* *"You not think we'll have fun tomorrow*

17:00:12 *C:* *"I just said no. I should have the whole week off. It is not on the page I requested it off with, but she lost it so, didn't know."*

17:00:15 *A:* *"I don't know, babe, unless you cut NO out".*

17:00:-- *C:* *"Hopeless"*

17:00:23 *C:* *"Haha"*

17:00:35 *C:* *"I only said no to sex.""*.

14. C confirmed in evidence at the trial that she understood the reference to cutting out "*No*" to be a reference to the fact that she had said "*no*" the night before. She said that in responding with *"hopeless"*and *"haha"*:

"I suppose I was putting it as something stupid. I didn't pay as much attention to it as I should have it. And I was rolling my eyes to it I think and, "Men, you know", just he

wanted to have sex and I said "No" and I was just thinking, you know, it didn't matter. I didn't take it as serious as I should have taken it."

15. C was further asked what she had meant by saying *"I only said no to sex."* She replied:

"I just mean as in I met up with him. We were talking, kissing, whatever. But, like, I didn't want to have sex. I didn't want him to touch me. I didn't -- to me that was all right. We hadn't seen each other in weeks and I wasn't just going to jump back into sleeping with him again."

16. The court heard evidence of the following further text messages:

"17:00:59	*C:*	*"Is that bothering you?"*
17:02:30	*A:*	*"No."*
17:02:--	*C:*	*"Then what?"*
17:02:46	*A:*	*"Just not letting me feel you."*
17:02:51	*C:*	*"I told you I'd make more of an effort."*
17:03:--	*C:*	*"Yeah, but it'll take time".*
17:03:14:	*A:*	*"That's good".".*

17. The complainant explained in regard to that exchange:

"So I was just saying, like, I told him I'd make more of an effort as in he knew I was reserved. He knew I didn't just want to jump back to anything. And obviously I would like to have tried to get back to being happy, like, dating or whatever, but it wasn't going to happen overnight because he did feck off into nowhere. I didn't know what was going on. And I was reserved. But then that's when I suppose it overlapped and he said, "Just let me feel you" and I said, "But that'll take time."

18. In further texts the parties arranged to meet again later that evening at 8pm and in the same location as previously, following which there were further exchanges. Amongst the last of the messages exchanged were the following (times omitted as nothing turns on them):

C: *"Okay at 8"; is that right?"*

A: *"Yes."*

C: *"Okay, cool"*

"But, [A], I can't say anything will happen if that's why you're asking me out tonight";

"I just don't want to lead you on an you be annoyed if I don't wanna";

A: *"It's okay, babe."*

C: *"Thank you"*

A: *"You welcome, babe"*

C: *"I'll see you soon"*

A: *"Can't wait.""*.

19. C's evidence was that at about 8pm on the 29th of October 2015, she and A met as arranged in Clontarf. Once again, C got in to A's car, and they travelled to Dollymount beach. Once there, they kissed for a couple of minutes in the front seat, before, by agreement, they moved into the back seat of the car. They resumed kissing. A put his hands up C's t-shirt. C said "*no"*. However, A did not stop and proceeded to remove C's bra through the sleeve of her t-shirt. C testified that she told A to stop numerous times, but that A told her to "*just enjoy it, babe",* and continued. C stated that A unbuttoned her trousers and pulled them down, before pulling down her underwear. C stated in evidence that she verbally objected to this throughout, but that apart from saying *"no"*, that *"I didn't fight him, I didn't hit him It should have been enough"*. A then digitally penetrated C's vagina with two fingers, during which she instructed him to stop. A then pulled down his own trousers and, positioned on top

of her, inserted his penis into C's vagina. C's evidence was that she had been saying "*no"* about once per second; that he was heavy; and that she was pushing. He did not use a condom. C was adamant that she had made it clear that she did not consent, by saying "*no"* and pushing him away. When she thought it to be over, he removed his penis from her vagina and ejaculated onto her.

20. An important detail in the context of this appeal is that the account just described represents a summary of C's evidence in chief to the jury. However, under cross-examination it was put to C that, in addition to what she had mentioned, A had performed oral sex on her. She agreed that that had occurred, stating, *"he did lick me, yes."* In response to a suggestion that she had not tried to resist she said, *"I didn't allow him. I said no. I asked him to stop. At no moment in time did I allow him to do anything other than kiss me."*

21. C gave evidence that following the incident, A drove C back to her own car at her request. Whilst being driven to her car, C told A, "*You don't force yourself on someone like that*". She testified that A apologised to her and asked how he could make it up to her. While in A's car, C texted her friend, S, asking "*Can I come over?",* followed by the word "*Emergency"*. When S replied asking what was wrong, C replied that she could not text it. She explained to the jury that she had been worried that A might grow suspicious. S asked C if she was safe. C stated that she did not know. Again, she explained to the jury that she had been worried that the A might not return her to her car. A did return C to her car and the pair separated. Shortly thereafter, between 9 p.m. and 10 p.m., A texted C a number of times requesting that she stop ignoring him and reply to him.

22. C subsequently drove to S's home and relayed to her what had happened, specifically stating that they had been kissing, before moving to the back seat of the car where the A had climbed on top of her and had pulled down her trousers. She told S that she had said "no", that she had tried to push him off, that he had raped her and then pulled out and ejaculated on

her. C was distraught and wished to have a shower, but was dissuaded by S, who instead took her to her local Garda Station, where C made a complaint to An Garda Síochána of having been raped. Later, C gave an account of the incident to Detective Garda Karen Griffin. In doing so, the complainant relayed essentially the same information as she had given to S, and indeed gave in chief at the trial, but in addition stated that A had performed oral sex on her before raping her. The jury received no evidence that digital penetration had been mentioned in either the account given to S, or during C's initial conversation with Detective Garda Griffin.

23. The evidence was that Detective Garda Griffin made no notes of her initial conversation with C and her evidence in relation to it was given from memory. She stated that having received C's account she made contact with the Sexual Assault Treatment Unit ("SATU") at the Rotunda Hospital, and conveyed C there for an examination. The evidence was that C did not mention that A had performed oral sex on her when providing a history to those examining her at SATU. On the contrary, when a SATU nurse had asked her, in the course of administering a SATU questionnaire to her, if oral sex had occurred, C had specifically denied it. Detective Garda Griffin, who had been present when the questionnaire was administered said that she did not recall C's specific reply to that question but accepted that the nurse had recorded C's replies in the SATU notes and that the notes did record a denial. The nurse in question gave evidence at the trial. She accepted in cross-examination that she was not told by C that there had been oral vaginal contact. It was also elicited in cross examination that the history provided by C at the SATU clinic did include an allegation of digital vaginal penetration.

24. When the SATU examination was completed C was then conveyed to another Garda Station where a formal statement of complaint was taken from her by Detective Garda Griffin. The evidence was that on this occasion C again stated that A had performed oral sex

on her before raping her, and this detail is recorded in the formal statement taken from her. However, Detective Garda Griffin did not herself make a statement concerning her involvement with C on the evening in question for approximately another ten months. When she eventually did so she made no mention in that statement that C had told her that A had performed oral sex on her before raping her. She later made a second statement adding this detail. When questioned about it in cross-examination Detective Garda Griffin could not explain why this matter had beenomitted from her first statement, beyond saying that she had not made a deliberate decision to omit it.

25. Under cross-examination, C accepted that, while co-operating with the garda investigation on the evening of the 29th of October 2015, and into the early hours of the 30th of October, 2015, she had exchanged text messages with S, and in doing had joked about deleting messages from her phone in case it was taken as evidence. She explained she had not known what to expect with respect to the investigation, and some of the rigorous aspects of it had surprised her, such as the fact that the process of taking her statement had taken four hours. She said she had been through hell and that these jokes with her friend *"helped me get through that night"*. Although she had joked about doing so, she had not in fact deleted any messages. Further text messages with S included regret expressed by C that she had not gone further in physically attempting to stop A, such as by punching him. It was put to C that this was indicative of her not having signalled that she was not consenting during the incident, and acceptance by her that A might have genuinely thought that she was consenting, and indeed blaming herself for that. C would not accept this, asserting *"he knows I said no"*. She accepted however that afterwards she had felt disgusted, ashamed and upset that this had happened to her, and regretted *"that I didn't fight this person off"*.

26. Other evidence in the case included evidence from a forensic scientist who analysed various swaps taken from C at the SATU unit, for trace evidence. Traces of semen or other

bodily fluids were found on some of those swabs from which a complete male DNA profile was generated, while in the case of others a mixed DNA profile was found, to which the aforementioned male DNA profile was a major contributor. Specifically, semen was found on swabs taken from C's mons pubis, abdomen and vulva, while traces of a bodily fluid which might have been either semen or saliva was found on a swab taken from C's left breast. Traces of semen were also found on some of the clothing that C had been wearing at the time of the incident, specifically a blue top, and again the same complete male DNA profile was generated from this seminal staining. This male DNA profile was then compared with a DNA profile recovered from swabs provided by A while in custody and was found to match. The statistical probability of the DNA found on the swabs and the clothing coming from someone unrelated to A was estimated to be *"considerably less that one in a thousand million."*

27. The defence did not go into evidence. However, the jury did receive evidence as part of the prosecution case that, following his arrest and detention on the 25th of May 2016, on suspicion of rape, A was interviewed on three occasions in the presence of his solicitor while in Garda custody. The first two interviews took the form of question and answer sessions and were essentially exculpatory, with A firmly and repeatedly denying that he had raped C. C's statement of complaint was put to him and he replied: "*it's lies*" and denied her allegations. A did accept knowing C, characterising her as his "*ex*". He accepted when it was put to him that he had had consensual sexual intercourse with her. He said, *"she was my girlfriend. I have done nothing wrong."* He acknowledged that a screen shot from C's phone, which was shown to him, contained a picture of him.

28. In the third of his interviews, which was conducted on the evening of the 26th of May 2016, A proffered to gardai a pre-prepared statement which he read out to gardai himself in the interview room. It was then signed by the appellant and was witnessed by his solicitor and the interviewing gardai. When the statement had been given, the interview continued in

question and answer format as before, with A being asked, and answering, questions arising from his written statement. It was put to him that the account in the statement was a fabrication, and he denied this.

29. The account of what happened, and the lead up to it, contained in A's pre-prepared statement was in the following terms:

> *"We were dating over a month and she kept asking me to meet more and more times. I did like her and I met her a good few times. She wanted to meet after putting her son to bed which she told me that he goes to sleep around eight. She text me one day and wanted to meet so we met in Naas as I was in Portlaoise with friends. I parked my car on the Main Street and she drove me in her car. We went to Brittas Bay, it was around midnight. We had sex on that night too on the beach in her car. She always wanted more and more sex. Mid-September she asked me, 'Why don't we move together somewhere in Tallaght' and I wasn't ready for that. So, I said to her, 'Let me think about it'. She kept putting pressure on me, so I decided to break up with her. I didn't want any harsh feeling or anything, so I said to her that I'm moving to USA. The minute she heard me saying that to her, she wanted to move me with her son too. I tried to explain to her that it's not that easy for her to move, but she started looking up information online and kept updating me. During that time, we arranged to meet again but on that same time my grandfather died so I was really upset over that and I couldn't meet her. A week later my brother came to see me in Ireland. She wanted to meet me, which I apologised. After he went she wanted to meet again in a hotel which I asked her to book if she wanted to, but she said that she had no money. Every time we did anything I made it my business to pay for everything, but I didn't want to be used for money. I went to USA for holidays and in my heart I liked her and I felt I was falling in love with [C]. I texted her to ask if we can meet when I come*

back. It was a bank holiday, so she said she can't meet on that day, we met on 28th October on Clontarf Road which is just opposite Clontarf Garda Station. We went to Dollymount Beach in her car. We were sitting on Dollymount Beach in her car in the back seat and we were kissing, and I put my hands to her bra, but she stopped me. So, we just kissed for a while. She wanted to spend more time with me and I said, 'I have to get some stuff from Tesco'. She said she doesn't mind going with me, so we went to Clarehall Shopping Centre. I bought all the stuff I needed, and she dropped me to my car which was parked on Clontarf Road. We arranged to meet again the day after as before going she asked me if I'm doing anything next day, which I had nothing planned so I said, 'I'm free'. During the next day we were texting each other and she told me that she misses me which I replied with, that I missed her too. On the 29th October we meet again in the same place as the day before on Clontarf Road. She asked me to drive my car today as she drove yesterday. So, I drove my car. We went to Dollymount Beach. We were sitting and talking there when she asked me, 'Is it safe to have sex here?' I said, 'Yes, why not'. She asked to go into the back seat which I said to her, 'We will in a while' as we were kissing. She told me, 'It's not comfortable here' so I agreed with her and went into the back seat. We are kissing, and she asked me if I had a condom. I said, 'No, I don't' and she told me she's on contraception. We started having sex which we both agreed to it. I was still afraid to ejaculate inside her, so I pulled out and ejaculated on her belly. After having sex, we sat on back seat for a while and start talking. She told me that the father of her son is not a good father. He doesn't look after him and also fights with her a lot. They had fought that day as well. She told me he is moving to UK and him or his family doesn't care about her son. She is sick being a single parent and wanted me to take over the role. It was a huge surprise for me and I said, 'I'm not sure if I can do that'. She

started crying and said that, 'You men are all the same'. I told her that I'm not ready for responsibility. We had an argument over that and she asked me to drop her to her car. I kept saying to her, 'It will be okay, you'll be fine, as it's normal to be upset'. She didn't want to know me when I refused to take responsibility for her son. I texted her a few times, tried to ring her to see if she was okay, I think I was in love with her. She didn't reply or answer any of my calls or texts. A couple of days later I got a missed call from her on WhatsApp. I was in a meeting, so I couldn't answer it. I texted her and apologised that I couldn't take the call as I was in a meeting. I cared about her and that's why I wanted to see if she was okay. She did text me again on Connecting Singles. I thought she wanted to talk again but when there was no response so I stopped contacting her. That was the last contact I had with her until the garda contacted me in relation to the allegation she has made against me. I am absolutely shocked and wish to say that at all times we had sex it was with her consent and we were to mature adults having a sexual relationship which was purely consensual. At no time whatsoever during our sexual encounter did she ever say no, and a lot of the meetings for sex were organised by her."

The Grounds of Appeal

30. The appellant appeals against his conviction on the basis that: -

(i) The trial judge erred in law in her rulings and/or in her directions.

(ii) Without prejudice to the generality of the foregoing, the trial judge permitted evidence which should not have been permitted, in particular evidence of recent complaint.

(iii) The verdict of the jury was contrary to the weight of the evidence and was perverse.

31. It is more convenient to deal with ground (ii) first, before proceeding to consider ground (i) and then ground (iii).

The admission of recent complaint evidence – ground (ii)

Submissions

32. During the trial, an objection was taken to the calling of complaint evidence from Garda Griffin on the grounds that it comprised inadmissible hearsay, in circumstances where recent complaint evidence had already been adduced from the complainant's friend, S, the first person in time to whom a complaint had been made. The trial judge noted, and the prosecution counsel readily accepted, that the application to adduce further such evidence was "*rather unusual*". However, prosecuting counsel submitted:

> *"…there is no rule that says I can't have more than one witness of recent complaint and I say in the special circumstances of this case where the complaint was made immediately to [S] and thereafter she was brought to the garda station immediately and made a more fulsome and a more comprehensive complaint to An Garda Síochána, in my submission to the Court it would be wholly appropriate to have that evidence before the Jury as I say in circumstances where the* interregnum *between the actual offence or offences as alleged and the fulsome giving of the complaint, which happened to be to a member of An Garda Síochána, it simply was the case that she made some complaint to her friend in the meantime".*

33. Although Garda Griffin had no record in her Garda notebook about the complainant telling her about oral sex, in her statement of proposed evidence the Garda indicated that the complaint made to her (unlike that made to S) did include details about oral sex. The prosecution thus contended that there were "*highly unusual circumstances*" in the case, such that the complaint made initially to S, and then elaborated on to Garda Griffin, represented the same narrative and it reflected a "*seamless complaint*". Prosecuting counsel submitted

that if Garda Griffin was not permitted to give evidence of what was said to her, it might *"give somewhat of a warped impression in relation to what was or wasn't the form of her complaint".*

34. The trial judge, on receiving this submission, pressed prosecuting counsel as to how it would give a warped impression, and she responded:

> *"Because it is quite clear from the manner in which the cross examination was conducted that there are parts which were said to Garda Griffin which perhaps weren't said to [S] and -- likewise obviously, as [defence counsel] is entitled to do, he is entitled to highlight, for example, the SATU report, which he did this morning, what was or was not said to [the SATU nurse]."*

35. Prosecuting counsel subsequently added:

> "*…it's unusual because there is such a short period of time between the complaint to [S] and the complaint to An Garda Síochána. That it is essentially a continuum. It is essentially part of the same narrative. She was taken immediately, in a situation of distress, you heard [S]'s evidence in relation to the high distress that she was in. My understanding from the evidence to be elicited from Garda Griffin is that she was likewise in a high state of anxiety and that in those circumstances I say that it's for the Jury to be aware of what she said to both of them because it gives a comprehensive account of what her complaint was. And the Court then went on to ask me about relevance and that was when I went on to say… it is relevant in light of the cross-examination that was conducted in relation to bits missing."*

36. The trial judge then interjected, leading to the following further exchanges:

> *"JUDGE: So, that's the point, that in light of the cross examination that there is additional elements of the complaint made to Garda Griffin.*

PROSECUTION: Yes but even aside, even aside from that, I would still have sought to elicit this from Garda Griffin because … it forms a comprehensive narrative that night within a matter of hours when she was in a high state of distress and so on that basis I say … the recent complaint should be a recent complaint that is as comprehensive as possible representing what she has said at the point in time … .

JUDGE: So, … you are indicating then that what was said to [S] wasn't a comprehensive account, that that has been brought out in terms of the cross examination that's been conducted and that it's only fair and proper that the full account given to two different people be adduced before the jury.

PROSECUTION: Yes. But I would say that the full and proper account should be, regardless of what the cross examination was, in these circumstances, where it is so close in time".

37. Responding to the prosecution's application, defence counsel submitted:

" … the only question asked of [S] in cross examination was that she would confirm that no account had been given of how the complainant's own clothing came to be removed and that isn't dealt with in this complaint. The ordinary rule is of course that the rule against narrative prohibits evidence being given of a complaint repeatedly made for the purpose of buttressing the truth of an allegation and in my respectful submission this is such a case where that is the only real purpose of doing so. [C] was not cross examined to suggest she had been inconsistent in the way she made the allegation and in my respectful submission no real forensic justification for adducing multiple evidence of complaint is appropriate or has been offered to the Court in this case. The complaint to [S]had the virtue of being made at the first reasonable opportunity, made voluntarily and made to a close and trusted friend and it should be borne in mind of course that if the purpose of adducing evidence of recent complaint

is to provide evidence of consistency and if [defence counsel] insists that the reference to oral sex is the important feature in that respect, well the difficulty she has is that the complainant didn't give evidence of oral sex in chief. It was something that in fact had to be put to her in cross examination. So, it is difficult to see how one could see that this evidence serves the purpose of showing consistency when it was something that the complainant didn't mention in her evidence in chief and in fact had to be put to her. And that's a real difficulty from my point of view in my submission in respect of evidence of this type."

38. This was disputed by the prosecution in rejoinder on the following basis:

"[PROSECUTION]: Well, of course as my friend is aware she didn't at any stage resile from that. We are all aware that often matters are left out, especially when giving of evidence is quite a traumatic event and she most certainly did not resile from it. So, it completely in my view, contrary to what [defence counsel] says, fulfils the consistency criteria but it's trite though as well to say that the complaint to [S] was made at the first reasonable opportunity, voluntarily."

39. The trial judge ultimately allowed the prosecution to adduce the evidence in controversy, and it is maintained in this appeal that she was in error in doing so. The trial judge ruled:

"There's a rather unusual aspect to this in that the complainant when she gave evidence in her direct examination she didn't refer to oral sex having been conducted on her on the night in question and that it's something that was adduced in the course of the cross-examination by [defence counsel]. Now, [defence counsel] makes the point that that raises an issue in terms of consistency but the reality is there's no difference between examination in chief and cross-examination. It's ultimately the entire evidence of the complainant. So, the complainant has given evidence that oral

sex was performed on her by the accused and that obviously came into the trial as a result of the cross-examination but nonetheless it is the evidence of the complainant. It raises an issue in terms of her consistency because, because it was adduced in the course of cross-examination that oral sex took place, certainly an issue arises as to how this didn't get mentioned at an earlier stage and it's something that I certainly was aware of and took a mental note of in terms of the evidence of the complainant but the reality is that it in fact was mentioned by the complainant at an earlier stage. So, because of that very particular circumstance, that the complainant did, at a very early stage, make a complaint in relation to oral sex to Garda Griffin, rather unusually I am going to permit this evidence of the complaint made to Garda Griffin in the very particular circumstances. Had the complaint made to Garda Griffin mirrored the complaint made to [S] I wouldn't have admitted this evidence but in light of the evidence given by the complainant, in light of the actual manner with respect to how the evidence of the oral sex came into the trial, the fact that this in fact was made at the earliest opportunity, this specific complaint in relation to oral sex was made by the complainant to Garda Griffin, it in fact is very important and I will permit that evidence to be led in the trial."

40. The arguments presented in the court below were in substance re-iterated before us. We were referred to various authorities to emphasise that complaint evidence is in principle inadmissible as hearsay and as contravening the rule against narrative, but that it may be admitted as an exception to those rules for the narrow and limited purpose of establishing the consistency of a complainant in terms of his/her evidence given at trial. The prosecution may adduce evidence of a complaint made in the early aftermath of an alleged sexual crime to show that the narrative provided by the complainant at trial has remained consistent with that which she provided at the earlier time. The authorities to which we were referred are well

known to us and included: *The People (Director of Public Prosecutions) v M.A.* [2002] 2 IR 601 and *The People (Director of Public Prosecutions) v Brophy* [1992] ILRM 709; *The People (Director of Public Prosecutions) v Gavin* [2000] 4 IR 557, and *The People (Director of Public Prosecutions) v McDonagh* (1998) WJSC-CCA 5745. We were also referred to McGrath on Evidence, 2nd ed, at para 3-171, where the author offers the following synthesis of precedent:

> *"An examination of the authorities in relation to the admission of complaints indicates that there are four conditions of admissibility that have to be satisfied: (i) the prosecution is for a sexual offence; (ii) the complaint was made at the first reasonable opportunity after the commission of the offence; (iii) the complaint was voluntary; and (iv) the complaint is consistent with the evidence of the complainant".*

41. We were also referred by the appellant to *The People (Director of Public Prosecutions) v Murphy* [2013] IECCA 1; and to *The People (Director of Public Prosecutions) v SOC* [2017] IECA 23, both of which emphasise the judge's discretion concerning whether it may be appropriate to admit evidence of more than one recent complaint, and provide examples of how that discretion was exercised in other cases.

42. While these authorities and materials, to some of which we were also referred by counsel for the prosecution, and about which there is no controversy, deal with various aspects of the law on recent complaints, they do not address the specific problem that arguably arises in this case, namely one in which recent complaints were made to more than one person, in close temporal proximity, which were not inconsistent *inter se*, but where more detail was provided in one account than in the other. We have used the word "*arguably*" because there is dispute between the parties in the present case as to whether the accounts provided by C to her friend S and to Detective Garda Griffin were in fact consistent. The prosecution argues that they were, whereas the defence disputes this; and this is an issue

we will engage with and endeavour to resolve later in this judgment. However, before doing so, and for the purposes of summarising the submissions made to us, it is important to record that counsel for the prosecution has referred us to a previous decision of this Court, namely *The People (Director of Public Prosecutions) v K.M.* [2018] IECA 261 in which a somewhat similar, albeit not identical, issue featured. In that case the complainant, who was a child, had made initial disclosures to a friend L, and to a cousin R, that she had been "*molested*" by the appellant, before giving a detailed account shortly afterwards to Gardai which included being subjected to sexual assaults that had escalated over time to rape. She gave evidence at trial and it was not suggested that it was inconsistent with what she had said in her statement to Gardaí, although, unlike in the present case, no attempt was made to put the complaint made to the Gardaí before the jury. The prosecution did, however, seek to introduce the complaints made to L and R, respectively. The defence objected unsuccessfully to the admission of evidence of those complaints, contending that they were not consistent with her evidence at trial. Prosecuting counsel in the present case places particular reliance on the following passage from paragraph 21 of the Court's judgment:

> *"21. Here, there is no inconsistency in the accounts. What has occurred is that on one occasion, an elaborate and detailed account is given. First, over several days when providing a statement to the Gardaí, and then in the witness box during examination, crossexamination and re-examination, whereas on the other hand, the account given to Ms. L was really lacking in all detail. However, in the Court's view, that is what is in issue: the distinction between an account where detail was not provided and an account where considerable detail was provided. Viewed in that light, there are no real inconsistencies. The Court does not believe that the reference to "molesting" can be interpreted as an account involving but limited to and not going beyond inappropriate touching. It is the nature of things that individuals who have been the*

subject of sexual abuse, in particular, perhaps, child sexual abuse, when they first bring themselves to speak of it, that they are likely to be very reticent and to provide few details. This is a factor that trial judges are entitled to have regard to when deciding whether to admit evidence of recent complaint that is offered. In this case, so far as the evidence is concerned, the Court is satisfied that the trial judge was well within her rights to admit it."

Discussion & Decision

43. Unlike in *K.M.*, the complainant in the present case was not a child when she alleges she was raped by the appellant and arising out of which she made complaints to S and to Detective Garda Griffin, respectively. Accordingly, the reticence point made in *K.M.,* i.e., that complainants in sexual abuse cases, but particularly cases involving child sexual abuse, often *"are likely to be very reticent and to provide few details"* was not really the same point as that being made in the present case. The point here is more nuanced. It is not really suggested that the less detailed account supplied to S compared with that supplied to Garda Griffin is to be attributed to reticence.

44. On the contrary, it is suggested that it may be explained by the complainant's distress and by the different contexts in which a complaint came to be volunteered to two different persons, in close temporal proximity on the day of the incident. The trial judge clearly regarded this explanation as being a cogent one, and we are satisfied that it was capable of arising by inference on the evidence. The situation was somewhat unusual. In the first instance C had reached out to her friend for assistance in circumstances where she was in distress and was explaining why she was in distress, whereas in the second instance she found herself very shortly thereafter to be imparting the information for a second time in the context of making a formal complaint to the police and with the expectation that it would be investigated. As stated, both complaints were closely connected in time, and it is suggested

that what was said in these two admittedly different contexts, involved the recounting by the complainant of a single narrative, but that simply because of the different contexts C had supplied more detail to Detective Garda Griffin than she supplied to S. That seems to us to represent a reasonable and credible analysis of the situation that C was in as disclosed on the evidence, and it was certainly capable of offering a cogent explanation for why one account contained more detail than the other.

45. We are satisfied that there was nothing to suggest that these two accounts were internally inconsistent. They simply differed in the level of detail they contained, a circumstance for which there is a cogent explanation which the trial judge accepted and which we believe she was correct to accept. The complaints were made in close temporal proximity and we can readily accept on the evidence as reflected in the transcript that from C's perspective they represented the provision of a single narrative within a continuum or sequence of events on the same date. There was nothing in either complaint, whether they are viewed together as a single narrative as the prosecution suggests (and we accept seems appropriate in the circumstances of this case), or as two separate narratives, which in any way contradicts the evidence given by the complainant at trial. We believe this case is distinguishable from the *Gavin* case cited to us on behalf of the appellant because in that case the description in the recent complaint of how the offence had occurred was described by the Court of Criminal Appeal as being *"crucially different from the account given by the witness at trial"*. The same is not true here. Yes, there was more detail in the later complaint concerning what occurred in the lead up to the act of rape, but the absence of such detail in the earlier complaint did not, in our assessment, render it a *"crucially different"* account in terms of how C came to be raped.

46. We are therefore of the view that no error has been established in terms of how the trial judge resolved the admissibility contest, and that she was correct to overrule the defence

objection and admit the evidence. To have done so in no way constrained the defence from exposing and exploring before the jury the circumstances in which C had failed to mention the detail of oral sex to S, or had felt it appropriate to mention that detail to Detective Garda Griffin, and to make such use of that as they saw fit.

47. This ground of appeal is accordingly dismissed.

The Rulings and Directions of the Trial Judge – Ground (i)

48. The trial judge's ruling on the admissibility of the complaint evidence of S and of Detective Garda Griffin has already been dealt with. Apart from that ruling, with which the appellant disagrees, there are two further sub-complaints under this heading. It is suggested (a) that the trial judge misdirected the jury on how to deal with the evidence of recent complaint; and (b) that the trial judge misdirected the jury in charging them on the issue of consent. We will examine each separately.

The Trial Judge's Charge with respect to complaint evidence

49. The appellant complains that the trial judge correctly sought to advise the jury as to how they should treat the evidence of the complaints having been made, but, in doing so, the judge failed to respect the appellant's position and eroded his challenge to the evidence of Garda Griffin, and the absence of any note made by the Garda of the appellant's purported complaint to her.

50. The passage in the Charge which the appellant finds objectionable, with emphasis by underlining added by counsel for the appellant, was in the following terms:

> *"So, it makes perfect sense that just because somebody says something to somebody doesn't mean that the something happened. It just means that the something was said. So, you have to be very careful about that because it is not proof of anything. <u>The fact that something is said, it doesn't mean that the event actually happened, it just means that the person said something</u>. Normally, because it has no probative value, juries*

never get to hear about the fact that somebody, say in an assault case, that well the person who was assaulted went and told all his friends, you don't get to have your 10 friends come in and say well he told me he was assaulted. There is an exception made in sexual cases and in sexual cases such evidence of a complainant saying something consistent in relation to an allegation of a sexual event and saying it within a reasonable time frame of when the sexual event is alleged to have occurred, that can be given in evidence and you have heard that in this case, you have heard the evidence of [S] and you have also heard the evidence of Detective Garda Griffin. It is important you know how to assess it because the height of how you assess that evidence is that it establishes a consistency in terms of the allegation being made by [C]. <u>It doesn't mean that it happened. It just means that she is telling a consistent story but in that you also have to have regard to what she said to [S] and what she said to Garda Griffin and there is an inconsistency in terms of that also because you will recollect that to [S] there was no reference to oral sex occurring but to Garda Griffin</u> there was a reference and of course if there is an inconsistency, for the reasons I have already explained to you, that can have an effect in terms of your deliberations."

51. Counsel for the appellant's objection was that the judge's instruction on this issue assumed a disputed fact, namely that C had told Detective Garda Griffin about the detail relating to oral sex. Detective Garda Griffin had been rigorously cross-examined about her lack of notes in respect of C's complaint as initially received by her, and the issue as to whether or not C had told her that A had performed oral sex on her was a live issue for the jury to resolve. It was suggested that in couching her instruction in the way that she did the trial judge had entered the domain of the jury on what counsel contends was *"that pivotal issue"*.

52. The trial judge was requisitioned as follows:

"COUNSEL: ... In relation to Garda Griffin's evidence about what was said in the station, I fully accept that the Court went through her evidence in detail but just before that when the Court was explaining the value of the evidence and the way in which it can be used, you said there was an inconsistency in what she said to [S] because there is no reference to oral sex but you said that there was consistency in what she said to Garda Griffin because there was mention of oral sex. Now, that is a fact in dispute and –

JUDGE: Sorry, what did you say that I said?

COUNSEL: You said that there was reference to oral sex in what she said to Garda Griffin. Now, I accept that Garda Griffin said that but that is a fact in dispute and Garda Griffin was -- and I fully accept that you put the cross examination".

53. Responding to the requisition, the trial judge said:

"JUDGE: But I also said that this evidence can be dealt -- this evidence was admitted on the basis of consistency but actually, as it happens, there is an inconsistency asserted by the defence also and that, for all I said about previous inconsistent statements, that that's -- it's not that this is consistent necessarily, the defence are in fact alleging that there is an inconsistency in terms of the two.

DEFENCE: Yes. Well, I don't think you made that clear when you were explaining the evidence to them. It is obviously a matter for the Court as to whether that was done or not. Thank you".

54. The trial judge was not disposed to recall the jury and re-visit that aspect of her charge. The appellant contends that that was an error.

Discussion and Decision

55. We have said many times that a narrow parsing of a portion of a judge's charge may be distorting and, in that respect, unfair. We think that that is the case here. The charge has to considered in its entirety. When it is so considered it is quite clear that the trial did not usurp the function of the jury on this issue. Indeed, that was the very point legitimately made by the trial judge in responding to counsel's requisition. She felt that she had made clear the limited purpose for which complaint evidence had been admitted and the limited use which the jury might make of that evidence, namely as demonstrating that the evidence given by the complainant at trial was consistent (or not) with what she had said to persons to whom she had complained in the early aftermath of the incident. In doing so, she did not purport to usurp the jury's function in determining what in fact had been said to each complainant, and whether what had been said was indicative or not of consistency by the complainant in terms of the evidence that she had given, but had simply reminded the jury that, whatever about all of that, there was a possible inconsistency between what was said to have been said to S on the one hand and Detective Garda Griffin on the other hand. That was so on the evidence. It still remained for the jury to satisfy themselves in the first instance as to what in fact had been said to S and to Detective Garda Griffin respectively. We are completely satisfied that what was said by the trial judge was said out of fairness to the accused and that it is clear that the trial judge was not telling the jury how to resolve the dispute concerning what were the terms of the respective complaints, nor was she assuming a disputed fact. We therefore are not disposed to uphold this aspect of ground of appeal no (i).

The Trial Judge's Charge with respect to Consent

56. Counsel for the defence in his closing speech to the jury suggested to them that the issues in the case could be distilled to just two: -

> *"The first is did [C] consent to the acts that occurred? You know she says she didn't but that is just evidence for you to assess and make up your own minds on. And the*

second question then is, if the prosecution have proved to your satisfaction beyond reasonable doubt that she was not consenting, have the prosecution also proved that [A] knew that or that he was reckless about that and reckless means being aware of a serious risk about something, a serious risk that she was not consenting and carrying on regardless, in other words ignoring that risk. Those are the issues that you have to consider."

57. It was therefore crucial in terms of the defence case that the jury should be correctly instructed on, and should properly understand and appreciate, the legal concept of consent. However, it is suggested on behalf of the appellant that the jury were misdirected on consent, because it is said that the trial judge's charge failed to deal adequately with the subjective perception of the appellant concerning whether C was consenting, and with defence counsel's analysis of the evidence in terms of his client's perception as presented at some length in the course of his closing speech.

58. The trial judge, in charging the jury on the issue of consent, said to them: -

"You must be satisfied beyond reasonable doubt that [C] did not consent to the sexual intercourse when the sexual intercourse was occurring, at the time of the sexual intercourse. To consent to sexual intercourse that consent must be freely and voluntarily given. The failure or omission to offer resistance to the sexual intercourse does not of itself constitute consent to the sexual intercourse. Consent can be withdrawn at any time, either before sexual intercourse or during sexual intercourse and this is in reality what is at issue in this case. [C] has given evidence to you that she did not consent to the sexual intercourse which occurred on the night in question and the position adopted by the defence is that she did consent and that is the issue that you have to determine. Consent is a fact. At the time did [C] consent or not? Not what she thought beforehand, not what she thought afterwards but at that time, at

that moment, during the sexual intercourse, did she consent to it or not? And that is a matter that you, and you alone, have to determine and you must be satisfied that she did not consent and satisfied to a standard beyond reasonable doubt before you can convict the accused in respect of this matter.

So, you must make that determination and you must be satisfied beyond reasonable doubt that the complainant did not consent to the sexual intercourse at that time. If you are satisfied beyond reasonable doubt that sexual intercourse occurred, as I imagine you will be satisfied beyond reasonable doubt, and that [C] did not consent to it, you then move to the third element of the offence which I have already referred you to and you then move on to consider what the accused's state of mind was. Now, it's not what the reasonable person's state of mind was. It's not what any of you would have thought in the circumstances. It's what the accused's state of mind was at that time. In light obviously of the evidence that you have heard in the case, you can determine that issue. And what you have to be satisfied of beyond reasonable doubt is that the accused knew that she was not consenting, or he was reckless as to whether she was consenting or not. So, that's the accused not know that she was not consenting or him being reckless as to whether she was consenting. And what does recklessness mean? Recklessness means that the possibility that a woman was not consenting actually occurred in the mind of the accused. A man is reckless where he decides to proceed with or continue with intercourse in spite of adverting to the risk that the woman is not consenting. So, they are the three elements that you must be satisfied of and you must be satisfied of each of them beyond reasonable doubt. As I have indicated I can't imagine the sexual intercourse part of the definition will cause you difficulty. You then must consider did [C] consent or not. Are you satisfied

beyond reasonable doubt that she did not consent on that night at that time. If you are so satisfied you then move on to consider the accused's state of mind and that being that he actually knew or that he was reckless in terms of the definition that I have given you with respect to recklessness. And in determining all that, you obviously have regard to the evidence that you have heard with respect to this issue.

[Defence counsel] very properly referred to the fact that there are text messages but the text messages are before. There are text messages after. Obviously you will have regard to the text messages but there is also the events in the car and that is what is at issue and the text messages are something that you should take into account but they are not the only evidence in relation to this matter and I am very shortly now going to go through a summary of the evidence and specifically focus in relation to what [C] said occurred at that actual time."

59. The trial judge went on to give a detailed summary of the evidence in the case, including a summary running to thirteen pages of transcript of the evidence of the evidence given by C, both in chief and under cross-examination. She prefaced her summary by telling the jury:

"Now, to be clear about this, decisions on evidence are entirely a matter for you. I have no view in relation to the facts and I don't mean to portray any view. Even if I did have a view or even if you think that I have a view, you are the decider of facts, not me and you would be completely free to adopt or reject any view which I might inadvertently have expressed but I am telling you now I don't have a view because I have enough to do to ensure that the trial is run correctly and properly and that the law is explained properly to you. So I don't get myself involved in relation to the facts and I think it's important that you understand that so you don't think that there is

a slant in relation to the summary that I am going to give you. If, in this summary, I leave anything out and you think that I have left something out that was very important, well you are right. If you think it is important then it is important. So, simply because something is left out may be that I actually didn't take a note of it. It might be that I did think that it was unimportant but it doesn't matter what I think about it. It is you, and you alone. So, if I don't mention something that doesn't mean that it's unimportant. Also in terms of how I'm going to do this, you have probably seen that I have been taking a note, I do have a note of the evidence but I can't always rely on my note. Some of what I am going to deal with are from notes that I have made but, as it happens, every single word that is said in court is recorded and I have a typed transcript of everything that's said in court. Some of that I am going to read in relation to [C]'s evidence, I'm going to read that so that I am not going to make an error in terms of what my note has said. So, I am going to read from the transcript in relation to [C]'s evidence but the reason I am explaining to you about the fact that I have a transcript is for this reason, it is pointless us going through an exercise of me re-reading every single thing that was said in court because we'd be here for as long again and I know that you have been paying attention and you have been taking notes. So, I am going to give you a summary. If it is a thing that there is any aspect of the evidence that you would like me to go over again, that's absolutely no difficulty and we actually can go through it from what has been recorded as the spoken word in court. Obviously if you could identify what the issue was it would help rather than having to go through launches of evidence but I am here to do whatever you want and I have everything recorded. So, it is no problem at all. Please feel free in the course of your deliberations to come back to me and ask me to go back through anything at

all and we can reread it. The one thing we can't do is replay it but we certainly can reread it."

60. The trial judge was requisitioned after her charge and it was submitted to her that she had not adequately directed the jury in relation to the subjective element involved in the absence of consent and, more particularly, that the failure or omission to offer resistance might be something from which another person might draw subjective conclusions. However, the trial judge did not accept that requisition. It is contended on behalf of the appellant that this was an error and that the jury did not have a proper appreciation of those matters that might lead either to a subjective appraisal that there was consent or the absence of recklessness.

61. Responding to this submission, counsel for the respondent has referred us to the following passages from the judgment of Charleton J. in the Supreme Court in the case of *The People (Director of Public Prosecutions) v C. O'R*. [2016] 3 I.R. 322, and with which it is suggested the trial judge's charge was in full compliance:

"[41] The border between rape and sexual intercourse is consent.

…

Thus, consent must be given by the woman before sexual intercourse. Sexual intercourse and absence of consent to sexual intercourse are the two external elements of this offence.

[42] Whereas older authorities tended to concentrate on whether force had been used, the definition of rape is not at all dependent on force. Lack of consent constitutes rape. Consent is the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse. In the normal sphere of relations between men and women, consent does not simply exist in the mind of the woman: if there is desire for sexual intercourse then that is

communicated. Because insensibility, be it caused by sleep or an intoxicated or drugged state, cannot be any expression of consent, it follows that there should be communication from the woman through the senses that intercourse is to be allowed. In s. 9 of the Criminal Law (Rape) (Amendment) Act 1990, a clear distance is placed between any older authorities such as Hale or Blackstone, which emphasised the use of force, and the current state of the law. This provides: -

> *"It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to the act.""*

62. In specifically addressing the mental element of rape, Charleton J. stated as follows at paras. 46 and 47 of his judgment:-

"[46] It is to be emphasised that in the vast majority of cases no specific issue as to any belief aspect of the mental element in rape arises. Proof of that mental element of the accused knowing that the woman is not consenting or being reckless as to whether she is or is not consenting is a matter to be inferred from all of the relevant circumstances. There might also be an admission. The circumstances are very rare indeed where a genuine issue could arise that even though the woman did not consent, the man nonetheless believed that she was consenting. One such case where that issue was squarely raised was in the English case of Reg. v. Morgan [1976] A.C. 182 which concerned circumstances where a husband suggested to three of his friends that they should force themselves on his wife under the false pretext that she was "kinky" and would only feign protest. When they did so, the wife made her lack of consent plain. Having been convicted of rape by a jury, the three men argued on appeal that they had honestly believed that consent was present. The majority of the

House of Lords upheld the conviction on the basis that no jury properly instructed could have come to the conclusion that there existed any honest belief in consent. Nonetheless, the court determined that, as a principle of law, an honest though unreasonable belief in consent will mean that the mental element of rape is not proven. In due course, as detailed above, this was followed by a statutory amendment in that jurisdiction.

[47] In the ordinary course of prosecutions, rape cases tend to follow a predictable pattern. The woman says that she was raped and indicates the circumstances whereby she did not consent. The man denies this and puts forward a version of events telling of a sexually charged encounter participated in willingly by both sides. The task of the jury is to assess if the external elements of the offence have been proved beyond all reasonable doubt and whether, on the resolution of those facts in favour of the prosecution, a fact may be found beyond reasonable doubt that the accused knew of the lack of consent or was reckless as to whether the woman was or was not consenting. In those circumstances, the appropriate direction by the trial judge does not need to go beyond the presentation to the jury of the elements of the offence. As set out by Finlay C.J. in the Court of Criminal Appeal in The People (Director of Public Prosecutions) v. F. (Unreported, Court of Criminal Appeal, 27 May 1993) at p. 5, the elements of the offence may be elucidated as follows: -

> *'(1) that the accused had … sexual intercourse with a woman who at the time of the intercourse did not in fact consent to it, and*
>
> *(2) that at that time the accused knew that she did not consent, or*
>
> *(3) that at that time the accused was reckless as to whether she did or did not consent.*

It is unnecessary in those cases to embark on the issue of mistaken belief as it simply does not arise. Nor can anyone credibly plead alternative facts: that there was a consensual sexual encounter but if there was not then that the accused nonetheless believed that the woman consented. This would not be a pleading point; any such approach would utterly lack credibility."

63. The Supreme Court went on to consider how a trial judge should charge the jury in respect of the offence of rape: -

"[48] When it comes to a trial judge framing a charge to the jury in this commonly occurring kind of rape trial it is unnecessary to refer to the mistaken belief issue; The People (Director of Public Prosecutions) v. Creighton [1994] 2 I.R. 570. What the judge instructs the jury as to the law has to depend on what issue is actually raised at the trial.

…

[52] The 1981 Act as amended draws a distinction between knowledge and belief. It is unnecessary to explain ordinary words to a jury. An accused man is guilty of rape if he has sexual intercourse with a woman who is not consenting and he knows that she is not consenting. That category constitutes the vast majority of cases and unless the evidence suggests a belief detached from the facts necessarily proven by the prosecution to establish lack of consent, no issue of the accused having a separate belief in consent is raised; The People (Director of Public Prosecutions) v. Michael McDonagh [1996] 1 I.R. 565. Recklessness as to the woman not consenting requires that the accused advert to the lack of consent of the woman and for him to proceed nonetheless.

…

[53] Recklessness is the taking of a serious and unjustified risk. The crime of rape is about the right of a woman to be protected against a gross violation of her mental and physical integrity. Those rights are protected by the Constitution as part of the collection of rights which the State guarantees to respect and, specifically by making rape an offence, to defend and vindicate as far as practicable. No one is entitled under our law to justify any deprivation of the constitutional rights of another person on the basis that they might have been consenting. For any accused person to take any such risk would be unjustifiable. To violate a woman on any such premise as that she might be consenting to intercourse is outside the legal order as defined by the 1981 Act. If an accused is aware of the possibility that a woman may not be consenting, any conscious disregard of this advertence to that possibility means that for him to proceed is for him to act recklessly, and thus criminally."

64. It was submitted on behalf of the respondent that the trial judge's charge had adequately and comprehensively addressed the jury on the law in relation to consent and in particular regarding the subjective element of the appellant's belief as to consent. The respondent submitted that in the circumstances she did not fall into error. Rather, the trial judge had been correct to refuse the Defence requisition in that regard.

Discussion and Decision

65. We have no hesitation in rejecting this aspect of ground of appeal no (i). In our assessment the trial judge's charge with respect to the issue of consent was impeccable. It is not the function of a trial judge to make a second speech for the defence in the course of her charge. The jury could have been under no apprehension but that the defence case was based on a perception of consent. The law on consent was clearly explained, and the jury were provided with a very thorough summary of the evidence. They were in our judgment fully

equipped to render a just and appropriate verdict in the case, and we are satisfied that they did so.

The contention that the verdict was perverse -ground no (iii)

66. Counsel for the appellant relies on his written submissions in support of this ground. In those submissions our attention was drawn to *The People (Director of Public Prosecutions) -v- Nadwodny* [2015] IECA 307, where this Court applied the principle flowing from *The People (DPP) -v- Tomkins* [2012] IECCA 82 that emphasised that there is a high threshold to be crossed in claims of perversity, and that an appeal court should only quash a decision as being perverse where serious doubts exist about the credibility of evidence which was central to the charge, or where a guilty verdict, even by a properly instructed jury, was against the weight of the evidence. Moreover, in any assessment of a perversity claim, a court must look at all the evidence which was before the jury and not just selected portions of it. It was suggested that here, in light of all of the evidence tendered, as outlined in the transcripts, and having regard to the foregoing authorities, that the Court might find the appellant's conviction to be perverse and/or contrary to the weight of all the evidence. Particular reliance was placed on alleged contradictions in C's evidence, identified in the submissions.

67. Counsel for the respondent in reply makes the valid point that there was no application for a direction at the close of the prosecution's case. The respondent rejects any suggestion that the verdict was against the weight of the evidence and perverse.

Discussion and Decision

68. The transcript does not support the suggestion that the verdict was perverse. There was clear evidence on foot of which the jury might have acted to find the appellant guilty. In so far as the alleged contradictions in the evidence of C were concerned these did not relate to the alleged offence itself but to ancillary matters.

69. We are satisfied that the verdict was not perverse and also dismiss this ground of appeal.

Conclusion

70. In circumstances where we have not seen fit to uphold any of the appellant's grounds of appeal, his appeal against conviction is dismissed.