THE COURT OF APPEAL

Birmingham P.
Edwards J.
Kennedy J.

Record No: 157/17

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

RESPONDENT

-V-

P. K.

APPELLANT

Judgment of the Court delivered on the 8th of April, 2020 by Mr Justice Edwards

Introduction

1. On the 6th of April 2017, in the course of a re-trial, the appellant was convicted by the unanimous verdict of a jury in the Central Criminal Court of two counts of rape, being one count of rape contrary to common law, s.48 of the Offences Against the Person Act 1861 and s.2 of the Criminal Law (Rape) Act 1981 (as amended by s.2 of the Criminal Law (Rape)(Amendment) Act, 1990 ("s.2 vaginal rape"); and one count of rape contrary to s.4 (1)(a) of the Criminal Law (Rape)(Amendment) Act, 1990 ("s.4 anal rape").

2. The appellant had originally been charged on the one indictment with three charges of sexual assault in addition to the aforementioned rape charges. The s.2 vaginal rape was charged as count no 1, the s.4 anal rape was charged as count no 2, and three sexual assaults were charged as counts 3, 4, and 5 respectively. At a previous trial which had commenced on the 22nd of November 2016 and which had concluded on the 16th of December 2016, the jury had convicted the appellant of the three sexual assault counts but had disagreed on the rape counts.

3. On the 6th of February 2017 the appellant received concurrent sentences of seven and a half years' imprisonment in respect of the three sexual assaults, all sentences to date from the 19th of December 2016 to take account of time spent in custody.

4. On the 24th of May 2017 the appellant was sentenced in respect of the rape offences. A sentence of seven years' imprisonment was imposed for the s.2 vaginal rape, and a sentence of ten years imprisonment was imposed for the s.4 anal rape, both sentences to run concurrently inter se and to date from the 19th of December 2016 so as to also run concurrently with the sentences imposed earlier on the sexual assault counts. The final

two years and six months of the ten year sentence for the s.4 anal rape was to be conditionally suspended for a period of two years from the date of his release.

5. The appellant has appealed against his conviction and sentences for the rape offences. This judgment deals solely with the appeal against conviction.

The Circumstances of the Case.

6. The appellant was in a relationship with the complainant, AMB, dating back around three and a half years prior to the alleged offences. At the relevant time, the couple had one child together and the complainant was pregnant with their second child, due in late December 2014. They did not share a residence, however they frequently spent nights together.

7. The complainant alleged that the appellant would often have sexual intercourse with her as she slept, and she would often awaken to find the appellant penetrating her. She had communicated to him several times that she did not consent to this and did not want it.

8. The complainant alleged that on the night of the 22nd of December 2014 and into the morning of the 23rd of December 2014 she was asleep and awoke to find the appellant raping her vaginally. She further alleged that on the night of the 23rd of December 2014 and into the morning of the 24th of December 2014 she was again asleep and on this occasion awoke to find the appellant raping her anally. The accused accepted at interview, and testified at trial, that vaginal intercourse had occurred on the 22nd /23rd December but claimed this was consensual. He denied entirely the alleged anal penetration on the 23rd /24th December. It was accepted by both sides that the parties had engaged in consensual anal sex on previous occasions.

9. The complainant attended in person and in distressed state at a Garda station on Christmas Day 2014 looking to speak with a female garda, and then reported the rapes to a Sergeant Geraldine Browne who subsequently testified at trial that at the time of her presentation at the garda station the complainant was "*very upset, she was distraught, she was heavily pregnant, she was in a fragile state*". Following her report of the matter to An Garda Siochána an investigation was commenced. During that investigation a mobile phone belonging to the appellant was recovered and examined. That phone was found to contain three video clips, taken on various dates in November 2014, showing the appellant penetrating the anus of the complainant in a bed whilst she was ostensibly asleep. The complainant maintained that she knew nothing of these videos and had not consented to the activity recorded on these videos. She maintained that she had not been conscious when they were made, but that the appellant had told her that unawares to her he had drugged her in the past without her consent. Whether she was asleep or drugged during the videos, it was manifest from the recording that the complainant was insensate at the time and unaware of what was happening. The activity recorded on these videos gave rise to the preferment of the three sexual assault counts in respect of which the appellant was convicted during the first trial. During subsequent interviews, and at trial, the appellant had maintained that the videos were made with her consent, that she was

aware of them and that nothing untoward had happened. Further, he denied drugging the complainant.

The Grounds of Appeal

10. The appellants Notice of Appeal which was filed on the 20th of June 2017 merely indicated *"[u]ndue process by An Garda etc. I need to go over these grounds with a solicitor. I don't have one as of today*".

11. Subsequently, a document entitled "Grounds of Appeal" was filed with the Court of Appeal on the 15th of January 2019, which listed seventeen individual grounds of complaint with respect to the appellant's conviction. However, not all of those complaints were ultimately proceeded with. By the time the appellant filed his written submissions on the 27th of May 2019 those seventeen grounds had been reduced to just seven, namely:

    i. The trial judge erred in refusing to postpone the trial due to adverse publicity;

    ii. The trial judge erred in determinations, rulings and directions in respect of corroboration;

    iii. The trial judge erred in his ruling concerning the admissibility of the appellant's interviews;

    iv. The trial judge erred in his rulings, determinations and directions in respect of complaint evidence;

    v. The trial judge erred in failing to withdraw the charges from the jury following an application to so do by the defence;

    vi. The trial judge erred in his rulings, determinations and directions in respect of the requisitions raised;

    vii. The cumulative effect of the errors made by the trial judge rendered the verdict unfair in all the circumstances.

12. It is clear that ground no "vii" represents a rolled up plea that is really only engaged if we are satisfied that there were in fact errors that were insufficient in themselves to lead to a quashing of the conviction. Further, ground no "vi" relating to how requisitions were addressed can in each instance be dealt with when considering the substantive complaints in respect of which relevant requisitions were raised. That leaves five areas in which substantive complaints require to be considered, variously relating to adverse pre-trial publicity, corroboration, admissibility of interviews, evidence of recent complaint, and the refusal to withdraw the matter from the jury (on *P. O'C.* grounds). We will deal with each of these seriatim, save in one respect. The written submissions on behalf of the appellant deal with the complaints relating to corroboration and evidence of recent complaint together. This makes sense in circumstances where they are somewhat inter-related in this particular case.

Complaints relating to Adverse Pre-Trial Publicity

13. The substance of what is complained of is that there was a failure to postpone the trial in response to an application by the defence in that regard on day 3 of the trial. It arose in the following circumstances.

14. As previously mentioned there had been a previous trial in November/December 2017 at the end of which the appellant was convicted unanimously by a jury of three counts of sexual assault. The sentencing hearing in respect of those sexual assaults had taken place on the 23rd of January 2017 and he was sentenced in respect of them on the 6th of February 2017. Because of the somewhat unusual circumstances of the case there had been a good deal of press interest in it and reportage of it. However, as the case was a rape case (even though there was ultimately a disagreement on the rape counts) the hearing had been held in camera, and there were reporting restrictions to protect the anonymity of the complainant. In practice, this has meant that the appellant could not be named, and he was not named in any of the reportage.

15. The retrial on the rape counts commenced on the 15th of March 2017, a date which was more than six weeks after the sentencing hearing and in excess of four weeks after sentences were handed down. No application was made in advance of the 15th of March for a postponement of the retrial on the rape counts on the grounds of adverse publicity, nor was any such application made on the opening day of the trial. Further, there was neither any complaint made nor concern raised about press coverage in relation to the previous case and how it might impact on the impending retrial. The accused was arraigned and pleaded not guilty. The jury was put in charge and the case was opened by counsel for the prosecution. Thereafter a number of witnesses were called, including a mapper, a scene of crime examiner who had taken relevant photographs, and the Garda Sergeant to whom the complainant had reported the matter on Christmas Day 2014. In addition, the jury had read to them a witness statement pursuant to s.21 of the Criminal Justice Act 1984 ("the Act of 1984") from a security guard at a Tesco premises who had downloaded certain CCTV footage at the request of the gardai. Finally, on day one which was a Wednesday, the jury were sent away until the following Monday to facilitate legal argument in their absence concerning a request by the defence for leave to cross-examine the complainant, who would be next to give evidence, concerning her previous sexual history. The legal argument concluded on the Thursday, and the court did not sit on the Friday which was St Patricks Day.

16. It is relevant to observe at this point that a different trial judge had conducted the previous trial as was assigned to preside over the retrial. An important contextual detail in relation to what occurred next is the fact that during the previous trial the trial judge had found as a fact that the appellant in the course of giving evidence before the jury had deliberately defied certain rulings of the trial judge in an attempt to have the jury discharged and to derail the trial.

17. The case resumed on Monday the 20th of March 2017. Before the jury was brought out defence counsel indicated that he required fifteen minutes as his client wished to discuss with him a concern "*about something that appeared in the paper*". He was facilitated in

that regard. Following a short consultation between defence counsel and his client the court was informed that there had been a report in the Sun newspaper (three weeks earlier), which counsel had only seen that morning for the first time, concerning the sentencing of the appellant in respect of the three sexual assault counts of which he had been found guilty at the previous trial. The court was told:

> *" …he's just concerned about getting a fair trial now because of the -- because of the publicity that appeared arising out of the sentence even though he's not named, the circumstances are such that the members of the jury if they had read that three weeks ago --"*

18. The trial judge, having received and reviewed the report, and having observed that nobody was named in it, that no locations had been mentioned and that it didn't say anything about rape counts, inquired: "*Yes, what's wrong with the report?*" to which counsel replied:

> *"Yes, judge. Well, as the court is aware, if there is going to be a retrial in some matter, then one would ordinarily talk about the fade factor, that there would be a certain period of time between say the first trial and the retrial to, in a sense, obviate the danger that there might be sort of contamination."*

19. The trial judge then inquired: "*So are you asking me to discharge this jury?*", to which defence counsel answered "*Yes*".

20. The appellant was then called to give evidence in the absence of the jury as to his concerns. He stated:

> *"It's just the details and everything and all that are in it, my age, the two rape charges in it, AM 's age, the fact that she was pregnant at the time and all. I've limited resources for social media, none in prison. But my daughter told me on the phone that it was all over social media and all with links to the news, newspaper clippings and all on it. It was on Facebook, she said. My brother lives in the States, your honour, and he was able to get it over in America on SundayWorld ie. the following day and he was able to read the report over there. Obviously he knew it was about me, because he knew about the case coming up and everything. But I'm just worried with the way I'm named as a monster and everything and all in it, and it was only three weeks ago that if the jury members had read it, that they're going to put two and two together really quick because of the details that they were given, that the newspaper article was actually about me, the monster. I had to go around I'm being called a monster in prison since that newspaper article came out, you know, even prisoners in The Midlands learnt it was me really quick, you know."*

21. However, having articulated his concerns in that way the appellant was then asked by his counsel: "*In those circumstances, what would you like his lordship to do?*", and he went on to outline that he wished more time to prepare his case in any event, stating:

"I'd prefer to have more time for the case in anyway, your honour, it's very hard to get legal instruction while I'm in prison, I've had very little time with my team since December, phone calls are nearly non existent. I got the book of evidence in only on the 3rd of March and I didn't receive it from the Prison Services until the evening of the 7th of March. I've only had my book of evidence in since then. You know, so I feel I should be allowed time to defend myself you know, and I made it clear in the last trial that I was only allowed time to go over one of my video of interviews, and I wish to go over the rest, and I still haven't got them. At the end of the last trial, we requested the transcripts of the court, actually I've only got four days of transcripts so far, for the first four days of the trial and I'm still waiting for the rest, you know. I think I should be allowed go over the evidence and all myself too in time."

22. The application was opposed by the prosecution who argued that there was nothing in the piece that had been produced that would make somebody connect the first trial with the retrial. In subsequent submissions there were the following exchanges:

DEFENCE COUNSEL: Just briefly by reply, Judge, in terms of the publicity, I would say that when one looks I mean, if somebody has read it three weeks ago, given the similarity with this trial opening in front of the jury, the danger of them making a connection is all the greater. And particularly because of the in a sense, the nature of the publicity, "Monster drugged pregnant girlfriend. Sex abuse, film", it's a sort of a lurid depiction of it, and for that reason there's a greater likelihood that a connection will be made, that's what I would say.

JUDGE: Yes. My difficulty too, like your side, is I haven't a book of evidence that's peculiar to this trial, there's overlap in it. Is there evidence in this trial that would overlap in terms of the photography or that?

PROSECUTING COUNSEL: No, no, absolutely not, no, definitely not. Everything to do with the three counts will be edited out obviously, no evidence whatsoever will be led that touches at all upon the three counts that he was convicted of.

JUDGE: Or photographing or that

PROSECUTING COUNSEL: Absolutely nothing, nothing.

23. The trial judge refused the application for a discharge of the jury and ruled:

"JUDGE: No, I've some trepidation, but I the DPP wishes to proceed, I'm inclined to agree that provided nothing is said in this trial that would be a direct link with the other trial. I don't believe that there's anything wrong with the report I read, social media, we don't know about, just that is hearsay. It is my only hesitation and it's a slight hesitation in the matter is that it is so close in time to the sentencing. But I think if the jury is properly charged, unfortunately other courts have taken a different view, but my view is that if you tell anybody not to look for

something or to ignore what's out there, it is an absolute invitation, because I know my own reactions to such information. So I won't be able to say that to the jury, I'll take any other suggestions from either or both sides in relation to anything I can do to help with the jury. But at the moment, I believe the trial can proceed, this is on the application in relation to the publicity, should proceed. In relation to the other matter that your client raised, if there's any problem in relation to the trial and the furnishing of papers or transcripts or whatever, that's a matter to be raised by (sic) the people who are handling the trial."

24. The ruling by the trial judge is now criticized on the basis that the proximity in time to the original trial and the sentencing hearing, coupled with the very particular circumstances of the case and the parties involved, raised a real risk that a member of the jury panel might have recalled the media reports at the time and drawn a connection between the two cases. It was submitted that even if every effort was made by the parties to avoid drawing a direct link between the two trials, certain evidential issues were always going to overlap, not least the fact that the forty year old complainant was eight months pregnant with her fifty three year old boyfriend's second child at the time of the alleged offences. It has been further submitted on behalf of the appellant that the matters in respect of which he expressed concern in the course of his evidence were specifically detailed in reports circulated by various media outlets enjoying wide, extensive and diverging readerships.

25. It bears commenting upon in regard to the latter submission that only one media report was placed before the trial judge, namely a report from the Sun newspaper. In the circumstances references in the appellant's written submissions to "reports (plural) circulated by various media outlets enjoying wide, extensive and diverging readerships", are not in accordance with the evidence and both inappropriate and irrelevant. There has been no application to adduce new or additional evidence. While the appellant himself gave hearsay evidence concerning members of his family encountering other reports or commentary concerning the previous trial and/or the sentencing that followed it on social media or on the internet none of those persons were called as witnesses, and no copies or recordings of the alleged other reports were put before the court. In so far this court is concerned with reviewing the trial judge's ruling, we can only have regard to the evidence that was before the trial judge.

26. We were referred to various authorities by counsel for the appellant concerning an accused person's entitlement to a fair trial and the duty of the trial court to take necessary steps to counter the risk of prejudice through adverse publicity. We have had regard to the authorities cited, although in truth there was no controversy as to the law in this area which is well established. The authorities to which we were referred included *P. O'C. v. The Director of Public Prosecutions* [2008] 4 I.R. 76; *The People (Director of Public Prosecutions) v. Haugh (No. 2)* [2001] 1 I.R. 162; *Zoe Developments Ltd v. The Director of Public Prosecutions* [1999] IEHC 118; *D v. The Director of Public Prosecutions* [1994] 2 I.R. 465; *Z v. The Director of Public Prosecutions* [1994] 2 I.R. 476; *The People (Director of Public Prosecutions) v. Nevin* [2003] 3 I.R. 321, *Redmond v. The Director of Public Prosecutions* [2002] 4 I.R. 133; *Rattigan v. The Director of Public Prosecutions* [2008] 4

I.R. 639; *The People (Director of Public Prosecutions) v. Wharrie* [2013] IECCA 20; *O'Brien v. The Director of Public Prosecutions* [2014] IESC 39; *M.S. v. The Director of Public Prosecutions* [2015] IECA 309, *Lowry v. The Director of Public Prosecutions* [2016] IEHC 92; and *The People (Director of Public Prosecutions) v E.C.* [2016] IECA 150.

27. We are satisfied that the trial judge dealt appropriately with the issue of adverse pretrial publicity. He satisfied himself that there was no evidence that the appellant had been named in the material complained of, nor were any locations identified, nor was there any reference in the material in question to complaints of rape having been made against the person who was reported as having been convicted of sexual assault. Further, he satisfied himself that there would be no significant overlapping evidence which might cause a juror to make a connection between anything that they might have read about the previous case and the case then before them. In particular, he satisfied himself that the prosecution did not intend to lead in evidence the salacious details that had been enthusiastically reported by the Sun newspaper that the person who had been convicted of the sexual assaults in question had drugged his girlfriend before doing so and had filmed or video'd his abuse of her. While it was true that the jury would learn that the forty year old complainant was eight months pregnant with her fifty three year old boyfriend's second child at the time of the alleged offences we are satisfied that those details, in and of themselves, were not likely to lead any juror to connect the two cases. We are satisfied that the trial judge dealt with the matter appropriately and that it was not necessary for him in the circumstances of the case, and on the evidence before him, to discharge the jury. The evidence in respect of the risk of prejudice and to a fair trial was not sufficient to require that the trial be aborted so as to allow for a fade factor. Insofar as a concern has been raised that the trial judge may have approached the application with perhaps a certain skepticism in light of the fact that the appellant had tried to derail the previous trial, we would not fault him if he had done so, although there is no evidence that he did so. No concern had been expressed about adverse publicity in the run-up to the retrial. No concern was expressed about it at the opening of the retrial. The issue was not raised until Day 3 of the retrial. Although the appellant did express certain concerns in the course of his evidence, when he was asked what he wanted the trial judge to do about it he made no further reference to those concerns, or how they might be addressed, but instead changed tack and indicated that he didn't want the case to proceed because he felt he needed further time to prepare. The trial judge was entitled to have regard to all of these matters in coming to his decision.

28. In the circumstances we find no error on the part of the trial judge in relation to how he dealt with the issue of adverse publicity, and accordingly we are not disposed to uphold the appellant's complaints in that regard. Ground of appeal no "i" is therefore rejected and dismissed.

Complaints relating to Corroboration and Evidence of Recent Complaint

29. The trial judge, at an early point in his charge to the jury on Day 14 of the retrial referred to the issue of corroboration. This was in circumstances where he had decided to give a corroboration warning having discussed that possibility with counsel on Day 13. He said:

> *"Now, you heard corroboration mentioned and the fact of this case is that nobody saw these two, these two events or sorry, one event and one alleged event. But nobody saw the I call them these two incidents, except the two people concerned. And in those circumstances, you haven't got independent evidence of somebody seeing it. Corroboration is evidence which is independent of the evidence to be corroborated, in other words, the evidence in in other words, the evidence in this case of the complainant that tends to implicate the accused in the commission of the offence. As I say there's no direct such evidence, there are matters that can be taken as supportive of the complainant's evidence such as her state of distress and that and I'll come to that. But as I say, no direct evidence. And in those circumstances, you must it is very dangerous to convict, you must be particularly careful. But having said that, as a matter of law this case has gone to you after a trial, and it is a matter entirely for you, you are entitled to convict or acquit as you find, having taken that warning on board."*

30. Later in his charge, on the following day (i.e., Day 15) he returned to the issue of corroboration, stating:

> *"And I then went on to say that unless you find corroboration in the case, nobody witnessed this case, I said that corroboration is evidence which is independent of the evidence to be corroborated. And in this case, you've no other person, you could consider, it's a matter for you, the demeanour of the complainant and indeed, the fact of the the consistency of the complainant. You could consider that supportive or corroborative of the prosecution case. But that's as I say, a matter for you. But if you find that it doesn't corroborate the prosecution case, you must be extremely careful to convict. Miscarriages of justice do occur and have occurred and it is very important that we try to avoid them."*

31. The appellant complains that the latter passage contained a material misdirection which is characterised in terms that the trial judge had instructed them incorrectly that evidence of complaint was evidence capable of amounting to corroboration. It is clear to us that the trial judge said no such thing. He did not refer to evidence of complaint at all. Rather he referred to two things as being possibly "*supportive or corroborative of the prosecution case*", namely (1) "*the demeanour of the complainant*" (by which the trial judge manifestly meant her state of distress when first encountered after the alleged rapes, i.e, when she presented at the Garda station on Christmas Day, because he had earlier, in the course of charging the jury on the previous day, specifically alluded to her distress as being potentially relevant in the context of possibly providing support for the prosecution case) and (2) "*the consistency of the complainant*".

32. To deal first of all with the complainant's "demeanour" as it was put, i.e., evidence of her distress (although nothing turns on it in this appeal), there is clear authority that evidence that where a complainant is found to be in a state of distress in temporal proximity to an alleged sexual offence, that circumstance is at least capable of amounting to corroboration although whether or not it in fact provides corroboration will of course be

a matter for the jury - see *The People (Director of Public Prosecutions) v. Slavotic* (unreported, Court of Criminal Appeal, 8th November, 2002; also*, The People (Director of Public Prosecutions) v. Ryan* [2010] IECCA 29. Accordingly, and understandably, that portion of the charge has not been criticised or impugned.

33. It is necessary to turn at this point to the aspect of the instruction which is criticised and impugned, i.e., the suggestion that "*the consistency of the complainant*" could possibly be "*supportive or corroborative of the prosecution case*". The complainant's consistency as a witness is not the same thing as evidence of complaint, although the appellant's written submissions appear to conflate the two things. The correct position is that evidence of recent complaint may be admitted in the trial of sexual offences for the purpose of demonstrating the consistency (or otherwise) of a complainant, but for that purpose only. Evidence of recent complaint can never amount to corroboration, but in fairness the trial judge never said that it could. If the evidence of a complainant to the jury at trial concerning what happened to him/her is demonstrably consistent with what the same complainant reported to some person in the early aftermath of the alleged event, then a jury may find that to be of assistance in their assessment of the credibility and reliability of the complainant's evidence to them in the course of the trial.

34. On the assumption that the jury in this case might have been satisfied as to the consistency of the complainant, the correct question for this court is therefore whether "*the consistency of the complainant*" could possibly be "*supportive or corroborative of the prosecution case*", as was suggested by the trial judge. (In strict theory, it is the evidence of the complainant that requires to be supported or corroborated, not the prosecution case. However, we are satisfied that to phrase it as the trial judge did merely represents imprecision of language and to have put it in that way was not per se a misdirection). As to the substance of the instruction, it is correct to say that the prosecution's case will be supported (in the sense of being stronger and more likely to result in a conviction) where a jury concludes that the complainant is to be regarded as credible and reliable because of the existence of some evidence (e.g., evidence of early complaint) which demonstrates, or from which it may be inferred, that she has been consistent in her account. However, evidence pointing to consistency does not represent evidence additional to that of the complainant tending to implicate the accused in the alleged crime and so it does not support the prosecution case in that sense. Moreover, while evidence of her consistency might be supportive of the prosecution's case in the general sense that we have suggested, we do not believe that it is sufficiently independent of the complainant for it to represent possible corroboration in the legal sense and again, with respect to corroboration, while it may enhance the jury's view of the complainant's testimony in terms of their assessment as to whether it is credible or reliable, it does not represent additional evidence that tends to implicate the accused in the crime. Accordingly, we are satisfied that the charge did contain a misdirection in terms of what evidence was capable of supporting or corroborating the prosecution case.

35. The question for this court, therefore, is whether it reasonably possible that the jury would have been materially misled by this misdirection so as to have convicted in circumstances where they would not otherwise have done so?

36. Before addressing this issue we think it important to consider the issue of whether there were requisitions, and if so how they were responded to.

37. At the conclusion of the judge's charge, counsel for the appellant raised no requisitions, and it was specifically indicated by leading counsel for the defence that he was "*happy with the charge*". Accordingly, the defence, who complain about the misdirection now, did not do so at the time.

38. The trial judge was, however, requisitioned by counsel for the prosecution on this aspect of his charge in the following terms:

> *"PROSECUTING COUNSEL: Well, the only thing I was going to say, Judge, is that I felt that the medical evidence should have been pointed out to them as something that could be supportive of the complainant's testimony should they feel that it does. The evidence in particular that there was significant tenderness at the anal margins on examination 50 hours after the alleged rape. And in circumstances, Judge, I'd submit where a number of matters were pointed out to them as matters that might give them a doubt, I think in fairness to the prosecution what, could possibly be supportive should have been pointed out also. And that was now, your lordship did point out demeanour, but didn't specifically point out the medical evidence and I'm submitting that the medical evidence is capable of being supportive should the jury find that it is and it's a matter for them again. But apart from that, the only other thing I'd mention is I know you did say consistency and that her what she said was evidence of consistency, and I'm just questioning whether it was made clear enough to the jury. Now, if you feel that you did yourself, I know you said it yesterday that what she said was evidence of consistency and wasn't capable of being corroborative. But it was said in a very fluid way today that maybe*
>
> *JUDGE: Well, as I say all I was doing today was repeating what I said yesterday.*
>
> *PROSECUTING COUNSEL: Repeating, yes, very good. Well, the only issue I really have*
>
> *JUDGE: All right.*
>
> *PROSECUTING COUNSEL: is in relation to the medical evidence and I feel and I submit that that should have been pointed out to them as something that was capable of supporting her evidence, should they feel that it does.*
>
> *JUDGE: Right, yes, I did cover that you're right, I did cover that aspect of the evidence, but I didn't make the comment.*

PROSECUTING COUNSEL: You didn't make it and I think in circumstances where a number of things were point out that could be

JUDGE: I take your point, I take your point.

PROSECUTING COUNSEL: Yes, thank you.

DEFENCE COUNSEL: So far as the defence are concerned, we're happy with the charge that your lordship has given, apropos what my friend is suggesting, in my respectful submission, I think the Court has kept an even balance between both sides and I would just be concerned if the Court brings the jury back out and specifically focuses on what my friend is talking about, that would be

JUDGE: Okay, no, I wholly understand, I wholly understand that concern. But I will bring them back, but I will try to cover that concern very carefully in it.

DEFENCE COUNSEL: Very good.

Jury returned (11.35 am)

JUDGE: Sorry ladies and gentlemen, this will be very very brief. Only one matter was raised and I agree that I should bring you back on it. I did and judges don't always do it, but I did give examples of what could be doubt in the context of this case. I didn't give many examples, I gave some on the other side, of the prosecution of consistency in the evidence of the prosecution case or what could be held what you could consider to be supportive of it. I mention the evidence, but didn't mention the fact that it could be supportive of the prosecution case and that was the medical evidence, particularly the evidence to the effect that there was marked tenderness at the I forget the medical term, the entrance to the anus and that was emphasised and it was suggestive of recent anal intercourse. Now, I hesitated to bring you back to tell you that because it might put it up in highlights, it's not up in highlights, it's of an equal status, if you like, of the matters I mentioned for the defence, I should have mentioned that too and I'll say no more than that. Thank you very much indeed."

39. Two observations arise from the exchanges with counsel and the re-charge just quoted. The first is that prosecuting counsel seems to have been under the mistaken impression that the trial judge had told the jury in the course of his charge that "*evidence of consistency wasn't capable of being corroborative*", whereas in fact he had said the opposite. The second thing is that prosecuting counsel's only substantive concern was that the trial judge had not identified the medical evidence in the case as being capable of providing support or corroboration for the evidence of the complainant. Prosecuting counsel did not ostensibly see anything wrong with the charge otherwise.

40. The appellant is represented by a new legal team at the hearing of this appeal. They acknowledge that the failure to raise a requisition at the time represents a problem for them in terms of complaining about the misdirection at this point, having regard to the

jurisprudence in *The People (Director of Public Prosecutions) v. Cronin (No 2)* [2006] 4 I.R. 329. Despite this they maintain, correctly, that the *Cronin (No 2)* jurisprudence is not absolute in its terms and that an appellate court retains a discretion to entertain a point not taken at trial where the essential justice of the case requires it. In support of that contention, we have been referred to relevant passages (with which we were well familiar in any event) from *The People (Director of Public Prosecutions) v. Hussain* [2014] IECCA 26; *The People (Director of Public Prosecutions) v Zhao Zhen Dong* [2015] IECA 189 and *The People (Director of Public Prosecutions) v Forsey* [2018] IESC 155.

41. It is of importance that *Cronin (No 2)* suggests that as a general pre-condition to seeking the exercise of the discretion just referred to, an appellant should put an explanation before the appellate court as to why the point at issue was not taken at the trial. In practice, the way in which this is normally done is by the filing of an affidavit or affidavits sworn by members of the previous legal team addressed to the issue. In the present case there is no affidavit evidence. We have simply been informed by present counsel that he has spoken to leading counsel who acted for the defence at the trial, and that he has been able to offer no explanation other than inadvertence. Previous counsel claimed to have followed the judge's charge carefully and to have perceived no defect in it. This Court has been asked to accept that as being a sufficient explanation in circumstances where prosecuting counsel also perceived no defect and, indeed, was left with the mistaken impression that the trial judge had said the opposite to what he had in fact said. It is suggested that because of the particular phraseology and language used by the trial judge in the critical passage of his charge that those listening to the charge, including the defence legal team, may have been given a similar misleading impression. In response to that, we might observe that it is not immediately obvious to us how the trial judge's phraseology and language as recorded in the transcript could have given rise to such a misleading impression, and one that caused none of the six lawyers for the prosecution and defence to pick up on his *ipsissima verba*. However, that is seemingly what happened.

42. It is appropriate at this point to return to the question we posed earlier but which we have not yet answered. That question is: whether it is reasonably possible that the jury would have been materially misled by the misdirection that evidence of consistency was capable of supporting or corroborating the prosecution case (or more correctly, as we have pointed out, the complainant's evidence) so as to have convicted in circumstances where they would not otherwise have done so? The context in which the impugned instruction was given was that the trial judge had given the jury a corroboration warning (the terms of which it has to be said were not a model of clarity, but no specific complaint is made about that) to the effect that it was dangerous to convict in the absence of corroboration, and that while they could still do so they had to be extremely careful. The implicit corollary of such a warning is that in a case in which the jury finds that there is corroboration they may more readily convict, subject of course to still being satisfied of the accused's guilt to the standard of beyond reasonable doubt. It seems to us that it cannot be gainsaid that if the jury in this case had been satisfied, as they might well have been, in consequence of having received evidence of recent complaint, that the

complainant was consistent in her accounts, they may regrettably have been left with the impression that such demonstrated consistency was per se sufficient to corroborate her account, thus relieving them of the obligation to have regard to the admonishment that it could be dangerous to convict in the absence of corroboration, and allowing them to more readily bring in a conviction. The question posed must therefore be answered in the affirmative.

43. That being the case, we cannot foreclose on the possibility of a fundamental injustice notwithstanding the failure to raise the misdirection in requisitions at the trial. We do not regard the explanation provided as entirely satisfactory but will accept it reluctantly as being, in the unique circumstances of this case, sufficient to enable us to exercise our discretion to allow the appellant to rely on the point not taken in the court below in this appeal.

44. In conclusion, on this issue, we are prepared to uphold the complaint made concerning a material misdirection concerning what evidence was capable of supporting or corroborating the complainant's evidence. We would allow the appeal on this ground.

Complaints in relation to the interviews

45. The evidence in the case was that the appellant was arrested on the 26th of December 2014 on suspicion of having committed rape contrary to s.4 of the Act of 1990 (s. 4 anal rape) on the 23rd/24th of December 2014, following which he was taken to a Garda station and presented to the member in charge who was satisfied to detain him pursuant to s. 4 of the Act of 1984 for the proper investigation of the offence for which he had been arrested.

46. While the appellant was in detention he was interviewed four times. Interview number one related exclusively to the alleged s 4 anal rape. However, in the course of interview number two he was asked questions both about the alleged s. 4 anal rape on the night of the 23rd/24th of December, and the alleged s. 2 vaginal rape which was said to have occurred twenty four hours earlier on the night of the 22nd/23rd of December. The questioning in so far as it related to the alleged s.2 vaginal rape took the form, for the most part, of reading an extract of the complainant's statement of complaint to the appellant and inviting commentary from him. Such comments as were made were exculpatory.

47. At the material time., i.e., in December 2014, the provisions of s. 4 of the Act of 1984 included subsections (5) and (5A) enacted in the following terms:

> "(5) If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his detention is necessary for the proper investigation of the offence to which the detention relates, he shall, subject to subsection (5A), be released from custody forthwith unless he is charged or caused to be charged with an offence and is brought before a court as soon as may be in connection with such charge or his detention is authorised apart from this Act.

(5A) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence to which this section applies, other than an offence to which the detention relates or an offence in respect of which the person's detention has been suspended under subsection (3A), and the member of the Garda Síochána then in charge of the Garda Síochána station has reasonable grounds for believing that the continued detention of that person is necessary for the proper investigation of that other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained."

48. Subsection (5) in that form had been substituted in place of that originally enacted by s.2 of the Criminal Justice (Miscellaneous Provisions) Act 1997, save that the reference therein to subs. (5A) was originally a reference to subs. (6). Subsection (5A) was originally subs. (6) but was renumbered by s.34 of the Criminal Justice Act 1999. There was a further minor amendment to subs. (5A) effected by s.7(b) of the Criminal Justice Act 2011 and it is incorporated in subs. (5A) as reproduced above.

49. It was argued before the court below on behalf of the appellant that if the Gardaí had wished to question him in relation to the alleged s.2 vaginal rape, which was an alleged offence other than the alleged offence for which he had been detained, it was incumbent on them to satisfy the member in charge that there were reasonable grounds for believing that the continued detention of the appellant was necessary for the proper investigation of that other offence. It was contended that they had not done so and that the failure to do so had rendered the continued detention of the appellant unlawful. Accordingly, it was contended, the court should rule the contents of all interviews conducted while the appellant was in unlawful detention, i.e. interviews numbers two, three and four, inadmissible in evidence.

50. Counsel for the appellant relied upon the decision of the Supreme Court in The People (Director of Public Prosecutions) v M.C. [2014] 3 I.R. 279, as supporting his argument. In particular he contended that the decision in M.C. had overturned that court's previous decision in *The People (Director of Public Prosecutions) v Howley* [1989] ILRM 629. It had been held in *Howley* that it was quite permissible for members of the Garda Siochána to put questions to a person in custody under s. 30 of the Offences against the State Act 1939 in respect of offences other than that for which he was arrested. In that regard, Walsh J had stated, at pp. 634 and 635:

> "It is already well-established by the decision of this Court in *The People v. Kelly (No 2)* [1983] ILRM 271, that it is quite permissible for members of the Garda Siochána to put questions to a person in custody under section 30 of the Act of 1939 in respect of offences other than that for which he was arrested … There is nothing in the decisions of any Irish courts to suggest that the lawfulness of the detention, or as in this case the extension of the detention, is dependent upon the offence or the suspected offence which is the occasion of the detention being the

dominant concern of the members of the Garda Siochána when, as the occasion arises, they may wish to questions such detained person in respect of an offence or offences other than that in respect of which the detention order was made."

However, *Howley* had been decided at a time prior to the enactment of subsection (3A) of s. 30.

51. In response, counsel for the DPP argued that the decision in *M.C.* was distinguishable on the basis that that decision was not concerned with interpreting s.4(5A) of Act of 1984 but rather was concerned with a different statutory provision in a different statutory code, namely, s 30(3A) of the Offences against the State Act 1939 as inserted by s.21 of the Criminal Justice (Amendment) Act 2009. Moreover, the majority of the Supreme Court in *M.C.* had held that the Oireachtas had legislated separately for the detention of persons suspected of having committed different types of offences and that while there were many similarities there were also differences. These different statutes should not be treated as being *in parti materia*. It was not intended that the provisions of one Act should be read into another. Further, the Supreme Court had not said that Howley was wrongly decided, simply that the statutory position had altered in the case of persons detained under s.30 of the Offences against the State Act since *Howley* was decided. In the prosecution's submission s.4(5A) of the Act of 1984 properly interpreted only requires the involvement of the member in charge to authorise continued detention in circumstances where the grounds for suspecting the person concerned of having committed the offence for which he had originally been detained had dissipated, or alternatively even if that suspicion still persisted his detention was no longer considered necessary for the proper investigation of the offence for which he had been originally detained. It was contended that neither circumstance had obtained in this case.

52. The trial judge ruled in favour of the prosecution's argument, stating:

> *"All right. I am satisfied, fully satisfied that in the circumstances where the suspicion persisted, that the guards were entitled to question, albeit for such a short period, to question the accused in respect of the night of the -- the earlier night, the 22nd/23rd."*

53. This court has carefully considered the terms of s. 4(5A) of the Act of 1984. In our judgment subs. (5A) must be read together, and in the light of, subs. (5). Subsection 5 provides expressly that there must be a release or charging, "*if at any time during the detention of a person … there are no longer reasonable grounds for believing that his detention is necessary for the proper investigation of the offence to which the detention relates*". What this means in substance is that there must be a release either on dissipation of the suspicion that had given rise to reasonable grounds for the persons detention for the proper investigation of the offence for which he was arrested, or if the investigation has reached a point where his further detention is unnecessary (in order to further progress the investigation if it is continuing, or because the investigation is at an end). However, this is all expressed as being "subject to subsection (5A)"., which allows for continuing detention where a member of the Garda Síochána, with reasonable cause,

suspects that the person concerned has committed another offence and the member in charge has reasonable grounds for believing that the continued detention of that person is necessary for the proper investigation of that other offence. In other words, subs. (5A) is intended to cover a contingency where there is otherwise an imperative to release or charge. If, however, there is no imperative to release or charge, because the original suspicion still subsists and continues and the necessity to continue to detain him for the proper investigation of the offence for which he was originally arrested also still subsists, subs. (5A) has no application.

54. We think that it is of importance in considering the *Howley* and *M.C.* jurisprudence that there is no analog of s.4(5) of the Act of 1984 in s.30 of the Act of 1939. Section 30 of the Act of 1939 does not expressly require release on the dissipation of the suspicion which provided the basis for the original detention, and so subs (3A) which has been inserted into section 30 does not require to be read in conjunction with such a provision. This is an important difference, of the sort alluded to by Fennelly J in *M.C.*, militating against treating s.4(5A) of the Act of 1984 as being *in pari materia* with s. 30(3A) of the Act of 1939.

55. In the circumstances we are satisfied that the trial judge was correct in his interpretation of the effect of s. 4 (5) and (5A) of the Act of 1984. In our judgment of the memoranda of interview were all correctly admitted in evidence, and we dismiss this ground of appeal.

The refusal to withdraw the case from the jury (on P. O'C. grounds)

56. The gravamen of this complaint is that a failure to seize bedsheets from the scene coupled with a failure to seize the complainant's phone until the 14th of June 2016 (some eighteen months after the incident) irretrievably prejudiced the appellant's right to a fair trial. It was submitted that had the bed linen been seized and tested the analysis may have returned a negative result for the presence of semen thereby supporting the appellant's contention that no sexual intercourse and ejaculation had taken place on the night of the 23rd/24th of December as alleged. Furthermore, it was contended that the failure to seize the complainant's phone, which was available to gardai at the time, led to a situation where the full record of text messages between the parties for the relevant period was no longer available for the jury's consideration due to the deletion or automatic overwriting of texts.

57. It is incumbent on an appellant who contends that he is irredeemably prejudiced to the extent that he can no longer receive a fair trial to demonstrate, through a rigorous and thorough engagement with the evidence, how that prejudice arises.

58. We must consider in the first instance the alleged failure to seize and examine the bed sheets forensically. The appellant's submissions expressly assert that "*the evidence at trial was that bed sheets had never been seized, did not feature as an exhibit and therefore no testing took place.*" That appears to be an over-statement of the position. The appellant's *P O'C* application was made at the end of the prosecution case. While no witness for the prosecution had referred to bed sheets as having been seized in the course of the scene of crime examination, that is not the same thing as there having been

positive evidence that sheets were not seized. There was evidence that bed sheets could be seen on the bed when the garda photographer photographed the scene of the alleged crimes, and there were later photographs showing the bed with the bed-clothes off and a stain on the mattress protector. There was no witness evidence, however, as to what happened to those bedclothes, or any other bedclothes that may have been seized at the scene from a laundry basket or elsewhere. Be that as it may, as every criminal lawyer knows, it frequently arises that the Gardai take possession of items during a scene of crime examination that are not subsequently relied on as evidence in support of any subsequent prosecution. However, an exhibits chart is invariably prepared listing everything seized, whether used or not, and this is routinely furnished to the defence as part of pretrial disclosure. In this case it was asserted by the prosecution in the course of submissions to the trial judge, and it was not controverted or disputed in any way by the defence; and in the circumstances it was accepted by the trial judge; that the exhibits chart that was disclosed to the defence did list bed clothes amongst the items that were seized. It was accepted that these bed clothes had not been handed over for forensic testing, and an explanation has been proffered for this, which we will consider presently. However, and importantly in our view, following the seizure of bed clothes they had been available, as in the case of everything on the exhibits chart, for inspection by the defence if they had wished to do so, and for examination and testing by defence experts if that had also been desired. No request was received at any time from the defence to either examine or test the bedclothes that were seized.

59. In submissions to the court below the explanation advanced for the failure to submit the bed linen for forensic testing was that it was considered pointless to do so. The usual purpose of examining bed-clothes would be to detect any traces of bodily fluids that might have been present on them. There were two possibilities in that regard in this case, namely semen and urine (the latter in circumstances where it was uncontroversial that the complainant had voided her bladder in the bed on the 23rd / 24th of December, although the complainant contended this occurred while she was being forcibly anally raped while the appellant maintained that she had simply wet the bed on account of a bladder weakness associated with her advanced stage of pregnancy.) There was, however, no evidence that where sexual intercourse occurs in a bed semen would invariably be deposited either on clothing worn at the time or on the bed-clothes on the bed. The court below heard evidence from a forensic scientist, Dr Kenna, that examining clothing for traces of semen would be pointless in the circumstances of the case, where it was uncontroversial that there had been vaginal sexual intercourse between the parties in the bed both forty-eight hours and twenty-four hours earlier. It was common case that the parties had had consensual sexual intercourse in the bed on the night of the 21st /22nd of December, Further, it will be recalled that while it was also uncontroversial that sexual intercourse had occurred on the night of the 22nd /23rd of December, the complainant was maintaining that on that occasion it had occurred without her consent when she was asleep, while the appellant was maintaining that there had been consensual sexual intercourse. The forensic evidence was that semen will survive on clothing until it is washed. Assuming the bedclothes had not been changed between the 22nd and the 24th of December, it follows that a finding of the presence of semen, or

indeed a failure to find semen, would not contribute one way or the other to resolving the controversy concerning the circumstances in which there had been sexual intercourse on the 22nd /23rd, nor indeed would it reveal when any such trace evidence had been deposited. While this observation had been offered with respect to clothing it was suggested by the prosecution that same reasoning and logic would have applied to the bed clothes. Moreover, it seems to us to also follow that in circumstances where it was common case that the complainant had urinated in the bed on the night of 23rd /24th a finding, or absence, of urine on the bedclothes would not have contributed to resolving the conflict concerning whether the acknowledged urination had occurred in the course of an anal rape or simply due to the complainant's stage of pregnancy. Moreover, a finding, or absence, of semen in circumstances of admitted sexual intercourse earlier in the same bed, could not contribute to resolving the conflict as to whether there had been an anal rape in the bed on the 23rd / 24th of December.

60. The appellant maintains in any case that any sheets that may have been seized, if indeed they were seized, were not the same sheets as had been on the bed because he had changed the sheets after the complainant had wet the bed. He suggested that he had done so during interview number 3 with An Garda Siochána. However, even if this were so, and we note that the complainant conceded under cross-examination the possibility that the appellant might have changed the sheets, we do not see that this alters the position. He has not demonstrated that even if there had been a seizure of the bed clothes that he claims to have removed there was a likelihood that anything of forensic value could have been found on them, or that the absence of anything on them would have been forensically significant.

61. The trial judge was satisfied that there was no unfairness in placing the appellant on trial in circumstances where the bed-clothes, and specifically the bed sheets, had not been forensically examined. We consider that there has been a failure on behalf of the appellant to engage with the actual evidence in the case and to demonstrate how, if that which is complained of as not having occurred with respect to the bed-clothes had in fact occurred, it could have assisted him. We find no error in either the approach or ruling of the trial judge on this aspect of the case.

62. Turning at this point to the second facet of the complaint, namely that there was a failure to seize and examine the complainant's phone until the 14th of June 2016, we reiterate the point made earlier that it is incumbent on an appellant who contends that he is irredeemably prejudiced to the extent that he can no longer receive a fair trial to demonstrate, through a rigorous and thorough engagement with the evidence, how that prejudice arises.

63. The significance of the telephone evidence was this. The complainant went to a Garda station at around 1:30 AM on the 26th of December 2014 and made her complaints. She was then taken to a hospital and to the sexual assault treatment unit (SATU) there where she made further statements of complaint. In the course of those she outlined texts that she had sent to the appellant after the rapes but before making her complaints, including

one in which she is stated "*I can't be with you anymore, I can't be with you after what you done to me …*". Also, prior to making her complaints, the complainant had gone back to the appellant's flat in the course of Christmas Day to get the Christmas presents for her daughter and a number of personal items. During that visit, she informed him that they wouldn't be seeing each other again because he had raped her. After she had left the flat she received a text from the appellant which said "*Some things just can't be undone! I am sorry*". The prosecution characterised this, and relied upon it in the course of the trial, as being an admission.

64. In so far as this alleged admission was concerned, the complainant herself gave evidence concerning it at the trial. Moreover, she had provided her phone to the gardaí upon being requested to do so on the 14th of June 2016 and upon a technical examination this text message was found to be amongst incoming or received messages in the memory of her phone, and to have been received on Christmas Day 2014 from a telephone number matching the appellant's mobile phone. A printout or paper record was generated by the technical experts who examined the complainant's phone showing the relevant information concerning this text, and this was put before the jury as an exhibit.

65. The appellant was arrested on the 26th of December 2014 and at the time of his arrest his mobile phone was seized. This was technically examined in the same way as the complainant's phone was later examined. However, the appellant's mobile phone did not contain a record of the relevant text in its memory.

66. The trial court heard evidence from two technical experts, Mr. Brian McGarry and Mr. Donald Sullivan, who were involved in examining the phones in question. A technical explanation was provided as to how it could be that the text traffic records on the two phones did not match. The evidence was to the effect that the complainant's phone was a modern smart phone with a substantial memory, whereas the appellant's phone was an older model phone with very limited memory. Normally when a text message is received and deleted it does not disappear from the phone. It is merely transferred into an area on the phone's processor where "unallocated data" is stored. While the deleted text is no longer available to the user and cannot be recovered by him or her by any ordinary commands given to the phone, a deleted text which remains in the "unallocated data" file on the phone's processor can usually still be recovered by specialists in the course of a forensic technical examination. However, when a phone is low on memory a user will be prompted to free up space in normal memory by deleting files, such as recently received texts. In that situation, previously deleted texts residing in the unallocated data file may be overwritten by more recently deleted texts. Accordingly, the fact that the memory printouts of the two phones do not match does not necessarily imply anything sinister.

67. The appellant has not indicated how the late seizure of the complainant's phone could have prejudiced his right to a fair trial. His submissions are entirely silent as to this issue beyond asserting that the complainant's phone could have been seized earlier. There are no submissions as to how the late seizure of her phone impacted on his right to a fair trial either procedurally or factually.

68. It is also of relevance to note that the appellant himself gave evidence before the jury after his *P. O'C.* application had been refused by the trial judge, and that in the course of his evidence he did not seek to engage at all in his evidence in chief with the evidence that had been given by the complainant that he had sent her a text which said: "*Some things just can't be undone! I am sorry*". He was only very briefly cross-examined by counsel for the prosecution, and he was not cross-examined about that alleged text.

69. The trial judge ruled (with respect to both facets of the complaint):

> "…I'm satisfied that, having now heard the evidence in the case, that the accused has to date had a fair trial. The telephone was mentioned, but not much was said about it, it was seized sorry, the complainant's phone was seized late. But no indication has been made as to how this could have prejudiced the applicant. The bed clothes were another matter. But again, the evidence of the expert in the case and that can be contradicted should the defence go into evidence. But the evidence of the expert in the case is that if she had them, we now know they were seized. But if she had them, she would not have examined them. So I'm quite satisfied that the trial is fair."

70. We are satisfied that the appellant has failed to demonstrate that he suffered any prejudice arising from the late seizure and examination of the complainant's phone, or that it could have had any impact on the fairness of his trial.

71. In the circumstances, we are not disposed to uphold the complaints based on the failure to withdraw the case from the jury on *P. O'C.* grounds.

Conclusion:

72. In the situation where we have seen fit to uphold the complaints made by the appellant concerning a misdirection with respect to what was capable of amounting to corroboration, in circumstances where the trial judge had decided in the exercise of his discretion to give a corroboration warning, we will allow the appeal on that sole ground. All other grounds of appeal are rejected.

73. We invite submissions in writing (to be filed electronically through the Court of Appeal Office) as to the appropriate orders that should follow from our decision to allow the appeal, including concerning whether we should direct a retrial.

74. The Director of Public Prosecutions is hereby directed to file her submissions within nine days i.e., by close of business on the 17th of April 2020, and the appellant is directed to file his replying submissions within a further seven days, i.e., by close of business on the 24th of April 2020. The DPP has been afforded the additional two days to take account of the intervening Easter Bank holiday weekend. The Court will indicate its intended orders by electronic communication at 10.30am on Tuesday the 28th of April 2020, and advance confirmation of this scheduling, or any intended change to it, will be published in the Legal Diary.