



THE COURT OF APPEAL

Appeal No.: CA0147/2019

Neutral Citation Number: [2021] IECA 243

Birmingham P.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN

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

PLAINTIFF/RESPONDENT

AND

RICHARD O'MARA

DEFENDANT/APPELLANT

**JUDGMENT of the Court delivered by Ms. Justice Ní Raifeartaigh on the 27th day of
September, 2021**

Nature of the Case

1. This is an appeal against the conviction of the appellant of two counts of rape following a nine-day trial in the Central Criminal Court. The appellant was 27 at the time of the events in question, and the complainant 17. There is also a motion to adduce fresh evidence on

appeal, supported by an affidavit sworn by the appellant's solicitor which exhibits a report by a forensic scientist. Further details of this will be set out below.

The evidence of the complainant

2. The context for the alleged offences was an 18th birthday party held at the family home of the appellant, for his younger sister. The complainant was 17 years old. She did not know the appellant or any member of his family but was asked to go along to the party on the evening in question by a friend of hers. This latter person is a cousin of the appellant. The party was held in a marquee located at the rear of the house. The complainant's evidence was that she was raped on two occasions on the night in question. She said that the first rape took place in an adjacent field and the second on a couch in a sitting room of the appellant's family's home, some time later.

3. The complainant gave evidence of her movements on the evening which led to her attending the party, and about the alcoholic drinks that she consumed during that time. She said that she met the appellant at the house where the party was being held and began talking to him around midnight while having a cigarette at the side of the house. At a later stage, they met again, and the appellant suggested that they go to the end of the garden at the front of the house. At this point, they kissed, and the appellant suggested that they walk down the road towards the house of a neighbour. As they walked down the road, she said, the appellant pushed open a farm gate into a field. Just after they entered the field, he pushed her to the ground and proceeded to rape her. The complainant was lying on her back while the rape took place and she said that she struggled and resisted throughout the rape which lasted for a period of seven or eight minutes. Thereafter, they returned to the house. The complainant

said that she was “*roaring crying*” and was threatened by the appellant not to say anything to anyone. She said she had never had sexual intercourse before.

4. When they returned to the house, it was apparent that a minibus which had been arranged to take guests from the party had already left. The complainant was unable to find her handbag and while she found her phone on a table in the marquee, it was out of power. The appellant knocked on a patio door at the rear of the house into the kitchen and this door was opened by his mother. On the complainant’s account, only the appellant’s mother and her daughter were present in the kitchen at this time.

5. The complainant went into the adjacent small sitting room to look for her bag. Shortly, thereafter, she heard the appellant’s mother and sister go upstairs to bed. From an open door between the sitting room and the kitchen, she asked the appellant to call a taxi for her. He refused, saying that his mother was going to bed, and she would have to wait until the morning. Having closed/locked various doors and turned out lights, the appellant came into the sitting room via a separate door from the hallway. At this stage, she said, he proceeded to rape her for a second time as she lay or sat on a large red couch within the sitting room. He approached her from behind and pushed her head down into the couch and proceeded to have intercourse with her. She said that he ejaculated in the course of the rape.

6. The complainant’s evidence was that after the rape, she sat awake for the remainder of the night, a period she estimated to be four or five hours. The appellant remained in the room with her but fell asleep on a separate armchair. In the morning, he was woken by his mother coming into the room and telling him to organise a taxi home for the complainant. A short time later, a taxi arrived, and the complainant left the appellant’s family home and travelled

to the home of her sister. When she got to her sister's house, she went upstairs for a shower and found that she was bleeding heavily from her vagina and that this had stained her pants and jeans. The complainant's sister gave evidence that she had noticed bloodstaining on the complainant's jeans.

7. The complainant, who was still in school at the time, says that she spoke about the events to a former teacher some two days later. The evidence established that the complainant told the teacher only about the incident in the field and that she did not mention any sitting-room incident at this stage.

8. The complainant also confirmed in her evidence that she did not go to a doctor at any time after the incident. Some eight months then passed before the complainant made any report to the Gardaí. When the complainant went to the Gardaí, two statements were taken from her, on the 4 and 11 July 2016.

9. The complainant was cross-examined robustly on a number of discrepancies between her statements and her evidence, such as whether the appellant had ejaculated during the first rape and how she knew; the precise movements of the appellant prior to the second rape; and as to why she had delayed going to the Gardaí for eight months.

The evidence of the appellant's mother

10. The appellant's mother was called as a prosecution witness and there was a significant divergence between her evidence and that of the complainant. She described the minibus leaving and her son and the complainant arriving into the kitchen after it had left. She said there were a number of people in the house at the time, including her husband, his sister, and

a neighbour. She said the complainant and the appellant remained with them in the kitchen for about 40 minutes before going into the sitting room. Before she went to bed, she looked in on her son (the appellant) and the complainant, and they were sitting on separate couches. She said there were still a number of people downstairs in the house at that stage. The next morning, she said, she got up at 8am and started tidying, and about 10.30am she observed both her son and the complainant asleep in the sitting room. She told her son to organize a taxi and noticed nothing about the complainant's clothes i.e. there was no evidence that she had seen any bloodstaining on the complainant's jeans.

The evidence from the Garda investigation

11. The appellant was arrested by Gardaí on the 27 September 2016 and interviewed twice in connection with the allegations. He accepted that he met the complainant on the occasion of the party, and that they spoke and then kissed. He also agreed that they spent a period of time away from the curtilage of the house, but said this was with a view to locating her mobile phone which she had mislaid at the time. When they returned to the house, the minibus had left and they both spent the night in the small sitting room. The appellant denied that sexual intercourse took place between them at any time.

12. The Gardaí did not carry out any form of technical or forensic examination of the scene, that is to say at the appellant's home. The book of evidence was served on the 13 September 2017, and a request for disclosure was made on the 7 June 2018, which included a request for forensic evidence taken from the scene. The DPP replied by letter of 14 June 2018, advising that no forensic evidence was taken. For present purposes, it is important to note that this fact was known to the defence some 10 months before the commencement of the

trial, as was the fact that the complainant had said in her statement (contained in the book of evidence) that the appellant had ejaculated during the second alleged rape on the couch.

13. When questioned about the absence of forensic evidence at the trial, the investigating officer, Detective Garda David Lang, stated that such an examination would not have been “*beneficial*” eight months after the event in question. He accepted that no advice had been sought or obtained by the Gardaí from the forensic science laboratory as to the possibility of finding either blood or semen at the scene before a decision was taken that a forensic/technical examination of the scene would be valueless.

Evidence concerning the couches in the sitting room and the possibility/probability of blood being deposited on one of the couches

14. Central to the appellant’s appeal and motion before the Court is the contention that the Gardaí failed to conduct a forensic examination of the couches in the sitting room of the appellant’s home and/or to consult experts as to the likelihood of any forensic traces still being on the couch eight months after the alleged event. The position is somewhat complicated because of the way the evidence about (a) what couches were in the sitting room at the time and (b) whether blood might have been deposited on one of the couches, evolved over the trial. In what follows, what must also be borne in mind is the distinction between blood, semen and DNA traces more generally.

15. When the complainant was being cross-examined, the following exchange, which is key to the appellant’s motion and appeal, took place, concerning whether or not blood might have been deposited on the couch during the second rape:-

A. I didn't see the kitchen the next morning or anything else. I got up off the chair, went to the door, she [the appellant's mother] was at the door waiting to unlock it so I could leave.

Q. Right. And she would have seen you going out the door then; is that correct?

A. She held the door open for me as I went.

Q. Right. So presumably she would have seen the grass stains on the back of your white top?

A. Yes, and probably the blood on my pants too.

Q. And the blood on your pants?

A. Yes, probably.

Q. Right. When did you start to bleed?

A. After it, I've never had sex before.

Q. Right. Straightaway afterwards?

A. It must have been, yes.

Q. Right. And you're saying you bled into your jeans?

A. Well, normally blood does leave stains, yes, I would have had bleeding to my jeans.

Q. But when did you first notice this?

A. When I felt wet down there, when I was sitting on the couch.

Q. Right, right. So you were sitting on this small sofa, bleeding from your vagina?

A. Yes.

Q. Into the underpants and jeans you were wearing?

A. Yes.

Q. So much so that you felt wet down there?

A. Yes.

Q. And you sat on that sofa for the remainder of the night?

A. Yes.

Q. Surely in those circumstances, [the complainant's name], you would have left a blood stain on that couch?

A. Surely, yes.

Q. Sorry?

A. Yes.

16. The evidence concerning what precise couches were in the sitting room at the time underwent some evolution over the course of the trial. While the appellant's mother was giving evidence, the following exchange took place:-

A. I went out through the hall, when I was at the bottom of the stairs, I remember that actually that they were in there, so I opened up the door that -- from the hall into the small sitting room, just kind of stuck my head in, said I was going to bed.

Q. Okay. And who was in there?

A. [the complainant and the appellant].

Q. And where were they?

A. One was on one couch and one was on the other couch.

Q. Okay. Just looking at the photographs there, if you look at say photograph No. 4 there, if you can confirm that's your small sitting room?

A. That is, yes.

Q. Where was [the complainant]?

A. I don't remember which, who was on which couch.

Q. And there's a beige couch with red and green pattern on it and a red couch, were they those couches that were there at the time?

A. No, there was a different couch there.

Q. Which one was different?

A. The cream one was different.

Q. Okay, okay. When did that couch go in there?

A. I'm not sure to be honest, we moved the furniture around.

Q. Okay. So you don't know which one was on which couch?

A. No, I didn't take any notice of it.

17. In the cross-examination of one of the Gardaí, Garda Ryan, evidence was given that the complainant in her first statement had referred to there being two couches in the sitting room, but provided no description of them as such; and that in her second statement she had said "The couches were roughly, I can't remember their colour, they were fabric possibly creamy white."

18. Another Garda, namely Garda Lang, was asked about whether the issue of technical examination of the couch(es) had been considered. He gave evidence that it had been decided that it was not an avenue worth pursuing in circumstances where the complaint to the Gardaí had been made eight months after the alleged events:-

Q. Is it not the case that the material parts of her statements which I have put to you as having been made in July of 2016 by the complainant raised the possibility that blood had been deposited by her on the sofa she said she had spent the night on?

A. It could have been, Judge, yes.

Q. Yes, all right. So you agree it raises that possibility. Was any forensic examination carried out in relation to any part of the [appellant's] house, including in particular the sitting room where it is alleged that this rape took place?

A. There was no forensic examination carried out, Judge.

Q. Why not?

A. As I said, Judge, it's to do with the passage of time.

Q. Right?

A. It was reported to the Gardaí eight months afterwards and obviously that timeframe, the scene would have been -- could have been contaminated a number of times over.

Q. Right. Well, if you just take the question of blood and if that is deposited on a sofa so as to leave a stain, that's not going to be readily contaminated, is it, Garda, it's not going to disagree with the passage of time, is it?

A. I'm not qualified in forensics to ...

Q. All right. Well, was it you who made the decision not to conduct a forensic examination in the sitting room?

A. No, Judge.

Q. Right. Well, who was it?

A. I -- I never had a conversation, I never received any information regarding that.

Q. Right. You see, I understood from your colleague's evidence yesterday, Detective Garda Ryan that you were the person who had control of this investigation?

A. Yes, I investigated the matter, yes.

Q. Right. So are the jury to take it that the matter wasn't really considered at all?

A. As I said, it was -- it was reported historically.

Q. Yes?

A. It was eight months after the fact.

Q. All right?

A. Usually in circumstances if it had occurred the night before, there would have been scenes of crime there. But in this instance --

Q. Yes. But on the particular account provided by the complainant, there was the reasonable possibility of semen and perhaps more importantly blood being left of these items of furniture; isn't that correct?

A. From what she said, yes.

Q. Yes, all right. I mean, did Gardaí even take the step of obtaining advice from the Forensic Science Laboratory as to whether anything of evidential value might be obtained at this point in time before a decision was taken not to do anything?

A. No, Judge, there was no -- I've had no consultation with the forensic lab in relation to it.

Q. Yes, right. Was it not particularly important that this line of enquiry would be explored in circumstances whereby reason of the delay in the making of the complaint, there was going to be no medical evidence of injuries or anything of that nature?

A. Could you repeat that again?

Q. Was it not particularly important that this line of enquiry relating to a forensic examination of the scene would be properly and fully considered in circumstances whereas a result of the delay in the complainant coming forward, you didn't for example have evidence from a medical examination which might have disclosed injuries or indeed the presence of semen which might have been subjected to DNA profiling?

A. No, Judge, as I said it was eight months after the fact and there was no -- there was no scenes of crime analysis of the couch.

Q. Right. You just closed your minds to that issue?

A. Closed our minds to it?

Q. Yes, so it seems?

A. No, Judge, it was reported to us eight months after the fact

19. Garda Lang also asked about the Gardaí's state of knowledge regarding the furniture that was in the room at the time of the alleged rapes:-

Q. I also want to ask you about the question of identifying the actual sofa that the complainant sat on in the aftermath of this incident. You will have heard me ask your colleague yesterday about the description given by the complainant in relation to these items of furniture in her first two statements, you were here for that?

A. I was, yes.

Q. Yes. And as I understand it, a third statement was taken from [the complainant] in which she looked at photographs which the jury have in their album and made certain comments, and as I understand it, that's a statement you took from her; is that correct?

A. That's correct, Judge.

Q. On the 21st of April 2018?

A. That's correct, Judge.

Q. Right. And I think in the course of the taking of this statement, she is asked to go through the various photographs in the album that we have and the material part of her statement in this regard is as follows, she says, "The fifth", this is a reference to the fifth photograph, "... is of a second couch, I sat on the couch, that's where I sat when he was finished with me. The sixth is of the big red couch, this is where he raped me after we came in from the field." So just to turn to the album, it seems that

the complainant was saying at that time in April of 2018 she was confirming that the couch that she sat on subsequent -- sorry, do you want a moment to get the --?

A. No. 6, is it?

Q. No, No. 5, the complainant was confirming that the couch she sat on after the incident was the couch we see in photograph No. 5?

A. I'd have to read the statement over again.

And then --

Q. MR DELANEY: Can you confirm that that's what she said in her statement?

A. "The fifth is of a second couch".

Q. Yes?

A. Yes.

Q. "The fifth is a second couch, I sat on the couch, that's where I sat when he was finished with me", that's the material part of it, Garda?

A. Correct, yes.

Q. Yes, all right, okay. And that was her evidence in the trial as well; isn't that correct?

A. That's correct.

Q. She identified that as the couch that she sat on subsequently when she was bleeding and she said that that would have left a stain on the couch; isn't that correct? We then have the evidence of Mrs O'Mara on Monday I think and when she was asked to look at the book of photographs, she said that in fact that sofa there as we see it in photograph No. 5 wasn't the sofa that was there at the time of the incident, you heard that?

A. Yes, I heard her saying that.

Q. Yes, all right. In that context, can I ask you, Garda, was any attempt made at any time to establish with Mrs O'Mara what sofa in fact was in that position in the sitting room at the time of the party in 2015?

A. From my -- from my dealings with Mrs O'Mara, I didn't speak with her in relation to any sofa.

Q. Right. Well, are you aware of any other member seeking to establish that fact with her?

A. No, I'm not aware of what other members do, Judge, I'm only aware of what I do.

Q. But you're in charge of this investigation?

A. That's correct.

Q. And my question is directed to a step taken or not taken in the investigation, so why can't you answer the question?

A. Well, I'm telling you what I did in the investigation.

Q. All right?

A. I didn't have any -- my dealings with Clare O'Mara in relation to witness summonses and stuff like that, it wasn't anything to do with the couch in the --

Q. Yes?

A. -- and where it was and where it was located.

Q. Okay. Well, if I could put it this way, if a statement had been taken from [the appellant's mother] dealing with the identification of the couch or sofa that was in that position in the sitting room at the time of the party, that would be on the garda file; isn't that correct?

A. That's correct, Judge.

Q. And you would be aware of that?

A. I would, yes.

Q. Yes. So can you tell the jury whether there is such a statement?

A. I didn't take any statement from [the appellant's mother].

Q. That wasn't the question, Garda, is there or is there not such a statement in existence?

A. There isn't, there isn't as far as I'm aware, Judge.

Q. All right. Why not?

A. Because -- because I was never -- there just isn't a statement.

Q. Yes. You didn't think you needed to because of course, you weren't going to bother even carrying out a forensic examination of the furniture in the sitting room; isn't that right?

A. I already explained that, Judge, it was eight months after the fact.

Q. Yes. But [the appellant's mother] did provide a statement to the gardaí on the very day that her son was arrested and being interviewed in the garda station in Shannon; isn't that correct?

A. She did.

Q. And she wasn't asked at that time to identify or describe the furniture that was in her sitting room at the time of this event?

A. No, Judge, it's not in that statement.

Q. Or subsequently?

A. Correct.

20. It was established in re-examination that there had been no mention of bleeding onto the couch in the complainant's statements to the Gardaí:-

Q. Just by way of re-examination in relation to this and arising from what my friend asked, you've said that [the complainant] made statements on the 4th of July and the 11th of July of 2016, statements of complaint; isn't that correct?

A. That's correct, Judge.

Q. And can you just -- you were asked about the content of those statements in relation to those statements, was there mention of bleeding at the [appellant's] home?

A. I'd have to read them back over again, Judge, I don't ...

Q. Perhaps if the witness could for a moment, just in terms of your state of knowledge in terms of the investigation?

JUDGE: If you want to do that, Garda Lange?

WITNESS: Judge, in relation to the statement of the 4th of July, there's no reference to blood on the couch.

Q. MS. CROWE: What's there a reference to, is there a reference to any bleeding?

A. Just when she got home when she had the shower, when she got home to her sister's house [...].

Q. Right, and in the statement of the 11th of July?

A. No, Judge, in relation to the statement of the 11th of July, there's no reference to blood on the sofa.

Q. What is the reference to blood in that statement?

A. Reference, [the complainant], when she says when she's having a -- when she had a shower afterwards she was bleeding.

Q. And where was that shower?

A. At home at [address], her sister's house.

Q. Her sister's house?

A. Yes.

Q. I see. So in terms of the investigation, is it the position that there was no evidence of her having bled at the O'Mara house?

A. No, Judge, there's no evidence of that.

21. The trial judge asked:

Q. In terms of the suggestion that the couch that [the complainant] was sitting on on the evening in question is a different couch to the one in the photographs. When did you become aware of that suggestion?

WITNESS: In the course of the trial.

JUDGE: When [the appellant's mother] gave her evidence, is it?

WITNESS: Correct.

Application to direct an acquittal

22. At the conclusion of the prosecution case, on Day 6 of the trial, an application was made by the appellant for a directed acquittal on the basis that he could not receive a fair trial by reason of the failure of the Gardaí to conduct a technical examination of the scene. Counsel relied upon the jurisdiction of the trial judge as described in *DPP v. PO'C*,¹ and referred to *McFarlane*² for the proposition that the “POC- jurisdiction” may be exercised in a case where relevant evidence is no longer available. Counsel contextualised the submission concerning a failure to conduct technical examination by pointing out that the appellant was already disadvantaged by the fact that the complainant had delayed by eight months before making a complaint to Gardaí. This, he said, had prevented potential evidence from being

¹ [2006] 3 IR 238

² [2007] 1 IR 134

obtained from her clothing, or from a medical examination (either for the presence of semen/DNA, or injuries, all of which would have been expected having regard to the details of her description). The absence of such evidence would have been of probative value to the defence, he submitted, but because she had delayed for eight months, her clothing was not available nor would a medical examination been of any assistance. The absence of forensic examination of the couch was said to be very significant in that particular context.

23. Anticipating that the prosecution might point out that the defence had not made any pre-trial inquiries concerning technical examination of the couch/scene, counsel referred to a number of matters. First, he submitted that the role of the defence is different from that of the prosecution and said that they do not have same scientific or forensic expertise at their disposal. Secondly, he submitted that the logically prior step would in any event be to find out whether the relevant couch was still available in the house for testing, and this evidence would have had to come from the appellant's mother, who was a prosecution witness; he said that this created difficulties for the defence in that it would involve making direct inquiries of a prosecution witness. Thirdly, he submitted that in order to carry weight, if there were evidence from the mother, the inquiries would need to be initiated by the Gardaí.

24. In reply, the prosecution strongly disputed that there had been any failure of the Garda duty to properly investigate. It was submitted that, having regard to the contents of the statements made by the witnesses at the time, there was no reason to think that blood might be found on the couch; this evidence had emerged for the first time at trial in response to a question put to the complainant in cross-examination. The statements merely referred to the injured party having noticed blood when she was showering at her sister's house, and to her sister noticing blood stains on her jeans. Further, the mother had indicated in her evidence

that there had been changes in the furniture in the room. As to the issue of DNA, one would expect DNA traces to be found at someone's house if they lived there. Counsel pointed to the fact that the defence had raised no queries concerning technical examination of the scene, despite having notice of all the evidence in the possession of the prosecution. Finally, counsel suggested that the Gardaí would have taken into account that the complaint was not made until eight months later, and the likelihood (if any) of finding any relevant forensic evidence at that stage.

25. The application was refused by the trial judge. She accepted that the *POC* test was the appropriate one to apply in the circumstances. In the course of her ruling, she said:-

“The height of the defence argument really only can be raised to the possibility that semen or DNA would have been found on that couch. And that's obviously on foot of the complainant's evidence. While she has asserted that the accused ejaculated, even in a situation where there would be ejaculation that doesn't necessarily mean that semen would be deposited on the couch. The further issue obviously is the time-lag between the allegations, and then in fact the complaint that's made. And we're all well aware that in terms of the Forensic Science Laboratory's ability to assess any body deposits that are left at a location, they deteriorate with time.

Now, I don't need evidence to tell me that, we're all well aware of that. The reality of it is that while the DNA of the accused may have been found on the couch, the reality of there being semen found at such a far distant remove is highly unlikely. And that's for that reason that I indicate that the height of the defence argument and in fairness to Mr Delaney [counsel for the defence], he doesn't push the semen issue as

strenuously as he pushes the blood on the couch issue. The height of the argument would be that there would have been DNA of the accused.

Now, Ms. Crowe [counsel for the prosecution] answers that argument on the factual basis that this was indeed the accused family home. While I'm aware that there is a situation where there seems to be a disengagement between the accused and his family and obviously completely unaware of the reasons for that. Nonetheless, clearly at the time of these allegations the accused was still in contact with his family, he was obviously there on the night and helping out at the party on the night. So the on basis of the evidence, whatever estrangement has taken place whether it be since then or before then, he clearly still was a visitor to the family home at that stage in October of 2015.

So Ms. Crowe makes the argument that because of his contact with the family home, the presence of DNA on the couch would have been expected and really doesn't progress matters one way or the other in terms of the prosecution's case or the defence case. And that is true, one would have expected that the accused DNA would be around the house and would have been on that couch as it would be in many other areas of the couch. So in terms of real specific and actual prejudice to the accused by reason of this red couch not having been examined, the reality is that it's simply not established in the argument before me.

Further, the absence of this test doesn't result in an unfairness, even if it was a thing that there was evidence that semen could in fact have been located at the far remove of eight months from the date of the allegation and the complaint, that doesn't raise

an unfairness which is insurmountable. The reality of the situation is that the courts have said and one only needs to consider delay cases in this regard, that prosecutions can be mounted in the absence of corroborative evidence. But obviously the fact that there are no SATU examinations, there is no forensic examination in relation to the red couch is something that the jury will have to consider in due course. And obviously can take account of in terms of deliberations, and is something that one would imagine the defence will rely on in terms of its remarks that it makes to the jury in terms of the evidence before it.

It's a matter for consideration of the jury, but it doesn't result in a specific and actual and real prejudice that results in an unfair trial that the accused has before this Court. So with respect to the lack of a forensic examination in relation to the red couch, I'm of the view that a specific unfairness doesn't arise that can't obviously be dealt with by myself in terms of addressing the issue with respect to no examination having been conducted by An Garda Síochána in relation to that couch. That then raises the more forceful argument from Mr Delaney, as I would have expected it to have been in respect of the other couch that's within the room.

Now, with respect to this couch a number of issues emerge with respect to the evidence and the statements of the complainant that have been given in the course of the investigation. Firstly, the complainant never indicated that she had in fact bled into the couch. As I understand it in terms of her statements, she indicated that she noticed that she was bleeding the following day. Now, in terms of her evidence before the Court, it doesn't actually go so far either to say that she actually bled on to the couch. It isn't that she gave evidence to the jury that she in fact saw a blood stain.

But her evidence was to the effect that she had been bleeding, bleeding from the rape, and that she felt wet down there, and she agreed then with Mr Delaney that surely one would expect that there would have been a blood stain and she agreed with that proposition.

The reality of it is that had the guards conducted a forensic examination and I accept Ms. Crowe's proposition that it isn't actually stated in her statements that one would have expected blood to in fact to have been on the couch. But had An Garda Síochána in fact conducted a forensic examination of the couch when the allegations were in fact brought to their attention, the reality of the situation is now that the couches have changed. So the real issue that arises is on foot of [the appellant's mother's] evidence. An examination of the couch which the complainant in fact indicates in the course of the statement that she sat on in terms of the photographs having been taken and them having been shown to her. And I know those photographs were taken in January of 2017, the issue that arises is whether further enquiry should have been made in relation to what couch in fact had been present in light of [the appellant's mother's] evidence.

Examination of the couch that in fact is contained in the photographs obviously wouldn't have produced any results, good, bad or indifferent because that's not in fact the couch that was present on the day in question. In relation to that issue, again there one has to consider whether there is in fact a specific unfairness that arises for the accused with respect to that. Firstly, the guards were unaware of that and that is clear from the evidence. Indeed I asked a specific question yesterday as to when the guards became aware of [the appellant's mother's] assertion that a different couch

had been in the room on the occasion. And the guard indicated that he only became aware of that when [the appellant's mother] in fact gave her evidence.

There is an input in relation to the accused that one does have to consider. Again, going back to what I've earlier said in the course of the ruling, while the accused I am aware is estranged from his family, he clearly wasn't estranged from the family or at least had contact at the time of this party in October 2015. The photographs that were intended to be relied on by the prosecution I'm told were served on the accused and provided to his solicitor in June of last year. There certainly is a possibility that the defence could have engaged with this issue. And the accused had he, and perhaps he did examine the photographs, but this issue in terms of there being a different couch present in the room on the occasion in question could have been raised.

That said, nonetheless one has to consider the issue from the perspective of the prosecution case. Clearly it's not a case that the guards had any knowledge in relation to a different couch being present on the occasion in question. So the issue of not examining the different couch simply didn't arise. And as I've already indicated had they examined the couch that in fact was present in the photographs, nothing of a probative or negative nature would have arisen from that because it simply wasn't the couch that was present. So for that reason, I'm of the view that the guards are not at fault, such that an unfairness arises.

Obviously an issue arises now as to enquiries, whether they should or shouldn't be made with respect to the couch. But ultimately separate to the issue as to whether

enquiry should be made, I'm of the view that an unfairness doesn't arise, no more than what I said with respect to SATU records, SATU investigations. This is an issue that the jury will consider, they are entitled to consider it. I'll obviously be drawing it to their attention. But it does not result in an actual unfair trial for the accused having regard to the legal directions that I can and will give the jury in that regard. So I am against you, Mr Delaney, in relation to your application."

The course of the trial after the refusal of the direction application

26. Obviously the trial judge made her ruling on the basis of the evidence as it stood at the time. However, matters did not rest there. Notwithstanding her ruling adverse to the defence in the terms set out above, at the conclusion of her ruling the trial judge gave the defence an opportunity to request the prosecution to carry out further enquiries in relation to the whereabouts of the couch in question. It was indicated at this stage that the appellant wished such enquiries to be made, which were then carried out by the Gardaí on an informal basis while the trial adjourned temporarily.

27. Upon resumption of the trial the trial judge was informed that the appellant's mother had made a mistake in her direct evidence and that the couch which featured in the relevant photograph was in fact present at the time of the incident. Arrangements were made for an additional statement to be taken from her on the subject.

28. Counsel for the appellant also requested that a forensic examination be carried out for blood. This was done following an exchange between the trial judge and counsel for the appellant in which the trial judge made it clear that if any such examination was positive,

the trial could not proceed before this particular jury because it would not be fair to the accused as he had come to meet the case as it stood on the book of evidence.

29. The trial judge also clarified that the mother's indication about her change of mind in relation to the furniture did not affect her previous decision on the application for a direction.

30. On Day 7 of the trial, the appellant's mother was recalled and clarified that the two-seater couch seen in a particular photograph was indeed the couch that was present in the room at the relevant time. She also confirmed that the couch and its cushions had been washed/cleaned only once, approximately seven years earlier.

31. The Gardaí then took the cushions and their covers to the Forensic Science Laboratory for examination. Evidence was given by forensic scientist, Sandra McGrath, on Day 8 that the testing of the cushion covers revealed *no blood staining*. She was then cross-examined and gave evidence as follows:-

Q. Yes. Now, just in relation to that, if we work from the premise, and I want to stress this, if we work from the premise that a blood stain was left on one of these items that you examined in October of 2015, that's three and a half years ago, and assuming those items weren't washed in the meantime?

A. Okay.

Q. Would you have had some expectation of finding a trace of blood staining?

A. It's difficult to know what my expectation would be, given we would need to know how much blood was transferred in the first place.

Q. Yes?

A. And where it was transferred. So for example, if it was only a small amount of

blood and it was sitting on the top of the fabric, it could be removed from wear and tear I suppose is a good way to describe it. However, if there was kind of a larger amount of blood and it soaked into the fabric or through to the inner cushion itself, I probably would expect that to remain as it's not in direct contact with wear and tear of people sitting or using the cushions.

Q. Yes, yes?

A. If this was the case, I would have detected that. However, like I said if it was only a small amount on the very top of the fabric which could have been removed, that wouldn't have been detected.

Q. Yes?

A. So it's a very difficult question you know which I can't answer because I don't know.

Q. Yes, I understand?

A. Yes.

Q. Yes. But blood doesn't degrade so much over time, that if there's a reasonable amount of it left that it would simply disappear?

A. It would not disappear, no.

The application for a corroboration warning

32. The trial then proceeded in the ordinary way to its closing stages. After the close of the prosecution case on Day 8, application was made to the trial judge to give a corroboration warning. In support of that submission, counsel identified certain features of the evidence, including the following:

- (i) The delay of eight months in making a report to the Gardaí;

- (ii) The fact that the disclosure to the complainant's teacher was limited to the incident in the field only;
- (iii) The differing reasons given by the complainant for the delay in going to the Gardaí;
- (iv) The evidence of the complainant concerning bleeding in the aftermath of the rape in the sitting room and the negative results from the forensic examination of the couch cushions and covers;
- (v) The change in the Complainant's evidence as to how the rape in the sitting room commenced; and
- (vi) Inconsistencies between the account of the complainant and the account of the appellant's mother.

33. In respect of the matters put forward in support of the application, the Court stated as follows:

“All bar [the mother]’s evidence did not raise any concern for me in relation to a corroboration warning being required with respect to this matter. They are issues that arise, they are issues that the jury will clearly have to consider...”

In this context, the trial Judge stated that she was of the view that there was nothing *“special or peculiar with respect to those individual issues”* and she refused to give the warning. She elaborated:

“I did have a concern in relation to [the appellant’s mother’s] evidence initially in the case. And clearly there was a complete distinction between what [the latter] said, and what she asserted to be the case on the evening in question and what the complainant asserted was the case in terms of the mechanics of once herself and the accused came back into the house.

However, I've considered this, I've obviously listened carefully to the submissions made ..[and]... I've considered carefully the evidence that's been given over the weekend. While there is clearly a discrepancy between [the evidence of the appellant's mother and the complainant], the reality of the situation is that the interviews conducted by An Garda Síochána with the accused in fact support [the complainant's] version of events in relation to the mechanics of what happened occurred on that night in question, bar obviously his denial of a rape. But in terms of coming into the house and who was present in the house, in fact [the appellant] says it was his mother, his sister and he referred to another individual and if I remember correctly, it was [another individual] that he referred to. But he didn't see anybody else and in fact when one considers the evidence from his cousin [named], the time frame with respect to [that cousin] and him going into the big sitting room also matches what [the complainant] in fact said.

In terms then of [the appellant's sister] being in and out of the sitting room and upstairs as her mother had indicated, there's nothing of discrepancy in relation to [the complainant's] evidence. And the fact that [the cousin] in fact left with the handbag seems to me supportive of [the complainant] in terms of her not having in fact come across [the cousin] on the evening in question. Clearly on [the mother's] evidence, she went to bed and other people were up and about. But her son doesn't seem to have a recollection of meeting his father or his aunty [named], or the neighbour who I just can't remember the name of that lady now.

He also indicates that very shortly afterwards himself and [the complainant] went into that sitting room. While [his mother] has referred to 45 minutes, Richard O'Mara in his interview with An Garda Síochána doesn't have a similar recollection with respect to that. So it seems to me that while yes, there's a discrepancy, the discrepancy doesn't in fact establish an unreliability with regard to [the complainant's] evidence. It establishes a discrepancy in the evidence, but [the complainant] is supported in a very large extent with regard to her recollection of events by the accused version of events.

So for that reason, I'm of the view that this is a matter the jury will have to deal with, but it's not a matter that raises it to a situation that I would be satisfied that there is an unreliability with respect to [the complainant's evidence]. And for that reason I'm not prepared to give a warning in relation to the matter.”

Trial judge's remarks concerning the absence of forensic evidence

34. It may be noted that in the course of her charge to the jury, the trial judge stated as follows:

“Clearly you know that the couch wasn't forensically analysed. As it happens that now has occurred and you have the results of that, and you heard the evidence from the forensic scientist this morning. The red couch wasn't analysed. We also know that [the complainant] didn't make her allegations until eight months after these alleged events. And it was accepted by the guards that if an allegation of rape is made in the immediate aftermath, frequently you may have an examination conducted in relation to such a complaint and that may reveal something of an evidential value.

Also clothes may be seized and the guards accepted that that does happen in a recent complaint with respect to rape. But that didn't occur here because it was eight months. I should say to you ladies and gentlemen of the jury that in light of the evidence that you heard from the guards, if there is any concern that you have in relation to the investigation that was conducted, such that you have a reasonable doubt in respect to this matter, well then the prosecution have not satisfied you beyond reasonable doubt. And if you do have a doubt and therefore you must acquit the accused in relation to that.

Equally, should the fact that there is a time delay in terms of [the complainant] making these complaints concern you, well again that means that you're not satisfied on the standard that's required on the prosecution beyond reasonable doubt. That said, people aren't required to make a complaint immediately, frequently I'm sure you're very well aware that old sex cases come before the courts. This isn't an old sex case, it's an eight month delay. But if there are concerns that you have in relation to that and Mr Delaney made submissions to you in relation to the delay that occurred in this case, if you have any concerns in relation to that such that you have a reasonable doubt with respect to the prosecution case, well then you do have a reasonable doubt, and therefore you should acquit the accused in relation to the matter.

You heard the evidence from the forensic scientist this morning, you also heard from the evidence from [the appellant's mother] in terms of the couch, I won't go back on that I mentioned it earlier. In respect of the forensic scientist, she has now examined the cushions or the detached fabric from the cushions and you heard that there was no blood staining and she went through the various tests that she carried out in respect to that. Not just simply visual examination, but other examinations as well.

She did say that it was difficult to say what her expectations may have been regarding the finding of blood in terms of she doesn't know how much blood is supposed to have been left on the couch. If it was a thing that the blood was just simply on the top, well at this far remove it could have been removed by wear and tear.

However, if there was a greater bleeding that was significant, that's the way she referred it, if there was a significant amount of blood you would find to expect you would expect to find some mark there on the couch.” (emphasis added)

The Grounds of Appeal and the Motion to adduce new evidence

35. Some of the grounds of appeal contained in the Notice of Appeal are not being pursued. Those which were pursued on behalf of the appellant are as follows:-

- (i) The Trial Judge erred in refusing to hold that the trial of the Appellant had been rendered unfair and/or that there was a real risk of an unfair trial by reason of the manner in which the Gardaí had conducted their investigation;
- (ii) The Trial Judge erred in refusing to give a corroboration warning;
- (iii) In all the circumstances the verdict of the Jury was unsafe and the trial of the Appellant unsatisfactory.

36. The appellant has also brought a motion to adduce new or additional evidence at the hearing of the appeal, grounded on the affidavit of the appellant's solicitor, Mr. Stiofan Fitzpatrick. The evidence sought to be adduced is set out in a report dated 13 August 2020 from forensic scientist Ms. Orla Sower of Keith Borer Consultants. In broad terms, the evidence is to the effect that *semen*, if deposited on a couch, *may* remain detectable for nine months depending on:

- (i) The volume of semen transferred,

- (ii) whether it had dried on to the surface or soaked into the weave or lower cushions,
- (iii) the amount of use the couch received, and
- (iv) whether the couch was cleaned.

She describes the detection of semen as “possible”, depending on the above factors. Dr. Sower says that if such semen had been detected in 2015, DNA profiling technology in 2015 capable of identifying an individual could be obtained “as long as sufficient spermatozoa are present in the sample i.e. that the semen source was not vasectomised or had a low sperm count or that the sperm cells had been degraded”. It may be noted that the report deals with semen only; it does not deal with the deposit of blood.

The appellant’s submissions

37. Concerning the absence of forensic inquiry by the Gardaí, the appellant submits that the right to relief derives from the right to a fair trial and refers to the test of unfairness as whether the appellant has lost “the real possibility of an obviously useful line of defence” (Hardiman J., *S.B. v. DPP*³). He also cites *JO’C v. DPP*⁴ where Hardiman J. observed (in the context of an application to prohibit the trial of sexual offences on the grounds of delay) that to require positive evidence that what has been lost would have been favourable is to “ignore the presumption of innocence and to use the onus of proof as a sort of catch 22”. He cites *Wall v. DPP*⁵ where O’Donnell J. stated that the materiality of the lost evidence was “perhaps the factor to which most weight should be given”. `

³ [2006] IESC 67

⁴ [2000] 3 IR 478

⁵ [2013] 4 IR 309

38. The appellant submits that the trial judge erred in reaching the conclusion that the statements of the complainant did not trigger a need for a forensic examination of the sofa. Given the absence of any other forensic or medical evidence, Gardaí should have followed up on this “*real possibility*” of bleeding being present on the couch by arranging for a technical examination. The appellant submits that the reasoning of the trial judge regarding the “*possibility that there was some form of bloodstaining*” seems to place an onus on the defence to definitively establish that, on the evidence of the complainant, a bloodstain would have been left behind on the sofa. The appellant submits this places too high an onus on the defence.

39. The appellant submits that the complainant’s evidence that the appellant ejaculated during intercourse in the sitting room gave rise to a definite possibility that semen had been deposited on the large red sofa. The appellant further submits that the observation of the trial judge that it would have been “*highly unlikely*” that semen could have been found on the couch “*at such a far distant remove*” amounted to speculation on her part.

40. The appellant submits that while a forensic examination was carried out at the time of the trial which yielded negative results, this was of limited benefit to him. The evidence of Ms. McGrath from the Forensic Science Laboratory was to the effect that, as a result of the passage of time, the “*absence of evidence*” was not necessarily to be equated to “*evidence of absence*”. Had a forensic examination yielding the same negative results being carried out no more than eight months after the relevant date, the results could have been placed in quite a different context.

41. In those circumstances, the appellant seeks to have the report of Ms. Sower admitted as new evidence in order to demonstrate that the trial judge, in the course of making an important ruling in the case, made a significant error. In these circumstances, the appellant submits, a rigid application of the *Willoughby*⁶ principles concerning the admission of new evidence could work an injustice to the appellant. The appellant submits that the report of Ms. Sower clearly demonstrates that the trial judge's assumption was scientifically incorrect and that the evidence ought to be admitted.

42. In relation to the corroboration warning, the appellant accepts that the trial judge clearly had regard to the judgment of this Court in *Wooldridge*,⁷ but submits that the approach laid out in *Wooldridge*, requiring something “*special or peculiar*” before a corroboration warning will be required, is to set a threshold in relation to the exercise of the discretion which was not intended by the Oireachtas. To this extent, the appellant submits, that the ruling of the trial judge was made on an incorrect legal basis. Furthermore, the appellant submits that it was “*clearly wrong in fact*”. The appellant refers to the following features of the evidence; (i) the delay of eight months in making a report to the Gardaí; (ii) the disclosure to the schoolteacher being limited to one incident only (omitting the sitting room allegation); (iii) the different reasons given for the delay in making complaint to the Gardaí; (iv) the change in the complainant's evidence as to how the second rape allegedly commenced; (v) inconsistencies between the complainant's account and that of the appellant's mother; and (vi) the negative results from the (eventual) forensic examination of the couch cushions.

⁶ *DPP v. Willoughby* (Unreported, Court of Criminal Appeal, 19th of February 2005).

⁷ [2018] IECA 135.

The respondent's submissions

43. The respondent submits that the trial judge correctly considered the import of absence of the forensic examination of the couch(es) in light of the prosecution case as it evolved during the trial.

44. The respondent submits that the appellant fails to meet the first, second and third principles of the *Willoughby/O'Regan* tests concerning the admission of new evidence as follows: (1) there are no exceptional circumstances here which would allow such further evidence to be called in derogation of the principle that the defence should bring forward their entire case at trial; (2) the expert report could have been obtained by the defence in advance of trial and (3) the fresh evidence which is sought to be adduced is unlikely to have had any material or important influence on the result of the case. The respondent submits that it is speculative as to whether or not there was any semen deposited on the couch during the second rape.

45. The respondent submits that even if there had been a forensic examination after eight or nine months and no semen or DNA had been found, this would not have provided the defence with an "*obviously useful line of defence*". Whether or not semen might have been forensically detected nine months after the incident is itself highly speculative, as Ms. Sower's report itself concedes.

46. Furthermore, as was submitted on behalf of the respondent at trial and noted by the trial judge, the respondent emphasises that sight should not be lost of the fact that the couch

in question was in the family home of the appellant and that traces of his DNA could therefore in any event be expected.

47. The respondent submits that the correct approach to be taken is as set out by the Supreme Court case of *DPP v. C.Ce.*⁸ This decision post-dates the trial but in effect reviews and re-states the established legal principles.

48. Regarding the corroboration warning, the respondent submits that the decision as to whether or not to give a corroboration warning is one which falls squarely within the discretion of the trial judge. The trial judge had a discretion and exercised it in a way that was open to her. The appellant has not established any particular features of the case, individually or cumulatively, that took it out of the ordinary in the sense of ousting the judge's discretion.

Decision

The First Issue: The Forensic Evidence issue

The admissibility of new evidence

49. The 'semen issue' was in the case from the very outset insofar as the complainant in her Garda statements had said that the appellant had ejaculated during the second rape. Dr. Sower's report, which the appellant now wishes to adduce in evidence for the first time, is exclusively concerned with semen. It may be noted that the defence did not make any inquiry whatsoever about technical examination of the sitting room after the book of evidence was

⁸ [2019] IESC 94

received, notwithstanding that the statement of the complainant referred to the appellant ejaculating during the second rape.

50. Counsel for the appellant sought to justify this failure to raise the issue before the trial on the basis that there would have been certain difficulties with their pursuing the issue of forensic examination before the trial. These alleged difficulties are set out in the summary of their submissions which have been set out above at paragraph 23. However, in our view, these alleged difficulties would not have precluded a letter from the defence solicitor to the prosecution solicitor requesting that the Gardaí or prosecution take further appropriate steps. For example, they could have asked that appropriate inquiries be made of the appellant's mother as to whether the couches were still available for examination; if the answer was yes, they could then have requested that tests be carried out for semen, or asked that expert advice be obtained as to the likelihood of trace evidence remaining after the lapse of the relevant period of time. The 'difficulties' described by counsel relate only to the question of whether the defence might *themselves* engage experts to carry out tests or seek to interview prosecution witnesses such as the appellant's mother; no such difficulties would prevent them from writing a letter or letters requesting the prosecution to take these steps. However, no such inquiries were ever raised. This fact tends to undermine the submission they now seek to make, which places the absence of forensic examination of the couch at the heart of their submission that the appellant did not receive a fair trial.

51. Further, as regards the taking of expert advice, there was never any obstacle to the defence procuring a report of the kind they now wish to adduce. However, there is no evidence that the defence took any steps in the pre-trial phase to seek the advice of an expert as to the theoretical possibility of semen traces remaining on the couch; the report of Dr.

Sower now sought to be admitted into evidence was obtained only after the trial. Yet the evidence concerning ejaculation was there from the beginning, being in the complainant's statement; it will be recalled was only the evidence concerning blood that changed slightly. But Dr. Sower's report does not concern blood; it concerns semen. The decision in *Willoughby* makes clear that a defendant must bring forward his entire case at trial and that the evidence must not be such that it could not reasonably have been acquired prior to or at the time of the trial. There is no reason that a report concerning the likelihood of finding semen on the couch at an eight-or-nine-month remove could not have been procured by the defence prior in advance of and for the purpose of the trial. On that ground alone, the application for admission of fresh evidence should be rejected.

52. However, as the blood issue also arises, we will nonetheless consider the PO'C jurisdiction in relation to both the semen and blood, taking the Dr. Sower evidence into account on a *de bene esse* basis for this purpose.

The Failure to grant a direction and the PO'C jurisdiction

53. The relevant principles concerning the halting of a criminal trial which is already in progress have been described in a number of cases, commencing with *PO'C*, and restated recently in *DPP v. C.Ce.*

54. In the latter case, the principles as to the exercise of the *PO'C* jurisdiction were set out in a number of the individual judgments, but there was also general agreement with the

summary of the Chief Justice at paragraphs 9.2-9.4 of his judgment⁹, even though he was in a minority as to the result in that particular case from the application of those principles.

55. The Chief Justice was summarising the relevant principles in the context of a historical sexual abuse case, but these principles can be adapted with only slight modification to cases such as the present one i.e. a case where it is alleged that evidence is missing because a specific type of investigation was not carried out by the Gardaí (and the failure to do so was linked with the lapse of time in making the complaint to the Garda), and not merely or more directly because of the lapse of time (such as in the case of a witness who has died in the intervening period, which is the more typical scenario).

56. The relevant principles as stated by the Chief Justice are as follows:-

“9.2 In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations; first, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising

⁹ O’Donnell J. does not explicitly agree with paragraph 9.5 and appears to confine his agreement to paragraphs 9.2-9.4 of the Chief Justice’s judgment. The other judges did not enter any such (implicit) caveat, if caveat it be.

that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.

9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.

9.4 In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.

9.5 Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity.”

57. Applying those principles to the present, it is important at the outset to draw a clear distinction between the results of forensic tests which may indicate the presence of evidence and those which indicate the absence of evidence. From the defence point of view, what is important in the present case is potential evidence of the latter kind i.e. the absence of evidence.

58. To take a hypothetical example, suppose a woman alleged that a rape took place on a Monday night during which the suspect ejaculated and as a result of which rape, she says, she had vaginal bleeding while sitting on a couch. Suppose further that she says that she noticed that both blood stains and semen stains were left on the couch after the rape. Let us imagine further that she made an immediate complaint to the Gardaí, and a technical examination was carried out in respect of the couch cushions on Tuesday (the very next day), and this examination revealed *no* semen or bloodstains. In those circumstances, one would certainly say that the absence of such evidence was of significant probative value to the defence. The defence would rely heavily on this at trial to cast doubt upon the complainant's narrative, because, they would say, one would have a reasonable expectation that such traces would have been left on the couch if the complainant's story were true.

59. This example shows that the absence of certain evidence can be probative in circumstances *where one might reasonably expect such evidence to exist if the complainant's account is reliable*. The condition in the italicised words is important; the absence of evidence is only probative *if* one might reasonably expect it to exist. The greater the expectation of its existing, the higher the probative value of its absence. Conversely, the lower the expectation of its existence, the less its probative value. The expectation might, by

reason of various variables, diminish to a point where the absence of the evidence is not significant at all and the probative value is minimal or non-existent.

60. To illustrate the last point, we can vary our hypothetical scenario to describe a situation where evidence of washing or cleaning might be of evidential significance. Suppose there was reliable evidence from an independent source that the cushions had been thoroughly washed overnight after the alleged rape, and before the Gardaí arrived to remove them for forensic testing the next morning. Here, the expectation of finding semen or blood would be greatly diminished and the absence of trace evidence would be much less probative than in the original example, if probative at all.

61. Thus, in any given case, any analysis of the significance of an absence of evidence has to be firmly embedded in its factual context in order to assess the probative value of the absence of the evidence.

62. The facts of the present case vary from the initial hypothetical example above in two significant aspects. First, the Gardaí were not informed the next day or anything like it; on the contrary, the complaint was not made to them until some eight months later, which, according to the scientific evidence of Dr. McGrath and Dr. Sower, introduces a number of significant variables into the (objective) expectation of finding traces of blood and semen.

63. Secondly, the complainant in her statement(s) made no reference at all in her statement to blood or semen having been left on the couch. This leaves the Court in the position of having to consider the objective likelihood of semen or blood being left behind based on the rest of her account and/or the evidence of other witnesses. No witness said they

actually saw either form of stain on the couch. The questions then are: (i) To what extent would one necessarily expect semen to be left on the couch in circumstances where the complainant said the appellant ejaculated during the rape? And (ii) to what extent would one expect blood to be left on the couch, having regard to the precise terms in which the complainant and her sister described the blood on her clothing, and bearing in mind that the appellant's mother saw no blood at the time? It will be recalled that the complainant in her statement referred to vaginal bleeding which stained her jeans. She did not refer to the likelihood of traces of blood being left on the couch until this was put to her as a proposition at the trial when she was being cross-examined; and this never amounted to her saying that she *saw* any such blood on the couch.

64. The question of the absence of forensic examination in the case falls, therefore, to be considered both in light of the above considerations and the *PO'C* test.

65. *The Court's view on the semen issue in this case* – In the first instance, we are not persuaded that it was unreasonable of the Gardaí not to obtain expert advice as to the likelihood (or not) of semen traces remaining on the couch eight months some eight months after the alleged rape (when it was reported to them), or to conduct forensic examination of the couch(es) (having ascertained whether/that the same couch(es) were in the sitting room). The complainant had said that the appellant ejaculated while raping her, but in our view this circumstance in and of itself does not of itself generate a high expectation of finding semen on the couch. Further, even if we add the variables referred to by Dr. Sower in her report into the mix, the expectation of a positive finding of semen is even lower. We conclude that in light of all those variables, the probative value of finding no semen was not at a high enough level to indicate that the failure to pursue this line of investigation presents a real

risk that there was an unfair trial. It is not clear that it was likely that there was in fact missing evidence which would have been potentially material to the trial, or that this prevented the procuring of a “*real possibility of an obviously useful line of defence*”. Accordingly, even if Dr. Sower’s evidence were admitted into the case, we do not consider that it would make any difference to the outcome as we are of the view that the *PO’C* test is not satisfied in any event.

66. *The blood issue* – In the first instance, given what the complainant (and her sister) had said about blood traces in their statements, we are of the view that it was not unreasonable of the Gardaí not to obtain expert advice as to the likelihood (or not) of blood traces remaining on the couch eight months later, or to conduct forensic examination of the couch(es) (having ascertained whether/that the same couch(es) were in the sitting room).

67. Further, we are not persuaded that there is a real risk that there was an unfair trial, even taking into account of the concession made by the complainant in cross-examination during the trial as to blood having been probably left on the couch. We are of the view that, given all the variables described by Dr. McGrath, combined with the absence of any direct evidence that blood was ever left on the couch, the *PO’C* test was not satisfied in this case.

68. We therefore conclude that, whether one considers the matter from the point of view of the trial judge’s refusal to accede to the direction application, or the position as matters stands now (even taking into account Dr. Sower’s evidence), the appeal on this ground should be refused.

69. We are prepared to accept that the trial judge may have erred insofar as she appeared to concentrate more on the *presence* of forensic evidence rather than its *absence* (in circumstances where the latter was what was important from a defence point of view). She may also have erred insofar as she spoke about the expectation of finding the appellant's DNA at his home when what was (more precisely) in issue was semen or blood on the couch. Further, she may have erred in stating a view on the likelihood of finding scientific evidence eight months later when there was no scientific evidence before her on what the expectation might be and what the relevant variables were in this regard. However, this Court now has the scientific evidence of both Dr. McGrath and Dr. Sower and we are of the view, having regard to that evidence, that (a) the Gardaí did not fail in their duty to investigate; and (b) the test of a real risk of an unfair trial by reason of a failure to investigate something which might have been the defence an obvious line of defence has not been satisfied.

70. We reach this conclusion on the facts of the present case, having regard to (i) the precise nature of the evidence in the case concerning blood and ejaculation, and (ii) the evidence of Dr. Sower in the report exhibited to the motion to adduce new evidence, and that of Dr. McGrath during the trial, as to the variables which the possibility of blood and/or semen being detected eight months later. Even if forensic tests had been carried out when the complaint was made to the Gardaí eight months later and detected neither semen nor blood, the *absence* of evidence of blood or semen was not sufficiently probative to have deprived the appellant of an "*real possibility of an obviously useful line of defence*", the closing off of which would have created a real risk of an unfair trial. There are simply too many hypotheticals or 'ifs' for the Court to find that the relevant legal threshold has been met. It could at most be described as a speculative or hopeful line of inquiry. This does not involve the reversal of the burden of proof or an attack on the presumption of innocence. As

the Chief Justice said in *DPP v. C.Ce*, no trial is perfect. There is a legal threshold for establishing that the absence of some investigation or piece of evidence requires the appellate court to intervene, and we find that the threshold has not been met in this case.

The Second Issue: The corroboration warning issue

71. *Application of the wrong test*- In essence, the appellant's submission is that the Court in *Wooldridge* departed from the statutory provision concerning the corroboration warning and imposed a threshold for giving the warning which is higher than what is required by the statute, and therefore that the trial judge erred in applying *Wooldridge*. The formulation in *Wooldridge* refer to "something special and peculiar" in the evidence.

72. The corroboration warning which was formerly required to be given in all rape cases was based upon certain assumptions which are no longer accepted in Irish society. These included an assumption that a rape allegation is easy to make and difficult to disprove, and that a rape allegation should be treated with more than the usual scepticism which any allegation of a crime should be scrutinised. Historically, because of these assumptions, it was considered dangerous to convict in the absence of corroboration of a rape complainant's testimony; the testimony of a rape complainant was considered to be inherently reliable, irrespective of the circumstances of the allegation or the character, age or other characteristics of the complainant. By enacting s.7 of the Criminal Law (Rape)(Amendment) Act 1990, the Oireachtas rejected those assumptions and indicated that a blanket approach of giving a corroboration warning in every case was no longer considered to be appropriate. The Oireachtas chose to leave it to trial judges to give a warning if they considered it appropriate in a particular case. The discretion of the trial judge has been emphasised in a series of cases by this Court and its predecessor. The appellant argues, however, that the

formulation in *Wooldridge* goes further than merely emphasising discretion and that it places a threshold for giving the warning which is higher than what is required by the statute.

73. Logically, if the warning falls within the trial judge’s discretion and is not required to be given in every case, there must be something in a particular case which warrants it being given to the extent that a failure to do so would amount to an error of law which requires intervention by an appellate court (“incorrect legal basis or clearly wrong in fact”; *DPP v. Ferris*).¹⁰ This Court defined that ‘something’ in *Wooldridge* as ‘something special and peculiar in the evidence which could give rise to the danger of convicting a person on the uncorroborated evidence of that other person...’. The Court in *DPP v. RA*¹¹ referred to ‘factors taking the case out of the ordinary’. It is important in our view not to become overly entangled in semantics. What is important is that the trial judge avoids giving the warning simply as a matter of routine or out of an excess of caution (*DPP v. JEM*,¹² *DPP v. Wallace*¹³) and instead considers whether, on the evidence in the particular case before her, it would be “dangerous to convict on the uncorroborated evidence of the complainant”. The statutory intent, in our view, is to move away from a blanket giving of the warning and towards a case-specific consideration of whether the warning is required in each individual case. We are of the view that *Wooldridge* does not depart from or supplement the statutory intent that the trial judge should consider each case on its facts and not give the warning as a matter of routine. We consider that the trial judge correctly understood what she was required to do, and it is interesting to note that she referred not only to *Wooldridge* but also *R v.*

¹⁰ [2008] 1 IR 1

¹¹ [2016] IECA 110

¹² [2001] 4 IR 385

¹³ Unreported, CCA, 30 April 2001.

*Makanjuola*¹⁴ and did not see any inconsistency between those two cases. Neither does this Court.

74. The appellant seeks to make a distinction between the test for an appellate court and that to be applied by the trial judge. He says that while the *Woolridge* test may be appropriate for an appellate court to apply in circumstances where it is reviewing a trial judge's discretion and therefore reviewing the outer limits of the discretion, as it were, it is different in the case of the trial judge exercising discretion at first instance. The Court is not persuaded by this argument. The test describes when the trial judge should exercise discretion in favour of giving the warning as well as when the appellate court may intervene to correct a failure to give a warning in a particular case.

75. *Requirement for warning on the facts of the case* - As to whether the trial judge was wrong on the facts, we also consider that the trial judge was well within her discretion in deciding not to give a warning in the present case. The existence of discrepancies between a complainant's statement and her oral evidence, or as between her evidence and that of other witnesses (such as, here, the appellant's mother) is not an unusual feature of such cases. The jury had to consider the credibility and reliability of each and every one of the witnesses as well as the totality of the evidence. We do not consider that the discrepancies or conflicts were, even when combined with the delay in making complaint to the Gardaí (and the absence of the clothing worn at the time of the alleged rape thereby caused), such as to amount to an error of law on the part of the trial judge not to have given the corroboration warning. The jury were clearly directed that the clothing was no longer available because of

¹⁴ [1995] 1 WLR 1348

the delay in reporting the offence and they were directed about the evidence concerning blood on the couch; they would have applied their collective experience of life and common sense to all of the evidence and were well aware of what was no longer available by way of evidence. The giving of a warning goes further than merely pointing out that the fact (if it be such) there is an absence of corroboration; it gives a *warning* as to the danger of convicting in those circumstances. It is a judgment call for the trial judge to make, and in our view the judgment call that she made was not clearly wrong or outside the range of her discretion.

76. As can be seen from the excerpts from her charge set out earlier, the trial judge carefully considered all of the evidence before deciding not to give a corroboration warning. She had carefully reviewed the evidence, not only in terms of the discrepancies between the evidence of the complainant and the appellant's mother, but also in the context of the evidence of other witnesses and, pertinently, of what the appellant himself had said to the Gardaí during his Garda interviews. Taking all of the evidence into account, she considered that the case did not reach the threshold for requiring a warning and we consider that her reasoning, based as it was on the totality of the evidence in the case, was impeccable in this regard.

77. In all of the circumstances, we propose to dismiss the appeal and uphold the conviction. A hearing in relation to the sentence appeal will be held in due course.