



**THE COURT OF APPEAL**

**Record Number: 71/2021**

**The President  
Edwards J.  
Kennedy J.**

**BETWEEN/**

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

**RESPONDENT**

**- AND -**

**C.Q.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 22nd day of June 2022 by Ms. Justice Isobel Kennedy.**

1. This is an appeal against conviction. On the 30th September 2020, the appellant was convicted of rape, contrary to section 48 of the Offences Against the Person Act, 1861 and as provided for by section 2 of the Criminal Law (Rape) Act, 1981 as amended by section 21 of the Criminal Law (Rape)(Amendment) Act, 1990.

**Background**

2. On the 9th June 2018, the complainant was working until 4pm and when she returned to her home, she found that her brother and two of his friends, including the appellant, were present having a few drinks preparatory to going out that evening. The group asked the complainant to accompany them, however, she indicated that she did not want to go out that evening and retired to her bedroom.
3. The complainant and her brother were the only two persons residing in the family home at the time, as their family were on holidays. The appellant was the best friend of the complainant's brother and, as a result, was a frequent visitor to the home.
4. The complainant stayed in her bedroom that evening, using her laptop and phone and did not consume alcohol. At approximately 9pm, the complainant's brother, the appellant and their other friend went to various pubs and then ultimately, to a nightclub.
5. During the course of the night, the appellant was seen by a number of people to be intoxicated and at one point, upset. At the end of the night, the appellant did not return to his own home but instead returned to the complainant's home. The appellant, the

friend he had been with earlier that night, and two women entered the home of the complainant while she was asleep.

6. The complainant said she awoke to go to the bathroom during the night and heard voices downstairs and, presuming this to be her brother and his two friends, she returned to her bed. Thereafter, she said in evidence that the appellant entered her bedroom, they had a very short conversation, the appellant enquiring as to her well-being, (it appears that she had broken up with her boyfriend) hugged her and then he left the bedroom. The complainant thought this to be around 3am and she went back to sleep. The appellant's case was that this did not happen but that he went to the room at a later stage in the early hours of the morning and had consensual sexual relations with the complainant.
7. In her evidence the complainant said that the next time she awoke, (subsequent to the appellant coming to the room around 3am) the appellant was behind her, and his penis was in her vagina, she was wearing only her vest and her shorts. Her underwear was at the end of the bed, on the floor. It took time for her to register what was going on and she recounts that she "froze." She then got herself together and told him to get out of the room, at which point, she said the appellant pretended to be asleep. She told him to get out of the room again, the appellant crawled down the bed and left the bedroom. The complainant eventually fell back asleep.
8. The appellant contended that he performed consensual oral intercourse on the complainant and that she was awake at all times and facilitated the removal of her undergarments. He denied penetration.
9. Ms O'D, an eyewitness, described driving to the complainant's house on the relevant night with the appellant and two others. She described pulling up outside the front of the house, that the appellant went inside while the two others remained in her car with her. She said that the group stayed chatting in the car and listening to music until the music went off, at which point Ms O'D realised that her car's battery had died. She became aware that one of the cars parked outside the house belonged to the appellant.
10. Ms O'D decided to go inside the house to retrieve the appellant's car keys from him. She said that all three of the group entered the house and that she went upstairs to look for the appellant. She described opening the door of the complainant's bedroom, without knocking, and seeing a male on top of a female, the female's legs in a V shape and the male between them. She recalled stepping outside the door and laughing, explaining to one of her friends what she had seen, at which point, she saw the appellant approach the door to close it. She heard no noise from the room and no words were exchanged between herself and the appellant.
11. The following day, the complainant got a taxi to work for 12:00pm and her brother gave her a lift home after work. When she arrived home that evening she sent Facebook messages to the appellant, accusing him of raping her the night previous, during which conversation he apologised. That evening, the complainant also had a telephone call with her sister during which she was said to have been very upset. She gave an account to her

sister of what had happened the night previous. On the 20th June 2018, the complainant made a disclosure to her mother and on the 26th June 2018 a formal complaint was made to An Garda Síochána.

12. The appellant was convicted by a jury at the Central Criminal Court sitting in Cork on the 30th September 2020 and was sentenced to 8 years' imprisonment with the last 18 months suspended on terms. This appeal concerns conviction only.

### **Grounds of Appeal**

13. The appellant appeals his conviction on two grounds, namely;

1. The trial judge erred in law in failing to define "recklessness" in her charge.
2. The trial judge erred in her directions to the jury by placing them under undue pressure to come to a verdict rather than disagree.

Mr Bowman SC for the appellant relies on the written submissions in respect of ground 2 and expands in oral submissions on ground 1.

### **Submissions of the appellant**

14. At oral hearing, it became clear that the appellant intended to focus on the first ground of appeal. In that regard, it is said that three versions of events from three persons were put before the jury in this case:

- The complainant, that she woke up with the appellant behind her and his penis in her vagina, and that he had removed her underwear and pyjama shorts without her knowledge or assistance.
- The appellant, that there was a consensual sexual encounter between them primarily consisting of him giving her oral sex, that he believed she was awake and that she was participating, but there being no vaginal sex.
- An eyewitness, Ms O'D that she saw a couple having what she believed to be sexual intercourse.

15. This was a case where there were different versions of events as set out above and included an issue regarding the removal of the complainant's clothing with or without her consent/assistance. In those circumstances, it is submitted on the part of the appellant that it was not for the jury simply to determine whether or not the complainant was asleep, rather it was necessary in light of the evidence adduced, for the jury also to determine whether or not the appellant was reckless regarding the complainant's state of sleep. It is contended that this clearly arises on the evidence in the trial, not just the appellant's version of events, but bearing in mind the clothing issue and the version given by the eyewitness.

16. It is accepted that when charging the jury, the trial judge did address recklessness, this was in the context of defining rape. It is contended, in written submissions, that, thereafter, the trial judge presented matters to the jury in a binary manner which was to the effect that either the jury are satisfied beyond reasonable doubt on the complainant's version of events, in which case there could be no question of consent as she was asleep, and recklessness did not come into it, or they were not so satisfied. It is further noted that the evidence of the eye witness was not referred to in the context of these directions to the jury at all.
17. However, the focus in oral submissions concerned the judge directing the jury that where an individual has drunkenly had sex with a sleeping person, that constitutes the requisite recklessness, in other words, that the judge erred in equating drunkenness with recklessness.
18. While it is acknowledged that the jury were given the definition of rape, which included "recklessness", the appellant takes issue with the fact that they were not given any explanation as to what recklessness is at law. It is submitted that the way in which the trial judge advised the jury ignored not only the evidence, but also the simple fact of the definition of rape which includes within it the phrase "recklessness" which has a particular meaning at law.
19. For the reasons argued above it is submitted that the trial judge erred in refusing to re-charge the jury on the standard definition of recklessness and that consequently, the jury were not properly charged on all aspects of the law, as well as on all aspects of the law as they related to matters which were live issues based upon the evidence.
20. Insofar as the second ground is concerned, it is submitted that the jury retired to consider their verdict on Day 5 at 2:51pm, they were called back at 4:38 pm, no verdict had been reached and matters were adjourned to the following day at 10:08am. They were sent for lunch at 12:49pm, and recommenced their deliberations after lunch at 1:57pm. They were recalled to court at 4:03pm on Day 6. At which stage, they had been deliberating for 6 hours and 34 minutes over two days. The trial judge then gave the majority direction and advised them they were being sent home for the day to recommence the next day. They were advised that they had heard the evidence, and that if a jury could not reach a verdict it could result in a new trial taking place which is not an ideal situation for anybody.
21. On Day 8, Counsel for the appellant raised concerns as to the trial judge having indicated a preference for a verdict rather than a disagreement and requested that clarification be made to the jury. The judge then charged the jury again on a majority verdict and it is said that she was more forceful on this occasion regarding the desirability of coming to a verdict. They then retired at 10:06am and returned a majority verdict of 10-1 at 4:55pm, having spent 5 hours 37 minutes deliberating on their last day of deliberations.
22. The appellant contends that it is very clear that the jury were split in terms of their verdict and that had 2 of the jury disagreed, the result would have been a disagreement.

23. *The People (DPP) v Adach* [2012] IECCA 94 is cited wherein it was argued that the trial judge, by virtue of the choice of language used, brought to bear improper pressure on the jury with regard to their deliberations such as to render the ultimate verdict unsatisfactory. In a similar way to the instant case, the jury in *Adach*, were told by the trial judge that a disagreement was highly undesirable for various reasons.
24. McKechnie J giving his judgment for the Court of Criminal Appeal in *Adach* cited *R v McKenna* [1960] 1 QB 411, as the "seminal" statement of the law in regard to undue pressure being brought to bear on a jury by directions given by a trial judge. Quotation was made as follows:
- "[O]ne may add what is quite evidentially implied, namely that a jury must be free to consider its verdict uninfluenced by any form of improper pressure, whatever its source and whatever its nature might be."
25. McKechnie J also cited the judgment of Lord Lane CJ in *R v Watson* [1988] QB 690, wherein it was stated that a jury,
- "...[M]ust not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for prosecution, the defendant, the victim or the public in general if they do not do so"
- McKechnie J noted in particular from that case that suggestions of expense and inconvenience from a trial judge to the jury will be considered to be a potent incentive to agree.
26. The case of *R v Radford* (Unreported, Court of Appeal, 11 February 1992), was also cited to the effect that juries must always be free to reach their verdicts in their own time and without any kind of exhortation from the judge which indicates to them that they must strive to reach a verdict which has not come from a free mind.
27. McKechnie J also referred to the test arising out of a Canadian case, *R v G (RM)* [1996] 3 SCR 362, wherein it was stated that the court should ask itself whether having reviewed the entirety of the circumstances in the context of the proceedings as a whole, there was "a reasonable possibility that the impugned statements either coerced the jury or interfered with its right to deliberate in complete freedom from extraneous considerations or pressures or caused a juror to concur with a view that he or she did not truly hold."
28. Having considered the above caselaw, McKechnie J was of the view that the *Watson* case and the *R v G* judgment correctly represent the law in this jurisdiction. He concluded that there was a "reasonable possibility" that the freedom of discussion and decision making may have become fettered as a result of the comments of the trial judge in *Adach* and accordingly, that the conviction should be quashed.
29. In line with the above, the appellant submits that in the instant case it is undoubtedly a "reasonable possibility" that the jury were placed under pressure by the trial judge's

comments about the fact that there would have to be a re-trial if they did not agree and that another jury would face the same difficulties that they were clearly facing.

30. It is reiterated that it was quite clear that the jury in the instant case was split as they were not able to reach a verdict after the majority charge was given to them and that the comments of the trial judge regarding the undesirability of disagreement placed undue pressure upon them to return a verdict and not to disagree.

#### **Submissions of the respondent**

31. In response, the respondent notes that the trial judge was of the view that the need to give the standard definition of recklessness did not arise on the facts of the case but that this was fully teased out before the court ruled on the appellant's requisition.
32. The respondent cites the legal definitions of "rape and "consent" as per s. 2 of the Criminal Law (Rape) Act 1981 and s. 48 of the Criminal Law (Sexual Offences) Act 2017, which is substituted for s. 9 of the Criminal Law (Rape) (Amendment) Act 1990.
33. It is submitted that prior to the expanded definition of consent as enacted in 2017, the issue of charging a jury as to the *mens rea* in a rape case was dealt with exhaustively by the Supreme Court in *The People (DPP) v CO'R* [2016] IESC 64. Extensive quotation is made from that case.
34. At para 47 of that judgment, Charleton J states that "recklessness is the taking of a serious and unjustified risk" and "if an accused is aware of the possibility that a woman may not be consenting, any conscious disregard of this advertence to that possibility means that for him to proceed is for him to act recklessly; and thus criminally."
35. It is said that the judge appropriately charged the jury bearing in mind the diametrically opposed versions of events on the part of the respondent and the appellant.
36. In response to the second ground of appeal, the respondent cites *The People (DPP) v Kelly* (2006) 4 IR 273, wherein the Court of Criminal Appeal adopted the following passage;

"It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty."
37. *The People (DPP) v Mulhall* [2003] 4 IR 273, is cited. In that case, the appeal was rejected in light of the period of time between the impugned remarks and the jury's verdict. The respondent also cites *DPP v Adach* and indicates that the jury in that case was "very split", in an attempt to distinguish it from the instant case.
38. The respondent is of the view that the jury were in no way unfettered, any indication that they were "split" or in "deadlock" was speculative and there was no indication from the

jury that there was any sort of impasse in the jury-room. The judge advised the jury on the end of Day 6 and the morning of Day 7.

39. It is contended that the sequence of the events would indicate that the jury were not in any event, pressured by any comment of the trial judge. There was a full day's deliberation between the conclusion of her comments at 10.06am at the start of Day 7 and the jury verdict at 4.55pm on that day.

## **Discussion**

### **The *Mens Rea* for Rape**

40. The respondent, in every prosecution for the offence of rape, must prove that the offender had the necessary *mens rea* in conjunction with the *actus reus*. S. 2 of the Criminal Law (Rape) Act 1981, defines the offence of rape as:-

“(1) A man commits rape if-

(a) He has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and

(b) At that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,

and references to rape in this Act and any other enactment shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

41. Therefore, the prosecution must prove that:-

- there was sexual intercourse with a woman which involves penetration of the vagina by the penis, no matter how slight the penetration,
- that the woman did not in fact consent,
- that the man knew that the woman did not consent or was reckless as to whether she did or did not consent.

42. The *actus reus* incorporates the first two components set out above. The absence of consent is an element of the *actus reus* and must be proved to the requisite standard of proof. The 2017 Criminal Law (Sexual Offences) Act, s. 48 now substitutes s. 9 of the Criminal Law (Rape) (Amendment) Act 1990 and places on a statutory footing that which was the position in common law. For the purposes of this appeal, the relevant portions are:-

"9 (1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.

(2) A person does not consent to a sexual act if-

[....]

(b) he or she is asleep or unconscious.."

43. The trial judge was correct when she stated that the versions of events were diametrically opposed, in that the complainant gave evidence that she was asleep and woke to find the appellant penetrating her vagina, whereas the appellant contended that she was awake and consented to sexual activity. Again, there was a divergence as to the nature of the sexual activity in that the complainant said that the appellant penetrated her vagina from behind while she was in the foetal position, whereas the appellant said that the nature of the activity was oral intercourse which he performed on the complainant with her consent. This involved the facilitating of the removal of her underwear and shorts.
44. Insofar as the eyewitness' testimony is concerned, she did not give evidence as to the state of consciousness of the female she saw in the room (clearly the complainant), the most that could be said is that she heard no noise and had no conversation with the appellant when he got up and closed the door of the room. Her evidence did not in any significant way advance either version of events.
45. The judge properly directed the jury in terms of the definition of rape, as provided for by s. 2 of the 1981 Act and then properly stated:-

"I will continue with the rest of the definition of rape because even if you decide beyond a reasonable doubt, if you decide on the evidence beyond a reasonable doubt that she was asleep and that sexual intercourse did take place, then you should go on to consider whether or not the accused was reckless as to whether or not she was consenting, or knew that she was not consenting."

46. The judge then pointed out that if the complainant was asleep, she could not consent, which is of course, correct in law; a person who is asleep lacks the capacity to consent. A sleeping person simply cannot consent, it flies in the face of common sense, the common law and the statutory provision now enshrined in s. 9 of the 1990 Act.

However, the judge then went on to say:-

"There's no suggestion or evidence indeed of a mistake as to her condition. If again this is exactly what you have to determine in terms of the facts, if you are satisfied beyond a reasonable doubt that she was asleep, then you know that he either knew this or was reckless as to that fact."

47. Perhaps, it could be said that this paragraph may have led the jury to believe that if the evidence established that the complainant was asleep, then they could be sure that the



appellant knew this. If any criticism could arise on the wording, it may be that it was too definite in terms. However, on the facts of this case, where the versions were so distinct; ie; asleep or awake, we do not believe any issue arises. If the jury were satisfied the complainant was asleep, they then needed to consider whether the appellant knew that this was so. It did not automatically follow that simply because the jury were satisfied to the requisite standard that she was asleep, that the *mens rea* was also made out. It was for the jury to determine this issue, but the charge made it quite clear that this was an issue for their determination.

48. This, on its own, would not lead to any significant concern on our part, however, the extract from the transcript following on from the above is that upon which Mr Bowman has placed the most emphasis is where the judge said as follows:-

“If you consider for instance that he may have been drunk, again I can advise you that if a person drunkenly had sleep (sic) with a sleeping woman, that constitutes the recklessness required for the offence of rape, in terms of any mental state that is required. That is the core issue here, as I’ve said, was the complainant asleep and did the act of sexual penetration occur at that time as she alleges?”

49. The concern expressed is that by stating the above, the judge inadvertently equated drunkenly having sex with a person who is asleep with recklessness. The jury may therefore have been under the belief that if a person drunkenly has sexual intercourse (and the complainant is asleep) that it then follows that that individual is reckless.

50. As we have stated, rape requires penetration of a woman who is not consenting, the penetration must be intentional, and also it is required that the person penetrating the woman knows that she is not consenting or is reckless in that regard.

51. The test for recklessness in this jurisdiction is subjective. As stated by Prof. O’Malley in his text on Sexual Offences, 2nd ed. at para. 3-32:-

“It is now firmly established in Ireland that recklessness involves “not merely the taking of a risk but the *advertent* taking of the risk.” The test is therefore subjective, at least for crimes of consequence.”

52. He goes on to say in the context of a rape offence:-

“In a rape charge, on the other hand, what may become an issue is recklessness as to a circumstance, namely whether or not the complainant is consenting. However, the general moral principle that guilt should be judged subjectively (though that is not a principle commanding universal support) strongly suggests that recklessness in rape should also require advertence. In other words, the prosecution must show that the accused adverted to the possibility that the complainant might not be consenting, but carried on nonetheless.”

53. The Act distinguishes between knowing and believing. Proving the *mens rea* of the offence of rape, that is knowing that the woman is not consenting or being reckless in

that regard may be inferred from the factual matrix of any given case. In CO'R [2016] IESC 64, it was put beyond doubt that recklessness requires that the accused advert to the risk of the absence of consent and to proceed in any event.

54. In that decision Charleton J. stated as follows at para. 46-47:-

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

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

55. The issue in this case was a simple one and one which often arises; was the complainant, as a matter of fact, consenting to the sexual contact? And if not, did the appellant know this? If the jury were satisfied that she did not consent because she was asleep, and therefore lacked the capacity to consent, as she contended, in other words; if they accepted her account beyond reasonable doubt, then the jury needed to consider if the appellant knew that she was not consenting. The jury was informed of this by the judge. An accused man is guilty of rape if he has sexual intercourse with a woman who is not consenting, and he knows that she is not consenting. It is within that category that this case on the evidence fell for consideration and it against the factual background that the judge's charge must be viewed.

56. We acknowledge that the human condition is such that the accurate characterisation of an individual's state of consciousness is not always a binary choice between sleep and wakened consciousness. One might be very sleepy but not quite fully asleep, simply "half asleep" as it is sometimes described. If that was the complainant's situation, then recklessness might well have been relevant. In that factual situation, if the appellant

adverted to the possibility that she might not be fully awake, and therefore might not in fact have been consenting, but continued regardless, then recklessness would have been an issue.

57. However, that was not the position on the evidence, the evidence did not permit of this type of half-way house regarding the complainant's level of consciousness. There was *no evidence* to suggest that she may have been half asleep; it was never suggested by the complainant, the appellant or Ms O'D that the complainant might have been "half asleep" i.e., semi but not fully unconscious. In our view recklessness simply did not arise on the evidence and so in the present case, **on the evidence**, the situation for the jury was in fact a binary one. The complainant was either manifestly asleep, and therefore incapable of consenting which would have been obvious to the appellant, or she was conscious, in which case the issue for the jury was did she or did she not consent. However, in neither scenario was possible recklessness on the appellant's part an issue in the case and something that was going to trouble the jury.
58. If the jury rejected the appellant's version of events, and then looked to the complainant's account that she was asleep, and therefore lacked the capacity to consent, the issue then was whether the appellant knew that she was asleep. If the jury accepted that the complainant was asleep, it is stretching credulity beyond the outer limits to suggest that recklessness played any part in the case. It simply did not in our view.
59. On his own version of events the appellant would have *known* if she was asleep. He said in interview that she conversed with him, that she started to feel his penis, indicative of both verbal and physical interaction. This was not a case of an advertence to the possibility that she might not be consenting and proceeding nonetheless; i.e. addressing his mind to the possibility that she was asleep or partially asleep and proceeding to have sexual contact nonetheless. That did not arise on the evidence. This was a much simpler case; was there evidence to satisfy the jury that the complainant was asleep to the required standard of proof, was there a reasonable possibility that she was awake and participating in the events in issue? The real issue was one of knowledge and not of recklessness. In our view, neither version leaves open any room for recklessness. On both versions, the position was one of knowledge with respect to whether she was consenting or not consenting.
60. We repeat the *mens rea* for the offence of rape is that of knowing that the woman does not consent at the relevant time or being reckless as to whether she is or is not consenting. In our view recklessness was not, in reality, a feature of the case.
61. However, the judge properly defined the offence in terms of s. 2 of the 1981 Act, which incorporates recklessness, which actually favoured the appellant. What was unnecessary in our view was to proceed to advise the jury in very definite terms that drunkenly having sex with a sleeping woman constitutes recklessness and is sufficient to satisfy the mental element required for the offence of rape. If there is an element of error in this wording, it is simply the definitive nature of the words used. The issue of intoxication and

recklessness in the context of a rape offence is a complex one, and one which we do not need to address here.

62. The jury were not in our view advised that drunkenness equates with recklessness. Leaving aside the word "drunkenly", it is correct to say that if a person has sex with a sleeping woman, that *may* constitute (at the very least) recklessness. It is of course for the jury to decide if this is indeed so. As stated, if there is an error, it was the failure to include the word "may" in this portion of the charge, but the judge made it very apparent to the jury throughout the charge that they had to determine the issues, to decide if the prosecution had proved every element of the offence alleged.
63. If the jury are satisfied in any given case that a person drunkenly, or otherwise has sexual intercourse with a woman who is asleep, then the jury must assess whether he knew that she was asleep or was reckless as to whether or not she was asleep. It appears to us, as stated, that recklessness simply did not arise on the facts of this case; on either version of events. The issue was one of knowledge.
64. The judge advised the jury in clear terms that to drunkenly have sexual contact with a sleeping woman satisfied the *mens rea* required for the offence of rape. An alleged offender must know that a woman is asleep or be reckless in this regard. In many instances, it will be necessary to define and explain the concept of recklessness; that is an advertence to the possibility that the woman may not be consenting, consciously disregarding this possibility and proceeding, nonetheless.
65. However, in the present case, given the state of the evidence and taking the defence case as involving interaction both physical and verbal, it is very difficult to see how recklessness played any real part in the case. In reality, in terms of the evidence, if the jury were of the view that there was a reasonable possibility that the complainant interacted as said by the appellant, then the prosecution would have failed to prove beyond reasonable doubt that she was asleep. Should the jury have rejected his account, then on examining the prosecution's evidence, the case made was that the complainant was asleep, if so accepted, then the prospect of him being unaware of that fact is not apparent on the evidence.
66. Therefore, the issue of recklessness had no real relevance to the issue to be determined by the jury and the fact that the judge did not accede to the requisition raised is logical on the evidence. Moreover, when one looks to the requisition raised, and a requisition was certainly raised by counsel, the following is said:-

"Mr Bowman: [t]hat the Court said, "if he was drunk that constitutes recklessness". And I don't think the Court said or gave them the standard definition, is it would be a conscious disregard of all substantial risk, he having adverted to it and proceeded nonetheless. Now, it's just that if recklessness had been raised and that was my note of how the Court explained it."

At a later stage the following exchange took place:-

"Judge: Because it doesn't really arise on the facts, and because I thought they might just wonder what's the relevance of the drink, and actually in a way it's not relevant in this case, it seems to me.

Mr Bowman: Yes, it does seem to be a fact, but not a real consideration."

It is clear that recklessness was not a material issue in the trial. The judge was of that view and it appears that experienced counsel did not diverge from that view. Whilst this is of course not determinative, it is somewhat instructive.

67. Proof of the mental element of rape, that is knowledge of the absence of consent or recklessness as to the presence or absence of consent is to be inferred from all the relevant circumstances in the case. We are satisfied that recklessness did not arise on the facts of this case. A charge must be tailored to the facts as was done in the present case.
68. It is certainly so that a judge should advise the jury as to what recklessness entails in many cases, including in cases where it is alleged that a complainant was asleep, however, we observe that for such to arise, it would only do so in very fact specific circumstances which we will not speculate upon here.
69. Recklessness simply did not arise on the facts of this case in any material way and accordingly, this ground of appeal fails.

#### **Undue Pressure**

70. Insofar as the second ground of appeal is concerned, the criticism raised concerns the judge's remarks following the majority direction. First, it is readily apparent from the transcript that the judge in concluding her charge made it clear to the jury that they would "dictate the pace of events.." Thereafter, in advising the jury as to a majority verdict, she said:-

"But as in all criminal trials, the ideal verdict is one of unanimity. So if you can strive to achieve that, we would be very grateful. In any event, I am going to leave you with that new instruction for the moment, in the morning obviously that will apply and throughout the rest of your deliberations and I will inquire with you in due course as to whether you are making progress such as to reach a verdict. **And we hope you will because obviously in circumstances whereas you've heard the evidence in the trial now, if a jury doesn't come to a verdict, that can result in a new trial having to take place. And really, that is not an ideal situation for anybody.**" (our emphasis).

71. The following day, the judge informed the jury of the possibility of a disagreement and said thereafter:-

"Please, if you can, reach a verdict, but that is not to say that if there are amongst you those who hold very firm views one way of the other, this is not my attempt to try and sway some of you to one or the other side. It is always a matter for you, ladies and gentlemen, as to the facts and as to your views of them."

72. We have examined the transcript carefully and are not at all persuaded that the words of the judge were inappropriate. She merely advised the jury that if they were unable to reach a verdict, a new trial would be required. This was not urging the jury to achieve a verdict, but simply advising them of a fact, perhaps one that was already known to them.
73. The words of the judge the following day made it quite clear to the jury that the verdict was for them to reach, and they were placed under no time constraints of any kind. We are not persuaded that the jury were under any type of improper pressure to achieve a verdict.
74. Accordingly, as we have found no error in principle, we dismiss the appeal.