



THE COURT OF APPEAL

[UNAPPROVED]

Court of Appeal Record No. [114/19]

Neutral Citation No: [2022] IECA 20

Edwards J

McCarthy J

Kennedy J

BETWEEN

E. R

APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of the Court delivered by Mr. Justice McCarthy on the 28th day of January 2022

1. This is an appeal against conviction and sentence. E.R, the appellant herein, was on the 4th April 2019, after an eight day trial at the Central Criminal Court, convicted by a jury of a single count of rape, contrary to section 48 of the Offences Against the Person Act 1861 and section 2 of the Criminal Law (Rape) (Amendment) Act 1981, as amended by section 21 of the Criminal Law (Rape) (Amendment) Act 1990, on Bill No: CCDP0100/2015. On the 17th of May 2019, the appellant received a sentence of six years imprisonment with two years post-release supervision, dated from the date of the verdict. This judgment deals with conviction only.

2. The appellant, then aged 24, raped the victim, who was 22 years old at the time, in the early hours of the morning of the 21st March 2015. The appellant and the complainant had been in a relationship which began in January 2014. This progressed even though the appellant

travelled abroad in August 2014 for a number of months; they remained in daily contact and the relationship did not end until January 2015. Thereafter the complainant wished merely to remain friendly with the appellant, and they continued to have regular contact by text from this period until the incident in March. On a number of occasions, the appellant would offer or accept requests to drive from his home in County L to collect the complainant from her home in County C and take her to meet a friend who was living in County K. He would also collect her afterwards and take her home to County C; the round trip was a considerable distance. This journey was made on four occasions and the first was in February 2015. They had consensual sex on two occasions – the first and third of those four in all. The latter occurred at the same place as that where the rape occurred.

3. On the 20th of March 2015, the complainant had asked for a lift to visit her friend in County K and on this fourth such occasion the rape was perpetrated. The appellant told the complainant that he could collect her; despite the fact that the complainant was happy to leave it and go some other time; the appellant insisted he didn't have anything to do and called to collect her at approximately 7:45pm. When they arrived in County K, the appellant went to kiss the complainant, but she pulled away as she did not want to do so. He sent a text to her thereafter which said, "*Sorry for kissing you, I feel bad now (sic)*" and she did not send any reply. In any event, the complainant, later on, texted the appellant, as she was accustomed to do, asking him to collect her, and the appellant arrived at around midnight and waited for her to leave a particular bar; the complainant had approximately six drinks during the course of the evening. Firstly, the appellant dropped the complainant's friend home nearby, and they then proceeded to County C. On the way, they saw a garda patrol car – Gardaí were observing traffic. The Gardaí tried to stop the appellant, but he drove on to avoid them and he did this, as he told the complainant at the time, because he was driving without insurance and he had convictions for road traffic offences. Gardaí gave chase but abandoned it due to the dangerous

driving of the appellant. The complainant was not sure how long the appellant's "crazy" driving to evade the Gardaí lasted but she said that it "*felt like a lifetime and she was going to die*".

4. Having successfully evaded the Gardaí, the appellant drove back to his own home in County L to switch his vehicle for another. The complainant also got into the vehicle but described the atmosphere as heated and further said: "*I started giving out to him. He didn't even say anything, so I wasn't getting anywhere... I didn't talk to him, I was -- I was angry, I was scared.*" They eventually reached the complainant's home; however, the appellant did not stop but instead proceeded to the location of the consensual sex on the preceding occasion. The complainant was acute to what was going on and noted that "*I knew what he wanted, I was, like, no, drop me home but he just said two minutes and we ended up outside*". At this juncture, the complainant was anxious and just wanted to go home. She described efforts to leave saying "*I didn't get out, but I went to open the door and I was, like, I'll go myself*" but the appellant urged her to wait. She said that before she even knew it, the appellant had moved across from the driver seat on top of her. The complainant elaborated to the effect that "*the seat was pushed back and he was in between my legs and I had my hands up against his -- I pushed for a while but I wasn't getting anywhere and after a while of saying no, I have to go home to [my son] I just -- I froze*". The appellant proceeded to pull down her pants and underwear as well as taking off his own. She said no to the appellant approximately five or six times as well as mentioning her son's name and telling the appellant she wanted to go home. She had done this until, in her own words, "*it was too late*". The appellant then proceeded to intercourse. She remained silent at this point in a "frozen" state and turned her face away towards the window. The rape went on for a few minutes and he then dressed himself as did the complainant. He then dropped the complainant home, and nothing was said.

5. The appellant sent a number of text messages and one Facebook message to the complainant in the immediate aftermath of the rape, including one sent just after 03.03am in

which he said, *"I'm so sorry, Jas, and for being a bollocks"*. The next morning at 10:28am he sent another saying *"I'm sorry for what happened last night, Jas"*, and thereafter on the same day at 11:44am a third in which he said *"It's okay, I know how you feel by, all the best"*. Some four hours later, having received no replies from the complainant, the appellant messaged *"Are you dead or alive?"* and at approximately 6pm he again sent her a text asking, *"when can you talk please?"*. Finally, that evening, he messaged *"Why will you not answer? You must be sour. I leave you alone, have a good night. I staying at home and sorry, Jas, bye."* The following day two more messages were sent, the first was at 14:14 which said, *"You still sour now?" I'm at home alone until tomorrow if you want to call"* and thereafter that night at 22:22 he sent yet another to the effect that *"Body, do you NT give a shit what happens me?"*. In the Facebook message which one infers was sent later again on that day the appellant asked *"do you not care what happens to me"*. It appears that there were also a number of missed calls from the appellant. The complainant's mother, on viewing her daughter's phone and pressing the redial button, in respect of the appellant's number, spoke to the appellant whose first words were *"I'm sorry"* in response to how she spoke to the appellant in unequivocally critical terms.

6. The appellant's position at trial was that these texts, the Facebook message and phone contact referred to the wider events of the night and pertained more so to the kissing incident and particularly the car chase, whereas it was the prosecution's case that they amounted to admissions after the fact of the rape.

7. The complainant made a complaint to Gardaí on the 22nd of March 2015 and she was taken to a Sexual Assault Treatment Unit that evening where she was given a physical examination. A Dr Mehboob Kukaswadia noted that there were two areas of physical injury found on examination namely bruising in the right hip area and bruising in the left lower leg just below the knee.

8. The appellant contested the matter on the basis that the sexual intercourse which took place was consensual and the core of his defence is summarised in his account to the Gardaí, the most significant portion of which (set out in his written submissions) in that regard is as follows: -

“We arrived... and drove up through the town I asked her did she want sex or not and she agreed. I asked her where to do you want to pull down to and she said down to the usual spot where the limestone is. We pulled up there and I ripped my seat belt and she said give me one second there until I take off my pants. I jumped across from the driver's side to the passenger side. I ripped the buttons on my pants. I pulled down my pants and my underpants. She felt my penis to get me aroused. I inserted my penis into her vagina. She was moaning. She liked it. It lasted for about five minutes maybe. I comed into her, it was finished. I opened the door of the jeep, the passenger door, to fix my pants and she was able to fix hers. From which I sat into the driver's side, which I asked her was she all right and she said yeah, from which I started the jeep and I sat back and headed for her house, which was only a two minute drive, for which I pulled up outside her house and said I'd talk to her tomorrow. She closed the door and that was it. I texted on the way back saying sorry about the car chase. I drove home and into bed.”

As also pointed out in those submissions the immediate event as given in evidence by the complainant may be seen from the following portion of the cross examination: -

“Q. Okay. So, at this point were you saying anything to him?”

A. Yes, I just kept saying I had to go home to [my son].

Q. Okay. And did he respond to you?

A. *Just that time when he said oh, I'm stressed because my aunt is dead.*

Q. *Okay?*

A. *And I just kept saying no at the start.*

Q. *Okay. So, what were you saying no to?*

A. *I didn't want to have sex with him.*

Q. *Okay. And how many times do you think you said no?*

A. *Until it was too late.*

Q. *So, you'd indicated you said you wanted to go home?*

A. *Yes.*

Q. *You'd opened the door?*

A. *I didn't open the door, I went to open*

Q. *You went to open the door, you didn't get out or open the door fully?*

A. *No.*

Q. *And at that point you described him being on top of you on the passenger side; is that right?*

A. *Yes.*

Q. *Okay. So, what happened then?*

A. *The seat was pushed back, and he was in between my legs and I had my hands up against his. I pushed for a while, but I wasn't getting anywhere and after a while of saying no, I have to go home to [my son] I just I froze.*

[...]

Q. *And when you say you were trying to get him off you, did that work?*

A. *No.*

Q. *Right. And what were you saying, if anything, at this time?*

A. *I just kept saying I've to go home to my son.*

Q. *And what happened then?*

A. *He pulled down, he pulled down the, sorry. He pulled down the leg of my pants and took off his pants and took off the leg, my boot, my pants, my knickers, just off one leg and he took off his pants, not fully, just as if down as far as underneath the knees and his underwear as well underneath the knees.*

Q. *Okay?*

A. *And he just had sex with me.*

Q. *Okay?*

A. *His penis entered in my vagina.*

Q. *Were you saying anything at this time?*

A. *No. And it went on for a few minutes. It was slow and he finished and climbed back over to his own seat, pulled up his own clothes, I put on my clothes and just dropped me home."*

9. It is plain from the transcript that since the fact of sexual intercourse was accepted the only issues in the case were whether or not at the time of intercourse the complainant consented to it and whether or not the appellant knew she did not or (to quote the appellant's submission on this appeal), as is here contended, "*whether [the appellant] had believed that it had been (sic) [consensual]*". The core of the defence case *as it actually ran* was undoubtedly that consent had been given; there was no mention of any kind in the course of the trial whether in submissions, speeches, requisitions or otherwise of the issue of recklessness as opposed to knowledge that there was no consent. Whilst the supposed relevance of whether or not the appellant might have been reckless as to whether the complainant was consenting or not was raised in the second ground of appeal and referred to in particular in the written submissions it

was ultimately, and rightly, abandoned and, here, insofar as this appeal is concerned with the *mens rea* of the appellant and the charge in relation thereto we are dealing only with the question of whether or not, subjectively speaking, the appellant might honestly, though unreasonably, have believed that the complainant was consenting to the intercourse. This was not a source of procedural controversy as this was the issue raised below and the appellant was confined to it.

10. The closing argument by counsel for the DPP gave rise, subsequently, to a requisition and is the foundation for one of the two grounds of appeal now being pursued. We do not propose to quote her speech to the jury in extenso but she quite properly on the evidence, and as the prosecution case, advanced the proposition that the defence's position was a black and white one in that they summarised the appellant's position as: "*There can be no room for mistake, she wanted it and she got it.*" The appellant does not dispute the legitimacy of the contention. The appellant's position was that this contention would have, potentially, in the minds of the jury give rise to the view that mistaken consent could no longer play a part in their minds as a so – called "secondary" defence.

Grounds of Appeal

11. The grounds of appeal relied upon are as follows: -

- i. *The learned trial Judge erred in failing to accede to the requisitions sought by the defence in relation to the sole count on the indictment.*
- ii. *Without prejudice to the foregoing, the learned trial judge erred in failing to accede to the requisition sought in relation to the possibility of any recklessness being inadvertent notwithstanding the primary defence that there was expressed consent.*

- iii. *Without prejudice to the foregoing the Learned trial judge erred in failing to accede to the requisition sought in relation to the relevance and possible importance of the 'driving episode' to the overall defence case.*
- iv. *The verdict returned by the jury were (sic) perverse, inconsistent, and unsupported by the evidence.*

Counsel for the appellant is now relying on Grounds 2 and 3.

Ground 2 – “... *the learned trial judge erred in failing to accede to the requisition sought in relation to the possibility of any recklessness being inadvertent notwithstanding the primary defence that there was expressed consent.*”

12. As indicated above under this head, the question of a subjective but unreasonably held belief that consent existed was dealt with, the portions of the original charge directly relevant to the topic of consent (and we think it appropriate to set them out in extenso) are as follows: -

“Now, the question of consent looms large in this case. You must be satisfied if the prosecution is to succeed on this charge that the -- that [the complainant] did not consent to the sexual intercourse and you must be satisfied that that consent was absent and you must be satisfied beyond reasonable doubt of that fact. And that is a matter which is essential to the prosecution proofs and that is a matter in which there is a clear divergence in terms of the approach adopted by the prosecution and by the -- sorry, by the complainant and the accused, bearing in mind that the onus of proof is on the prosecution and the accused does not have to prove anything. In terms of the consent, therefore, that is a fact that must be established beyond reasonable doubt by the prosecution if they are to succeed. If they have not established that fact you must acquit.”

“The next element, in terms of the ingredients of the offence, it must be established that at the -- if it's established that the physical act has occurred, that it was without consent, it must be established also then by the prosecution that at the time of the sexual intercourse, the accused knew that the complainant did not consent to the sexual intercourse or was reckless as to whether she did or did not so consent. So, your task then is to assess and consider whether the prosecution have established whether the act of sexual intercourse occurred, whether that occurred without [the complainant's] consent and if you're not satisfied of those propositions you must acquit. If you are satisfied on those -- on those aspects of the case you're then entitled -- you then go on to consider what is regarded as the mental element. What was in the accused's mind in relation to these factors at the time of the sexual intercourse? If those matters are established beyond reasonable doubt you must consider whether at the time of the intercourse the accused intended to have sexual intercourse with [the complainant's] without her consent or was reckless as to whether she did not or did not -- did or did not consent to it.

Now, in that regard, the first element of that, are you satisfied beyond reasonable doubt that at the time of the intercourse with [the complainant], at the time when she was not consenting, the accused knew she did not consent and that is essentially an issue in this case, if you take it that the -- I'll come to the details of the evidence in relation, to the accounts given from both perspectives, but that is an issue that is -- the issue of consent and its existence is at the core of the case. The issue of the intention in the mind of the accused is at the core of the case.”

“You're entitled to infer from the surrounding circumstances whether consent existed and the state of mind of the accused in relation to the act of consent -- the act of sexual intercourse and whether it was by consent or whether there was knowledge that it was

without consent. If you're satisfied beyond reasonable doubt that the accused had sexual intercourse with [the complainant] without her consent, knowing that she did not consent, that is rape and you must convict. If there's a reasonable doubt about that you must acquit."

"An accused may claim that he genuinely believed that the complainant was consenting to sexual intercourse if an accused held an honest belief, a subjective belief on their part which might be regarded as objectively unreasonable by somebody looking in at it, that [the complainant] was consenting. This is a defence to a rape charge. It is the accused's actual and honest subjective belief that gives rise to the defence, not whether a reasonable man would have held such a belief and it's important to bear in mind it's his honest view as to the existence of consent that must be assessed. Any such belief, of course, must be genuinely held and must be based on circumstances that have some foundation or a foundation in reality. Whether it may have existed must be determined by reference to an assessment of the evidence. Therefore, when coverage the issue of recklessness, it is for you to determine whether a claim of honest though unreasonable belief in [the complainant's] consent was held by the accused. If [the appellant] was aware of the possibility that [the complainant] might not be consenting, any conscious disregard of that possibility that she was not consenting means that for him to proceed in the circumstances was to act recklessly and if he did that is the offence of rape. The prosecutor must -- the prosecution must establish that such an honest belief, if claimed, has been excluded on the basis of the facts established on the evidence, beyond a reasonable doubt and it's a matter for you to determine the credibility of the witnesses on this issue and on the facts as you find them and the appropriate inferences that you consider appropriate that may reasonably be drawn from those circumstances as established as to whether such belief existed or was honestly held. So, they are the

ingredients of the offence of rape and they are the legal principles, that's the legal definition within which the prosecution must establish the facts of the case beyond a reasonable doubt."

13. The judge, following a number of questions from the jury, returned to the topic as follows: -

"So, the elements you have to consider then; firstly, whether the accused had sexual intercourse with the complainant who, at the time, did not consent and you have the -- the physical element has to be established beyond reasonable doubt in terms of penetration of the vagina by the penis, slight penetration being sufficient and it's not necessary to establish ejaculation in the vagina. The penetration must have occurred without the alleged victim's consent and then it must be established -- if those factors have established beyond reasonable doubt you have to also consider the further factor that must be established which is that the accused knew that at the time of the sexual intercourse the complainant... did not consent to the sexual intercourse or was reckless as to whether she was consenting or not.

As part of your consideration of the belief whether a woman was consenting to sexual intercourse, the law requires you to have regard to the presence or absence of reasonable grounds for such a belief in conjunction with any other relevant matters in considering the belief of the accused in this case. So, have the prosecution established beyond reasonable doubt the physical aspects of the offence? Have they established beyond reasonable doubt that there's an absence of consent? Have they established beyond reasonable doubt that at the time the sexual intercourse took place the accused knew that [the complainant] was not consenting or was reckless as to whether she was consenting or not?"

“Now, in respect of the other aspect of the offence, recklessness, which is the other state of mind that may establish an offence of rape, if you're satisfied that there's no consent to the sexual intercourse, which is a matter of objective fact to be determined by you on the evidence available to you, if that's established beyond reasonable doubt you may consider it appropriate on the evidence to consider whether the accused had an honest, though unreasonable belief that [the complainant] was consenting to the intercourse. You may consider that, on the facts of the case -- sorry, you must consider the facts of the case and you must consider the issue of the state of mind in terms of knowledge at the time or recklessness on his part if you think that's an appropriate basis upon which to proceed having regard to the facts of the case, which are a matter entirely for you.

Recklessly means that the possibility that a woman was not consenting actually occurred to the mind of the accused. If the accused decides to proceed with or continue with the intercourse, even though he has adverted to that risk, that is recklessness. An accused may claim that he genuinely believed that the complainant was consenting to the intercourse and if an accused held an honest, subjective belief, personal belief, though looking in on it might be regarded as unreasonable that the woman was consenting, that is a defence to a rape offence. It's the accused's actual, honest, subjective state of mind belief that gives rise to the defence, not whether a reasonable man would have held such belief. It's an honest -- it's his honest view as to the existence of consent that must be assessed.”

“Now, of course any such belief must be genuinely held and must be based on circumstances that have a foundation in reality, whether they -- it may have existed must be determined by an assessment of the evidence. So, in considering recklessness it is for you to determine whether the claim of honest though unreasonable belief in [the complainant's] consent was held by the accused. If the accused is aware of the

possibility that a woman may not be -- that [the complainant] was not -- may not have been consenting, any conscious disregard of that possibility would mean that for him to proceed would be to act recklessly and if he does he commits the offence of rape.

Now, the prosecution must establish that if such an honest belief is claimed it has been excluded on the basis of the facts established in evidence, beyond a reasonable doubt. It is a matter for you to determine the credibility of the witnesses on this issue and also on the facts as you find them and the inferences that may reasonably be drawn from them as to whether such a belief existed or was honestly held. So, that's the second limb of the state of mind. So, it's knowledge that she knew -- that he knew she was not consenting at the time of sexual intercourse or recklessness as to her consent in the terms that I define it. So, that is rape as defined by law."

14. Counsel for the appellant ultimately contended before us that the closing argument of the DPP had a consequence as to how he should have charged the jury in relation to the *mens rea* for rape with particular reference to the subjective state of mind of the appellant as to knowledge of want of consent. It was expressly agreed on behalf the appellant that the judge's charge was "immaculate" in respect of the ingredients of the offence, including the requisite *mens rea*, whether it be knowledge or recklessness. The acknowledgement was subject to only one qualification, a qualification which gives rise to this ground, namely, the refusal by the judge of the requisition, referred to below, arising, it was contended, as a consequence of that closing. This was the requisition (so far as material in respect of the present ground): -

"... [counsel for the prosecution] then went on to say and I think the wording might be of importance so I will take correction: "There can be no room for mistake, she wanted it and she got it." Now, my fear is that that, there can be no room for mistake, might be taken to be an indication or some suggestion to the jury that precludes the fact that

consent was certainly a part of the defence case, that precludes the second possibility in terms of mens rea, not only that there was consent but that there was -- there was a mistake, albeit that there was a mistaken belief possibly as to consent even if it wasn't present, the two are not obviously mutually inconsistent.

So, by speaking to the defence case, although the Court perfectly well, and I've no complaint at all in the manner in which the Court addressed the second element of the mens rea in terms of that, that was a general direction given to the jury. In this instance, it was said specifically the fact that consent was maintained, positive consent was maintained out rules the possibility for if one interprets the no room for mistake comment as being that, that that out rules the possibility of an honest mistake type defence in relation to the mens rea. That is the first point that arises out of the closing."

- 15.** The requisition was refused by the learned trial judge on the basis that it was not the Court's function to "critique" the speech of prosecution counsel in the following terms: -

"Right. Well, in terms of the points made I'm not disposed to recharging in relation to the issues said to arise from [counsel for the prosecution's] submissions to the jury. They were submissions and submissions have their own standing within a criminal trial and I'm not going to get into a favouring of one submission over another or a critique of one submission as opposed to another and it seems to me that it would be not helpful to the jury if I were to embark on that exercise. It seems to me that the issue as to consent or not consent has been set out for the jury fairly in clear terms and that they now understand the burden in relation to that, discharging the onus is on the prosecution in respect of the consent issue."

16. It was contended here that when addressing the issue of knowledge of want of consent some direct, express, reference, at some point, ought to have been made to prosecution counsel's speech in terms; whilst the precise form of words to be used was not elaborated it was contended that it should have been said that contrary to the prosecution case it was open to the jury to take the view that even if there was no consent the appellant could honestly, subjectively speaking, though perhaps unreasonably, have believed that there was consent (what the appellant in his submissions calls a "*secondary defence* ") primarily on the basis of the sexual history of the parties.

17. We think that the judge was right to reject the requisition and that the absence of such a reference is not open to criticism. A charge, as emphasized repeatedly, is not a wish list of what a party might think is in his interest but an exercise in communication of the principles of law and the facts relevant to the decision from which will appear each party's case. It must be taken as a whole. The issues here could not have been more obvious to the jury on the plain terms of the charge, especially on the issue of *mens rea* and subjective belief whether reasonably held or not; each side's case was plain to be seen from what the judge said. The topic was dealt with comprehensively in every possible respect. There may well be cases where the judge should make some reference to what counsel said; the best example is when counsel may have erroneously stated the law or, perhaps in some significant way, the evidence. Whether to say anything or not will fall to the discretion of the judge. This is most certainly not such a case.

18. We therefore reject this ground.

Ground 3 – “*Without prejudice to the foregoing the Learned trial judge erred in failing to accede to the requisition sought in relation to the relevance and possible importance of the ‘driving episode’ to the overall defence case.*”

19. This ground was a criticism of the charge insofar, in fact, as it dealt with the texts, Facebook message and phone call. In respect of the phone call, having reprised the evidence referred to above pertaining to it the judge went on to say that: -

“Now, that's again a matter to be assessed by you was it said. You'd have to be satisfied beyond reasonable doubt that what [the complainant] said was said to her was said and then in order to act upon it as a statement acknowledging some guilt in the matter you'd have to be satisfied that it was referable to that beyond reasonable doubt and not referable to something else such as the driving and where there are two views possible you must accept that view which is most favourable to the accused unless the prosecution have excluded it to your satisfaction beyond reasonable doubt by reference to the -- to all of the evidence in the case.”

At a later stage in the charge the judge also said: -

“... While I'm endeavouring to give you a view – overview of the evidence, that's to say sorry, not everything will be included in it, although it might seem that way not everything is there. There are other things, such as the text messages, that you may wish to read yourselves and take account of have regard to. In the way they been open through counsel, I don't intend to [go] through all of those text messages. You give them such weight as you think appropriate. I made – I have mentioned some of the because they seem to be emphasised when being introduced into evidence for a particular reason.”

20. The requisition referred to under this head is as follows: -

“...but insofar as obviously the prosecution's view of the relevance of the chase is that it left the complainant in a distressed state which made her much less likely to be

amenable to the consent which the defence say was present, that is the prosecution's contention with regard to the importance of the chase.

The defence has its own very specific contention which was that it informed the apologies the day following, that the chase, both in its seriousness, not a common or garden chase, that it was aggravated, if one could use that word, that it was aggravated also by the legal consequences for the accused insofar as the fact that he was on hazard, would be suffering a heavier penalty... if he was detected rather than rather than the possibility for the students specific relevant or a specific relevance was highlighted to, to exclude that other relevance is not to bring to the jury's attention to it also at the same, again in... That they might find themselves thinking that they should not consider the chase which occurred in the context which the defence asked that they were considered and particularly not informing the issues on that night then back... Providing background to them, because, in terms of changing the cars but how they informed his mentality in the apologies he said that evening and following morning."

21. We understand this requisition to be that the judge should have made some additional reference in his charge to the defence case – beyond the already extensive references – that the car chase gave rise to the apologies in circumstances where it was the prosecution case that the chase and the complainants reaction to it was a contra-indication of consent (to put it shortly), as submitted in prosecuting counsel's speech. The topics are self-evidently separate. The judge made no reference to that prosecution contention – it was a submission by counsel and nothing more. The judge refused the requisition in the following terms: -

“Insofar as there is a concern that [there is] ... an imbalance in respect of the prosecution view being favoured in the charge in respect the summing up in terms of the account given by the complainant... That she would not be best disposed towards consensual intimacy having regard to the experience just some short time earlier in the car chase that ought to be balanced by some understanding of providing a background for his apology as well... The background to the apology is fairly well set out, both in his interview notes and his understanding and submissions made on his behalf and indeed the summing up in relation to the fact that the apology was in relation to the driving and so insofar as that reference in terms of understanding of the background to ...[the intercourse]... The background ultimately is in relation to the apologies made is in relation to the driving and that, I think, is make clear the jury so I don’t propose to recharge in respect of that.”

22. In the appellant’s submissions (and the same position was adopted the hearing) it was accepted: -

“... that the jury were well charged in general by the learned trial judge in relation to the summary of the evidence overall. That being so, the specific issue concerning the manner in which the evidence of the car chase was described by the judge – and its relevance to the defence – is unlikely to pieces fitted in and of itself to give rise to a misdirected jury.”

23. The jury had the texts. Extensive reference was made by the judge to what was said by the appellant to the Gardaí in interview. Frequently judges refer only briefly to the substance of interviews since the jurors have them in writing. Here, however, the judge went through the substance of what was said in some detail in a number of respects referring,

inter alia, to the responses of the appellant when asked about the texts. It was in these interviews that the entire defence was set out. Thus, the appellant's stance – the defence case – about the meaning and intent of the texts was abundantly clear to the jury and again, on this topic, the conflicting contentions of the parties were clear. We simply cannot here, on grounds of length, set out the repeated and extensive references in the charge to the texts and the appellant's explanation. There was no need for the judge to go further. We therefore also reject this ground of appeal.

24. We accordingly dismiss this appeal.