THE COURT OF APPEAL

Record Number: 232/2019

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

A.M.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of December 2022 by Ms. Justice Kennedy.

1. This is an appeal against conviction. On the 26th July 2019, the appellant was convicted of six counts on the indictment; counts 1 and 2 relate to offences of rape contrary to s. 48 of the Offences Against the Person Act, 1861 and s.2 of the Criminal Law (Rape) Act, 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act, 1990. Counts 4, 5, 6 and 7 relate to offences of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act, 1990.

Background

2. The complainant is a Slovakian national. She came to Ireland in 2009 with her two children to join her long-term partner who was already living in the jurisdiction. The complainant met the appellant, a Polish national, at a time when she was experiencing difficulties in her relationship with her partner. The appellant offered the complainant accommodation for herself and her two children at his house. The arrangement being that she would not be charged rent, but she was expected to clean the house.

3. The first count of rape relates to an incident which was alleged to have occurred on the 1st January 2013. The parties had attended a New Year's Eve party and while driving home the

following morning, the appellant explained to the complainant that there is a Polish tradition whereby on New Year's morning men sleep with their wives or partners. The complainant gave evidence that following this conversation, the appellant came into her bedroom and instructed her to go with him to his room. She said that he was shouting very loudly and produced a pistol. She gave evidence that she went to his bedroom and had sex with him for a moment, following which the appellant took her to collect the children. The complainant said that after this incident she moved out of the appellant's house and returned to live with her partner.

4. The second count of rape relates to an incident which occurred between the 1st February 2013 and the 30th April 2013. At this point in time, the complainant, her partner and their two children had moved to a new address and the complainant's partner was working for the appellant in his garage. The complainant gave evidence that while her partner was at work in the garage, the appellant asked her for oral sex in the living room of this new house while one of her children was present in the room. She said that he sat down on the sofa, opened his trousers and began to masturbate. It is the complainant's evidence that the appellant grabbed her and asked her to sit on him, at which point they had vaginal sex.

5. The appellant was in Poland for a period between 2013 and 2016. In August or September 2016, he made contact with the complainant as he was coming to Ireland to visit their daughter who had been born in late 2013. At this point, the complainant, her partner and her three children were living at a further new address and the appellant came to stay with them at this address for a period of approximately two weeks. During this time, the complainant alleges that the s. 4 rape offences contained in counts 4, 5, 6 and 7 occurred where she would be forced by the appellant to massage his penis and perform oral sex on him.

Grounds of Appeal

6. The appellant appeals his conviction on two grounds as follows:

> *"1. The Learned Trial Judge erred in law and in fact, or in a mixed question of law and fact, in failing to accede to a Defence application at the conclusion of the trial to discharge the jury in circumstances where the complainant had intentionally and gratuitously introduced misconduct evidence which was prejudicial and of no probative value before the jury, reflecting upon and touching upon the character of the Defendant, to include previous convictions recorded against him;*
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> *2. The Learned Trial Judge erred in law or in fact in failing or refusing to grant an application for a direction at the request of Counsel for the Defence at the conclusion of the Prosecution case."*

Submissions of the Appellant

The refusal of the trial judge to discharge the jury or to direct verdicts of not guilty.

7. The grounds are in effect considered as one in the appellant's written and oral submissions. In support of their submission that prejudicial evidence was put before the jury, the appellant refers to certain sections of the transcript which may be summarised, *inter alia*, as follows:

- An allegation by the complainant that the appellant takes cocaine.
- An allegation by the complainant that he had had previous dealings with the Gardaí: *"Well, Police were there [the appellant's house] before and as always they didn't find anything.*

They had some report on him but they didn't find anything because he always knew how to arrange things."

- An allegation by the complainant of a previous drug search at the house: *"Well, all of this happened before, earlier, and they were searching the house because of the drugs and they knew what kind of beast this person was and how could I defend myself against such a human, I was worried for my daughter."*
- Allegations by the complainant of the appellant drug dealing, being part of the Mafia, having murdered a person and having threatened his wife*: "But he is a terrible person. He is a drug dealer. He is mafia. He murdered a person in Russia. He is the—he is wanted in Poland and he also was in prison in Ireland for three years because he was threatening his wife. So what kind of person is that."*
- Allegations by the complainant's partner that the appellant is a thief, that he was under the influence of drugs and that those who worked for him feared him: *"he is just a thief and he is an animal. He takes things from other people. Also this car that is depicted in the photograph numbered 1, [the appellant] took it from another person. He took the key. He was beating that person, took a key and took that car. I remember that about this particular car because I went with him to get that car. He was violent with everybody because he was under the influence of drugs all the time because everybody that works for [the appellant], they are afraid of him because they are selling drugs for him."*

It is the appellant's position that this prejudicial evidence was proffered gratuitously in situations where it was not relevant to the question being asked.

8. The appellant cites McGrath on *Evidence* (3rd ed) at paras 9-15 wherein it is stated that evidence of the bad character of an accused is inadmissible, and that the prosecution cannot adduce such evidence as part of its case or seek to elicit it by cross-examination of the accused or witnesses called on his or her behalf. *The People (DPP) v Murphy* [2005] IECCA 1 is similarly relied on. In McGrath it is noted that evidence of the accused having been convicted of criminal offences, having served time in prison or having a history of violence clearly constitutes evidence of bad character.

9. The appellant submits that the admission of evidence of bad character poses a serious threat to the fairness of a criminal trial and that, therefore, it can be contended that the exclusionary rule in respect of bad character evidence is required by Article 38.1 of the Irish Constitution. McWilliam J in *King v Attorney General* [1981] IR 233 is cited in support of this.

10. The appellant, in respect of his submission relating to bad character evidence, further relies on *The People (DPP) v Keogh* [1997] IEHC 87, wherein Kelly J expressed the view that *"the adducing of such evidence would run counter to the basic concept of justice inherent in our legal system."*

11. Where misconduct or bad character evidence is introduced, this can be remedied by either the giving of appropriate directions to the jury, or where there is a risk of an unfair trial because of the prejudice that has been caused, the discharge of the jury. This was explained by Mahon J in *The People (DPP) v Coughlan Ryan* [2017] IECA 108, as follows:

"The exercise of discretion by the trial judge whether or not to discharge a jury has to be undertaken in light of the particular facts of each case, but always subject to the primary consideration as to the extent of the prejudicial effect of the inadmissible evidence on the jury and any likely consequential undermining of the accused's right to a fair trial."

12. The appellant notes that, in that case, a revelation by a prosecution witness, late in the trial that the accused had been in prison more than once for serious offences was held to have had a significant prejudicial effect and therefore, the jury ought to have been discharged.

First application to discharge the jury

13. This application was made on the 10th July 2019 as a result of evidence given by the complainant before the jury on two occasions concerning the production of a pistol. The defence were not on notice of this evidence. This application was refused.

Application for a direction and second application to discharge the jury

14. The application was renewed on the 22nd July 2019 on the conclusion of the prosecution evidence following what is said to be further highly prejudicial evidence as outlined above and the trial judge once again refused the application. This application was canvassed as an application for a direction, however, on clarification by the trial judge, it transpired that the application extended to discharge the jury, for a direction and to stop the trial, relying upon the inherent jurisdiction of the court in terms of the *PO'C* jurisprudence.

15. *The People (DPP) v WM* [2018] IECA 150 is relied upon wherein the complainant gave evidence that the accused was a convicted sex offender. No application to discharge the jury was made at the time and it was held that the judge had been correct not to discharge the jury on foot of an application made several days later. In contrast to this, *The People (DPP) v Murphy* [2015] IECA 201 is cited wherein there was no criticism of a delay in making an application for a discharge.

16. It is argued notwithstanding the delay in making the application to discharge the jury, that a point must come when evidence is so prejudicial that this Court must intervene to preserve an accused's right to a fair trial. Moreover, it is said that counsel explained (when moving the application) that it would have been premature to move the application to discharge the jury at an earlier stage in the trial.

Submissions of the Respondent

17. The respondent says that the impugned evidence arose in the course of cross-examination which came about as a result of repeated questioning on behalf of the appellant and that the trial judge expressly warned the jury not to rely on the material.

18. It is said that the trial judge was correct in refusing the applications. She expressed "surprise" that an application did not arise earlier in the trial given the nature of the evidence heard and had assumed "*there was a point to the fact that such evidence had been elicited in the course of cross-examination."*

19. It is submitted that the trial judge correctly exercised her discretion in refusing the appellant's application to discharge the jury on the basis of prejudicial evidence in circumstances

where such evidence was garnered in the course of cross-examination and the result of strategising by the prosecution.

20. The respondent distinguishes the instant case from a case relied on by the appellant, *Coughlan Ryan* and submits that the judge's approach in the instant case in considering the context in which the prejudicial approach was adduced was in keeping with the considerations set out in that case.

21. Reliance is placed on *WM* in which case this Court noted that the prejudicial evidence was given in the course of cross-examination of the complainant. The Court went on to state that:

> *"… having received the answers now being complained about, defence counsel was required to make a decision as to what to do about it. Although strenuous efforts are always made to ensure that it does not happen, it is a relatively common occurrence that despite the best efforts of all concerned a jury, through some accident or inadvertence, gets to hear some piece of inadmissible evidence. Where this occurs it should not automatically result in the discharge of the jury. Whether or not it requires recourse to that nuclear option depends in every case on the strength of the potential prejudice, the reaction of those who heard it and were in a position to do something about it, the stage of the trial at which the incident has occurred, and whether it might be effectively addressed in some fashion short of discharging the jury, e.g., a judicial instruction to the jury to disregard it.*
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> *In this instance it seems to us to be of considerable significance, and the trial clearly regarded it as such, that defence counsel elected to take no action at the time of the incident."*

22. The respondent states that there are a number of cases which indicate that the application to discharge should be made at the time that the prejudicial evidence is given. The appellant relies on the case of *Murphy* in which this Court did not take issue with the defence's delay in bringing an application to discharge the jury. The respondent points out that the Court in *Murphy* determined there was no injustice as a result of the decision made by the trial judge to refuse to discharge the jury.

23. The respondent maintains that the timing of the application during the trial is relevant in and of itself and also in relation to the tactical decision made during the course of the trial to make advantageous points in relation to the evidence of the complainant. The respondent notes that the trial judge surmised that defence counsel did not object in the matter at hand for tactical reasons.

24. Reliance is placed on *The People (DPP) v Roche* [2019] IECA 317 which held that even where inadmissible evidence finds its way into a case, discharging the jury or granting a separate trial in respect of one or more appellants should be used as a last resort and only in the most extreme circumstances.

25. Further, the respondent quotes portions of the transcript in which the trial judge warned the jury in respect of the bad character evidence given by the complainant and her partner : *"I am directing you not to have any regard to any of the evidence of bad character that was given in the course of the trial because it proves absolutely nothing. So, put it from your minds entirely".*

26. It is maintained that this warning, in light of the evidence put forward in the trial and all of the circumstances was very clear, measured and considered, and alleviated any prejudice suffered by the appellant.

Discussion

27. By way of background, it is important to note that disclosure had been made in the ordinary way in this case. That disclosure included the appellant's previous convictions, both in this jurisdiction and also in Poland. Those convictions included convictions for violent offences both of a sexual and non-sexual nature; specifically in the former case, convictions for rape.

28. Some of the impugned evidence is set out above. The appellant referred to two aspects of the complainant's direct testimony which caused some concern; namely, that the complainant said that the appellant was taking cocaine and that she said he produced a pistol in the context of the first rape allegation. However, at the hearing of this appeal, reliance was not placed on the contention of taking cocaine and insofar as the production of the pistol is concerned, it is argued that the introduction of this evidence, (of which there was no notice) gave rise to the necessity to cross-examine the complainant on that issue, which in turn gave rise to the impugned evidence.

29. Following the introduction of the evidence of the pistol, and before the conclusion of her direct testimony, an application was made to discharge the jury on the basis that the defence were not on notice of the evidence concerning the pistol and the prejudicial effect of that evidence. In opposing the application, counsel for the respondent contended that the evidence did not justify a discharge of the jury and pointed out that the evidence had the potential to inure to the benefit of the appellant.

30. As it transpired, the trial judge refused the application and observed (properly, in our view) that the evidence could in fact inure to the appellant's benefit for the reason that the complainant had not mentioned such a fact in her statement.

31. The evidence in the trial then continued and the impugned evidence arose in the course of cross-examination. As already alluded to, counsel contends that such cross-examination arose specifically from the introduction of the evidence concerning the pistol and that it was therefore essential for counsel to cross-examine in that respect.

32. There is no doubt that the evidence which arose during cross-examination disclosed evidence of bad character on the part of the appellant. However, the disclosure of such evidence does not inevitably lead to the discharge of the jury. The overriding issue is whether there is a real risk of an unfair trial and this must be assessed on a case by case basis in terms of the degree of prejudice caused as a consequence of the admission of such evidence. Issues which arise for consideration will include the nature of the evidence, how the evidence came about and the timing of the application made to discharge the jury.

The Evidence

33. Counsel for the appellant contends that in cross-examining the complainant on the issue of the pistol, the complainant introduced prejudicial evidence of bad character which evidence included evidence of previous convictions recorded against the appellant. The questions were asked through an interpreter and are phrased in the third person. A portion of the salient evidence which gave rise to the introduction of evidence of drug dealing is as follows:-

> **"***Q. Can I suggest to her that that's all the more reason why she would have made*

a complaint and put the police on notice that this man had a gun?

A. Well, police was there before and as always they didn't find anything. They had some report on him but they didn't find anything because he always knew how to arrange things.

Q. So, is she now telling the ladies and gentlemen of the jury that the police had been aware of him having a gun prior to this and they had searched him and the house where she was living looking for a gun, is that what she is saying now?

A. Well, all of this happened before, earlier, and they were searching the house because of the drugs and they knew what kind of beast this person was and how could I defend myself against such a human, I was worried for my daughter.

Q. I don't think she has misunderstood (sic) my question so can you ask her again please?

A. Can you repeat?

Q. If she was making this suggestion for the first time that the police were aware that there was a gun or an allegation that there was a gun or a pistol on [the appellant] or in his house where she was living that she saw this search take place and that she knew that there was no such gun found, why didn't she tell anybody about that until just now, this is the first time it's been mentioned?

A. Yes. I wasn't there directly when this happened, when there was the search. I discover everything only afterwards, after this New Year's Eve. I discover that he deals drugs and that he is a very bad person, that he is a beast."

34. This evidence arose during cross-examination when the witness was tested regarding her assertion that the appellant had produced a gun during his assault upon her. The above material followed a number of questions on the same issue. This material concerning the pistol was not contained in her statement and quite clearly the absence of this assertion from her statement was something which the defence understandably sought to utilise in seeking to undermine her credibility. It was therefore a legitimate line of examination to demonstrate inconsistency on her part.

35. However, in so doing there was, in the present case, a risk that the witness would disclose evidence of bad character on the part of the appellant. The defence had been furnished with the appellant's previous convictions both in this jurisdiction and in Poland and so the risk of material of this nature emerging if the witness was cross examined in a particular way was self-evident. These previous convictions included a conviction for drug trafficking, possession and use of weapons, rape, theft and threats of violence. In this jurisdiction, the appellant has a previous conviction for threatening to kill. Thus, it is clear that the defence were on the hazard if the witness was pressed to a significant degree.

36. The next series of impugned evidence arose when the witness was pressed regarding the appellant's use of cocaine and that she had called him a beast. It was suggested to her that she did so in order to place him in poor standing with the jury.

" Q. Can I suggest that to make an allegation such as the allegation of rape is placed on an entirely different level if the mention of a gun being used during the course of the rape has taken place, she understands that, doesn't she?

A. Sorry again?

Q. The allegation that a gun is produced by a perpetrator in a rape --

A. Okay.

Q. -- changes the quality of the rape allegation to one of the highest and most significant that you can possibly have?

A. Yes, I do agree with this.

Q. Okay. So that when she makes the allegation about a gun being present at the time that a rape takes place, it changes it from an investigation into a very -- the second most serious charge in the world, with murder being the only one over that, she understands that?

A. Well, I don't know the legal system, I don't know what the law is, but if a person like him does something like this he should not supposed to be in freedom, should not supposed to be free.

Q. Can I suggest that when she makes a description of him using drugs, such as the drugs up his nose, and calls him the names that she has called him, that that's also intended to show him in a particularly bad light, would she accept that?

A. But he is a terrible person. He is a drug dealer. He is mafia. He murdered a person in Russia. He is the -- he is wanted in Poland and he also was in prison in Ireland for three years because he was threatening his wife. So, what kind of person that is."

Analysis

37. It is said that the prejudicial effect of this evidence was compounded by the evidence of the complainant's partner in cross-examination. This evidence disclosed that the appellant, according to the witness, was a thief, was violent, was using and dealing in drugs and had killed a man in Russia.

38. There is again no doubt but that this is evidence of bad character. However, we repeat, the defence were on notice of the appellant's previous convictions and in making the suggestion to the witness that to call him a beast and to mention the use of drugs were intended to show him in a bad light, the defence were very much at risk of the appellant's previous convictions coming to light. While the grounds of appeal contend that the witness intentionally and gratuitously introduced this evidence, we can find no basis for this on a perusal of the transcript.

39. Some of the appellant's previous convictions are set out above, those convictions do not include a conviction for murder in Russia. However, as stated, he has a previous conviction for drug trafficking, possession and use of weapons and a number of convictions for rape in Poland, and a conviction for making a threat to kill in this jurisdiction. In pressing the witness on the issue of the pistol and as to why she called him a beast, the stakes were high.

40. That being said, the real question for the judge in the present case on foot of the prejudicial evidence, (and it was undoubtedly prejudicial), was whether, this evidence of bad character had a disproportionately prejudicial effect upon the jury. It is fundamental to every criminal trial that the prosecution may not adduce evidence of bad character, save for certain exceptions. The reason underpinning this rule is simple; every accused person is entitled to a fair trial. However, situations may arise where evidence of bad character is inadvertently disclosed in the course of direct or cross-examination. The question then arises whether such evidence is of a character which is gravely prejudicial to an accused person.

41. No application was made to discharge the jury following this evidence. An application, as stated, was moved on the close of the prosecution case for a direction which then expanded to an application for the jury to be discharged and a *PO'C* application, on the trial judge clarifying the nature of the application.

42. The first matter to note is that, as stated, the impugned evidence arose during cross-examination, this in and of itself would not necessarily give rise to a refusal to discharge the jury. Every accused has a constitutional right to a fair trial and this must be guarded by the trial judge. There is an obligation on judges in accordance with their oath of office to uphold the Constitution and the rights thereunder. The admission of prejudicial evidence may put the right to a fair trial in jeopardy and so the trial judge is vested with the discretion to discharge the jury should he/she feel that the evidence is so gravely prejudical so as to render the trial unfair.

43. In exercising that discretion, the judge, in determining the level of prejudice caused must assess the nature of the evidence, how the evidence came about, and any other circumstance of relevance. Included in that assessment may be material in the knowledge of the defence, such as an accused's previous convictions (as in the present case) and the degree to which a witness is pressed on issues where it is known that an accused is of previous bad character. Cross-examination in these kinds of circumstances may be difficult and must be approached with caution but must also be conducted effectively. We acknowledge that cross-examination in these circumstances is hazardous for any counsel.

44. In the present case, the issue of the pistol, being material, which was not included in the complainant's statement was evidence which could have inured to the appellant's benefit and so was, as stated, a legitimate line of enquiry. Undoubtedly, the defence were acting on instructions and in that regard pursued the line of questioning which gave rise to the impugned prejudicial evidence. The witness was repeatedly pressed on that issue and on the issue of categorising the appellant as a beast.

45. The fact that the application to discharge the jury was not made until the end of the prosecution evidence was a most significant factor for the judge in assessing the defence application. It must be said that it would be inimical to the administration of justice if a party refrained from moving an application of this character until the latter stages of a trial. The reason for this is readily apparent; if there was such concern regarding evidence, one might expect an application to discharge the jury to be made promptly, perhaps at a very modest remove from the prejudicial evidence, so as to protect the integrity of the trial should the application be refused. A party simply cannot wait to see how the evidence unfolds before making such an application. If an accused has suffered such unsurmountable prejudice so as to justify the nuclear option of a jury discharge, one might expect the application to be moved promptly. It is argued in the present case, notwithstanding that the application was not made until the eleventh hour, that the material was of such a prejudicial character, that this Court should now intervene and find an error in the exercise of the judge's discretion in refusing to grant the application made at trial.

46. When an application to discharge a jury is made on the basis of the introduction of potentially prejudicial evidence, it is incumbent on the trial judge to carefully consider all the facts and to assess in light of those facts and the context in which the evidence was introduced, whether the prejudice arising is of such a grave character that it cannot be alleviated by the directions of

the judge and thus may render the trial unfair. It is, in our view a high threshold and the timing of the application is of some considerable importance for the reasons stated above.

47. It is clear that the judge carefully considered the applications made to her and her ruling reflects the care that she took. Having addressed aspects of the direct and cross-examination, she proceeded to say as follows: -

> *"However, [counsel] began to press the complainant in relation to her reasons for omitting a reference in her statement to the accused having possession of a drug and he pressed her and pressed and pressed her about this and it then began that he started challenging her for describing the accused as a beast and she proceeded to not say much about it but to stick by her description of the accused as a beast and then when she is pressed further about it, with [counsel] invoking the issue of rape being a very serious offence, rape with a pistol being even more of a serious offence, the only further more serious offence is one of murder, it then emerged with the comments that we are all very aware of and the sling of statements made by [the complainant] in relation to the accused and most I suppose significantly the reference to her that he had murdered a man in Russia. Now, I have to say I was obviously surprised by the evidence but I in fact thought it formed part of the defence case because it couldn't have been beyond the defence that if she was pressed and pressed and pressed like this that something could have emerged that would have been prejudicial to the defence. I have obviously no idea whether what she said is accurate or not. It is not for me and I have no desire to know whether it is accurate or not but the reality of it is that she was pressed at length and then, because [counsel] didn't at that stage make an application to have the jury discharged, I was of the view that this in fact was going to form part of the defence case and in ways it almost did because there were times in the course of [complainant's partner] cross-examination when he referred to [complainant] indicating that a gun was being used at the time of her, what we'll refer to as false imprisonment, that clearly isn't before the jury but we will refer to it that way because it's how the incident began to be investigated on the night in question, so the fact that a gun hadn't been found, the fact that she told [partner] that drugs had been found, it seemed to me that in ways the defence in fact were making the case that [partner] and [complainant]were in fact in cahoots and had concocted this story and there was some cross-examination to that effect because [partner] was obviously -- it was pointed to him and pointed to [complainant] also that she was incorrect with respect to the pistol allegation and incorrect with respect to drugs having been found in the house. It is then with some surprise that I find that this -- the statements made by [complainant] and [partner] in fact now are being objected to and a direction application being made. Now, I suppose in respect of the bad character, it is not obviously a direction application, it is an application to collapse the trial with respect to that issue but it is all rolled up in one with by [counsel] and I understand his reasons for doing and saying that, when taken all together, there is a difficulty in relation to the case but if [counsel] had a problem with the comments made by [complainant] he should have made that known at the time and, as I have indicated, it did seem to me that in fact it was part of the defence case in light of the manner that it was dealt with."*

48. It is clear from the above passage that the judge was of the view that the cross-examination was part of the defence case in that it would enable the defence to assert that the complainant and her partner were working together and had concocted the allegations. It is understandable that she took this view, as the trial had run almost to completion and no doubt the defence team were acting upon instructions.

49. The judge was best placed to assess the run of the case and the context in which the evidence was introduced. This Court gives significant deference to the trial judge's position in exercising his/her discretion. Moreover, those present who ably represented the appellant's interest were also best placed to determine whether the evidence adduced assisted their client's defence or whether the evidence was so gravely prejudicial that an application was necessitated to discharge the jury once the evidence was heard by them.

50. During a trial, in order to protect an accused's interests, counsel will, (as in this case) make every effort to properly cross-examine a witness whilst attempting to avoid potentially prejudicial evidence. However, on occasion, such evidence may, despite best efforts, be heard by a jury. As stated in *WM,* this should not automatically cause a jury to be discharged. Edwards J. went on to say at para.61:-

> *"Whether or not it requires recourse to that nuclear option depends in every case on the strength of the potential prejudice, the reaction of those who heard it and were in a position to do something about it, the stage of the trial at which the incident has occurred, and whether it might be effectively addressed in some fashion short of discharging the jury, e.g., a judicial instruction to the jury to disregard it."*

51. The judge refused the applications made and indicated that she would direct the jury on the issues raised and that she would give a very stern warning regarding the evidence of bad character. In our view, it is significant that no application was made at the time of the introduction of the evidence to discharge the jury either at the conclusion of the complainant's evidence or on the conclusion of her partner's evidence. In the context of the run of the trial and the delay in making the application, which were factors relevant to the judge's determination on the issue, we are not persuaded that she erred in the exercise of her discretion. It may well have been that the appellant perceived that the credibility of the witnesses had been undermined in the course of cross-examination or at least progress made in this regard. If it were thought that the evidence was simply gravely prejudicial, then an application to discharge the jury would undoubtedly have been made. The fact that the application to discharge the jury was initially moved as an application for a direction re-enforces our view in that respect.

52. That now brings us to the trial judge's directions to the jury, and we say, without hesitation, that her directions to the jury were clear and unambiguous and, indeed, no issue is taken with the manner in which she addressed the impugned evidence. Having addressed the evidence of the complainant's partner she then advised the jury in the strongest terms to disregard the prejudicial material and to consider only the evidence concerning the counts on the indictment. No requisition was raised.

Conclusion and Decision

53. It is fair to say that the appeal focused on the refusal of the trial judge to discharge the jury and whilst two grounds of appeal were filed, the written submissions confirm that the second ground is subsumed into ground one for the purpose of the appeal. Consequently, this judgment addresses the issue of the application to discharge the jury. As can be seen from the foregoing paragraphs, we are not persuaded that the judge erred in her ruling. Whilst the evidence was potentially prejudicial, she properly analysed the evidence, the context of the introduction of the evidence, and the circumstances in which the application was made to discharge the jury.

54. Accordingly, the appeal is dismissed.