THE COURT OF APPEAL

Record No: 88/2022

Record No. 89/2022

Edwards J.

Kennedy J.

Donnelly J.

Between/

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

Respondent

V

G.O'H

Appellant

Between/

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

Respondent

V

E.O'H

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 31st of October 2023

Introduction

eOn the 10th of November 2021, E.O'H, having been tried before a jury in the Central Criminal Court sitting in Cork, was convicted of one (1) count of rape contrary to s. 48 of the Offences Against the Person Act 1861 ("the Act of 1861") as provided for by s. 2 of the Criminal Law (Rape) Act 1981 ("the Act of 1981"), as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990 ("the Act of 1990"); and one (1) count of sexual assault contrary to s. 2 of the Act of 1990 as amended by s. 37 of the Sex Offenders Act 2001. These counts comprised counts nos. 1 and 2, respectively, on the indictment (Bill CCDP0111/2019). There were two other counts relating to E O'H on the indictment, namely count no. 3 and count no. 4, respectively. No verdict was recorded on count no. 3 as it represented an alternative to count no. 1, and there was an acquittal by direction on count no. 4.

1. On the 10th of November 2021, G.O'H, who was co-accused with E O'H. in respect of a single offence, being count no. 5 on the same indictment, having also been tried before the same

jury in the Central Criminal Court sitting in Cork, was convicted of one (1) count of rape contrary to s. 48 of the Act of 1861 as provided for by s. 2 of the Act of 1981, as amended by s. 21 of the Act of 1990.

2. On the 9th of May 2022, following a sentencing hearing before Creedon J. in the Central Criminal Court held on the 28th of February 2022, both E. O'H and G.O'H were sentenced, in respect of the rape offences of which they had each respectively been convicted (i.e., in E.O'H's case on count no 1, and in G. O'H's case on count no 5), to 12 years' imprisonment with the final one (1) year thereof suspended on certain probation conditions, which custodial sentence was backdated to the date of conviction. In addition E. O'H was further sentenced to eight years' imprisonment for the sexual assault offence of which he was also convicted (being count no 2.), to be served concurrently with his sentence on count no 1, and again it was backdated to the date of conviction.

3. It should be stated at this early juncture that common features of the alleged offending conduct of G.O'H and E.O'H, respectively, were that it involved the same complainant, who was approximately 14 years of age at the time of the events, and each appellant's alleged offending conduct occurred on the same occasion and in the same location.

4. Both G.O'H and E.O'H now appeal to this Court against their respective convictions and sentences. This judgment deals solely with their appeals against their convictions.

Complainant's Evidence

5. On the 2nd of November 2021, the first day of trial, the complainant gave evidence in relation to the factual background of the appellants' offending. The complainant was aged 14 years in April 2017, the time of the offending, and was then residing in a seaside town on the west coast of Ireland, with her mother, her sister, and her stepfather. The complainant described how she would spend her weekends with her friends, that they would go out and sometimes would drink alcohol on special occasions.

6. The complainant described how she first came into contact with the appellants. The complainant recalled that she and her friends were drinking in the seaside town in question on a birthday occasion on a weekend in April 2017 and that they had encountered difficulty in sourcing alcohol due to being underage at that time. To get around this obstacle, the group had approached passers-by on the street to ask if they would purchase alcohol for them, and through this endeavour they encountered the appellants who agreed to procure alcohol on the group's behalf. Following this, and a subsequent parting of ways with the appellants, the complainant and her friends drank the alcohol that the appellants had procured for them, and they then spent the rest of the night wandering the streets of the town before eventually settling to socialise in a private car park where they were later joined by the appellants. After spending some hours there everyone walked home.

7. Subsequent to this night, the complainant received a friendship request on Facebook from E.O'H, which request she accepted. She then went on to describe in evidence how she and E.O'H occasionally messaged one another on social media over subsequent days.

8. The complainant also described a subsequent occasion when the appellants were again prevailed upon to buy alcohol for the complainant and her friends; and how, on yet another occasion, when the complainant and her friends were drinking on a beach, she received a message

from one of the appellants (she was not certain which of them it was), enquiring as to where the group was, and how the appellants, having ascertained the group's location, had arrived with a crate of cans and accompanied by some other boys.

9. She described meeting the appellants while in the company of a girlfriend on yet another occasion at some nearby cliffs, following which they had drunk whiskey and Coca Cola and had listened to music. The complainant told the jury that, by this stage, G.O'H had nicknamed her "innocent girl", alternatively would refer to her as "the virgin girl".

10. The girls left the cliffs somewhat abruptly, when a friend of the complainant's companion arrived by car to collect them. As, following this, there was a period of social media silence in so far as communications from the appellants were concerned, the complainant's evidence to the jury was that she thought the appellants were angry at her because she had, as she put it, *"upped and left with my friend so suddenly."* That was her last encounter with the appellants before the date of the alleged offences.

11. On the 22nd of April 2017, a friend of the complainant was celebrating his birthday and for this occasion the complainant, the friend in question and other friends got together at a GAA pitch. Some friends had brought vodka with them and this was shared with the group in the changing rooms. However there was not enough, and in light of this the complainant again messaged the appellants asking if they could procure more drink for them, as they had done previously. The appellants did so and arrived at the GAA premises just as the complainant's group was being ejected by a caretaker who had happened upon the assembled group. The complainant met with the appellants outside the gate of the field, and they then joined the group as they walked back through the town. The group then proceeded to the beach, and from there to the previously mentioned cliffs area, described by the complainant as "*like a natural seat like with the grass, it's all grass and like a little hill that could be used as a seat*". The group arrived at this area sometime between 15:00pm and 16:00pm that day. There, the group socialised and drank alcohol. At around 17:00pm to 18:00pm, the complainant recalled that the group began to disperse on account of cold, wet, and windy conditions. The complainant recalled the final people remaining comprised herself, two friends, and the appellants.

12. At this point the complainant, needing to go to the toilet, separated from her two friends in order to find somewhere to do so, a female friend who had agreed to go with her subsequently disappearing, following after her boyfriend who the complainant recalled had stormed off following an argument between the pair.

13. Having found a suitable place, and having relieved herself, the complainant was returning to where the group had been seated when she encountered the appellants. At this point the complainant was, in her own words, "*really, really drunk*" and she described how she had been drinking with her friends "*from pretty early*" consuming "*lots of vodka and stuff like that*". The complainant could not recall in total the contents of her conversation with the appellants, other than that they had suggested that the three of them walk up to a better cliff point near a caravan park where the appellants were staying. The appellants had assured her that there was more alcohol available there and that it was a nicer spot. While the complainant "*hesitated*" at first, she nevertheless obliged and proceeded to follow the appellants.

14. Enroute to this better cliff point, the complainant and appellants stopped by the appellants' caravan to collect more alcohol. The complainant recalled merely being "*at*" the caravan, and not in it. She could not recall which one of the two appellants entered the caravan, nor could she recall what they got from it other than alcohol. The party then crossed the road and entered a field using a stile by the road. There, they continued to drink. The complainant described how when she had gone up there, she had initially some grasp of her whereabouts and was capable of, to some extent, composing herself. However, the complainant recalled becoming, after a while, "*a mess to be quite honest*".

15. The complainant recalled being really cold, for which reason E.O'H gave her his jacket. At some point, the complainant passed out, and fell asleep on the ground. She came to and recalled E.O'H "*sort of like touching me and, like, trying to kiss me and things like that*", however she then fell unconscious once again. The second time the complainant came to, she awoke to discover E.O'H removing her leggings and kissing her legs before then proceeding to perform oral sex on her vagina. She then recalled falling unconscious once more, after which she awoke to discover E.O'H penetrating her vagina with his penis. While this was happening, E.O'H and G.O'H were conversing. The complainant's memory of the contents of these discussions between the appellants was incomplete, on account of her inebriation, however she recalled G.O'H telling E.O'H to "*show her what you can do*" and making other remarks to that effect. All the while E.O'H was penetrating her vagina, G.O'H was watching the event unfold and masturbating close by.

16. The complainant could not recall the duration of the vaginal intercourse, as in the currency of the sexual act she once again fell unconscious. When she awoke once more, she recalled E.O'H being "*about to finish*", however she could not recall (describing her memory as "*foggy*") whether he had finished by ejaculating, her focus at the time centring on her efforts to try and put her clothes back on as much as she could. The complainant described how she thought that that was going to be the end of the ordeal, but that E.O'H then nudged her towards G.O'H, to whom he remarked "*It's your turn*".

17. The complainant described being pulled on top of G.O'H who then proceeded to penetrate the complainant's vagina with his penis. The complainant recalled E.O'H masturbating as G O'H did so. The complainant could not recall for how long G.O'H had continued to penetrate her, but could recall E.O'H coming up behind her and ejaculating on the exterior of the general area of her anus.

18. The complainant described being left "*covered in [E.O'H]'s ejaculation*", feeling "*sticky*", and feeling as though she just wanted to put her clothes back on. She recalled it being dark outside at this point and she recalled knowing that she needed to go home. As the complainant and the appellants walked back through the field, exiting the same way as they had entered, they were met by a group of people at the caravan park, the complainant's mother among them. In the complainant's words, *"I knew I was in trouble. It was really late. I didn't have my phone. I was an absolute mess. I couldn't really walk properly, like, even"* The complainant recalled her mother, who was outraged, shouting *inter alia* "*what are you doing?*" and "*who are they?*". E.O'H's mother approached and proceeded to admonish E.O'H, slapping him and saying, "*what the fuck are you doing, she's 14 years old*".

19. The complainant recalled that after these events had unfurled, and on a night before the appellants who were staying in the seaside town for the weekend were due to return home, she

received messages on social media from the appellants asking to meet her the next morning before they went home. However, at this remove, the complainant and her mother were not on the best of terms. The complainant recalled that after the night of the events, her mother was "*extremely angry*" with her and that the complainant felt "*so ashamed*" of herself, for which reason she refrained from contacting her friends. The complainant was not allowed to leave the house at this point, her mother having "*grounded*" her. Physically, the complainant felt unwell. Mentally, the complainant described feeling "*violated*" and that she had a concern she might have fallen pregnant as there was a delay in menstruation. Such was her concern that she informed a friend, who then procured a pregnancy test on her behalf which ultimately yielded a negative result.

20. On the weekend of the 13th of May 2017, the complainant was finally allowed to leave the house and joined her friends to have drinks. Her mother, however, went looking for the complainant after she had happened upon the used pregnancy test down the side of the complainant's bed. Having collected the complainant at 9:30pm that evening outside a library, the pair went home. Upon arrival and after confronting the complainant regarding the used test, the complainant told her mother what had occurred on the 22nd of April 2017. Her mother then brought the complainant to her local Garda Station on Monday the 15th of May 2017 and over the course of the following days, the complainant made two statements to gardaí (one of which was an initial statement which she had prepared at home).

21. As a result of the making of these statements, gardaí opened an investigation into the complaint. The complainant, accompanied by her mother, showed gardaí the relevant location on the cliff and gardaí took photographs. The complainant was also brought to a sexual assault treatment unit (SATU) in Galway where she was examined. Following a request by gardaí, the complainant at a later remove, sometime in November 2020, made a clarifying statement in respect of certain events that had occurred. At this remove, the complainant was no longer living in the seaside town in question, her family having relocated to the United Kingdom and so the clarifying statement was provided to British police.

22. In cross-examination, counsel on behalf of E.O'H drew the complainant's attention to certain inconsistencies between her oral testimony and the clarifying statement she had made, as well as certain inconsistencies arising from the contents of witness statements made by her friends. In particular, counsel sought to emphasise that the initial statement made by the complainant in relation to E.O'H's actions during the events differed somewhat from the clarifying statement she made to British police some years later: that in the initial statement she had claimed that she awoke to find E.O'H trying to kiss her whereas in her later statement she described E.O'H as performing oral sex, and; in the initial statement she had asserted that E.O'H had merely watched as G.O'H penetrated her, whereas some years later she described E.O'H as masturbating. Counsel also emphasised that her demeanour upon emerging from the field was not such as would have suggested that she had been through the ordeal she complained of, that she was not "*dishevelled*" in appearance notwithstanding the statement she had made on the 18th of May 2017 to the effect that E.O'H had ejaculated over her body and leggings, and that none of the people waiting at the entrance to the caravan park, who had been looking for her, had described her as being so intoxicated that she was unable to walk properly, maintain consciousness, or was so incoherent as to be incapable of making conversation.

23. On this point, counsel for E. O'H put to the complainant in cross-examination that, after the complainant's mother had berated E.O'H, the complainant had said to her mother, "*Don't be shouting at them. They looked after me. My friends left me*". The complainant said she had no recollection of that. When pressed as to whether she might have said that, she said, *"I'm not sure. It was four and half years ago. I don't remember."* It was put to her that E. O'H's mother had also been present at the time and both she and her son E. O'H. had heard the remark. As it transpired, and notwithstanding this being put, neither defendant subsequently went into evidence (as was their entitlement). However, the complainant's mother, who gave evidence for the prosecution, gave evidence that the complainant made no such remarks and did not speak until after she had gotten into the car with her mother.

24. During his cross-examination of the complainant, defence counsel also drew attention to a witness statement made by one of the complainant's friends, who claimed that upon her arrival at the cliffs area earlier on the evening in question (this was at a time before the alleged rapes) she had found the complainant to be crying. The friend had stated that, having offered to bring the complainant home, she was told by the complainant that she did wish to return home because she did not want to go back to her mother. The complainant agreed that she *"sort of"* remembered that. She said *"I mean I assume it happened. I was very drunk."* She agreed that she had not wanted to go back to her mother. The purpose of this line of questioning was ostensibly to emphasise that there was a history of disagreement between the complainant and her mother arising from the complainant's underage drinking. In this context, counsel put to the complainant that she had fabricated elements of her clarifying statement taken by the British police to deflect from her underage drinking and had availed of the presence of E.O'H and G.O'H as "*easy scapegoats*". The alleged fabrication related to the following passage from the clarifying statement, *"E then pushed me over to G saying it was his go. G was laying on the bed and dragged me on top of him. He then put his penis into my vagina."* The complainant denied fabrication and was adamant that she didn't refer to a bed because they had been on a cliff. She stated that *"[o]bviously it's an error because I didn't state* [that] *anywhere else in my statement."*

25. Counsel, on behalf of G.O'H, put to the complainant that she had told G.O'H in social media exchanges that she was 16 years of age, or that she had otherwise led him to believe that she was 16 years of age. The complainant denied this. Counsel emphasised that the complainant was tall for her age, referencing her height of 5' 8½" as recorded by the sexual assault treatment unit in its review, and it was then put to her that the members of her friend group were all older than her, averaging around 15/16 years of age. The complainant agreed that this was possibly the case. Counsel also put it to the complainant that the delay of approximately 3 weeks between the events complained of and the making of the complaint had resulted in the loss of potentially relevant evidence. It was put that this was the case because, in the interim, the clothes the complainant was wearing on the night in question, which it was suggested might have yielded relevant trace evidence comprising *"DNA or semen or whatever"*, had been washed, and that this had arisen through no fault of counsel's client. The complainant responded *"Yes".* Counsel also drew attention to alleged inconsistencies in her recollections of the events, in particular inconsistencies between statements as to whether she had awoken to find E.O'H "*about*" to perform oral sex or whether she had awoken to actually find him doing so. Counsel also

emphasised that the complainant's evidence, in her oral testimony, of G.O'H masturbating was "*new*" and that in the series of statements she had made since May 2017 she had never once averred to that fact.

26. Counsel also seized upon the complainant's description of her memory as "*foggy*", putting it to her that "*it's not a good springboard for clarity of memory and clarity of thinking*" and that her recollection of events in relation to anything to do with G.O'H was "*utterly unclear*". While the complainant replied that she had been falling in and out of sleep, counsel observed that she was nevertheless able to navigate a stile on her way out of the field which counsel described as "*a potential tripping hazard [...] if you're very, very drunk*".

27. Counsel also put it to the complainant while her memory was "*faulty*" in relation to the timing of events on the date of the offending, the complainant nevertheless had an awareness of the lateness of the hour and that she needed to go home. The complainant accepted this, saying, *"I just realised it was really dark and it wasn't when I got there initially" …"* "*And that I needed to go"*. Pressing the matter, counsel referenced a statement made by E.O'H to the effect that the complainant had expressed a fear that her mother "*was going to kill*" her for being out past her curfew which was around 10pm/10:30pm. The complainant maintained that she didn't remember this, and made the point that she never had an exact curfew. Counsel suggested to the witness that the awareness which he was suggesting she had been exhibiting was inconsistent with the blackouts that the complainant averred that she had experienced, but this was not accepted. Counsel further suggested to the witness that her appearance upon returning to the caravan park was not so dishevelled as to suggest, as the complainant described, that she was a mess. The complainant responded, *"I looked a mess. My eyes were watery. I looked drunk. My hair was probably a mess." … "I don't really know. I didn't look at myself in the mirror afterwards".*

SATU Report

28. After the complainant had made her complaint to gardai, she was taken to a sexual assault treatment unit (SATU). On the 4th of November 2021, the second day of trial, the statement of a Dr Roger Derham, consultant forensic physician and clinical examiner at the SATU in question was read into the record pursuant to s. 21 of the Criminal Justice Act 1984. The report, on which his statement was based, was finalised on the 15th of May 2017.

29. Dr Derham averred that on the 14th of May 2017, at approximately 13:30pm, the complainant attended at the SATU with her mother and a female Garda. He related the history as provided to him by the complainant and which had informed his examination.

30. Dr Derham averred that a clinical examination of the complainant then took place in a dedicated forensically cleaned examination room, occurring between 14:00pm and 15:00pm on the 15th of May 2017. The examination included recording certain physiological features, such as, *inter alia,* her weight, height, blood pressure and temperature. With the consent of the complainant the SATU conducted an anogenital examination, colposcopic examination, vulval vaginal examination and an anal examination of the complainant. These examinations yielded "*normal*" results, reporting no evidence of injury. Further to this blood samples and throat swabs were taken and these were examined and again the results were "*perfectly normal*". Dr Derham's report further stated that no forensic sampling was conducted in circumstances where the alleged

sexual assault had taken place three weeks prior to the examination as forensic evidence would not be there. Dr Derham's report stated:

> "*A general and anogenital forensic examination of [the complainant] of 14 years [...] with a disclosure of penile vaginal penetration three weeks prior to the examination by two familiar adult males was conducted.*
>
> *14.2. Examination showed a soft annular ... hymen with no evidence of chronic transections or acute lacerations.*
>
> *14.3. There was no evidence of perianal injury.*
>
> *14.4. There was a disclosed history of significant alcohol abuse.*
>
> *15. Interpretation and Opinion*
>
> *15.1. In summary no evidence of any acute or chronic anogenital injury.*
>
> *15.2. Disclosure, a clear disclosure by an adolescent, must be regarded as the single most importance factor in the assessment of sexual abuse. The presence or absence of physical examination must always be interpreted in the broad context of history and full examination, the child's statements and the child's behaviour."*

Evidence of Detective Garda TJ Molloy

31. In the course of the trial the jury heard from a Detective Garda TJ. Molloy. D/Garda Molloy was the member of An Garda Siochána who was tasked with the arrest of G.O'H. This arrest was carried out the same day as that relating to E.O'H, i.e., on the 29th of June 2017 and counsel on behalf of G.O'H made admissions on behalf of his client pursuant to s. 22 of the Criminal Justice Act 1984 conceding that the arrest was lawful, that his detention lawful, that he was cautioned and that he was lawfully interviewed on two occasions while in detention.

32. On the second occasion during which G.O'H was interviewed on the 29th of June 2017, the questions were being put by D/Garda Molloy. At one point he asked the following question, which has a relevance which will become apparent later in this judgment:

> "*Question: "This girl has made a statement stating that you and [E.O'H] had sex with her and I am after outlining these allegations to you.* ***For a young girl the statement is very detailed?****" (Emphasis added).*

Judge's Charge

33. For the purposes of the present appeal, the following excerpt from the judge's charge given on the 9th of November 2021 is of relevance:

> "*Now, having told you what is evidence, I'm going to go back to what is not evidence so that there won't be any confusion.*
>
> *Questions put by counsel in the course of a case or assertions made by counsel, for example, "I put it to you that," are not evidence in the case. I'll give you an example that I borrowed from a colleague that's outside of this case. Say this case was about a bank*

robbery and the evidence of a witness in the witness box was that there was a black Mercedes outside the door of the bank with the engine running, the suggestion being that it was the getaway car. The evidence is the car outside the bank was a black Mercedes.

Now, suppose counsel for the defence then gets up and says to the witness, "I put it to you on my instructions there was no black Mercedes there. I put it to you on my instructions that what was outside the bank was in fact a white Mini." Now the witness says, "No, it was a black Mercedes." The only evidence in the case in those circumstances is that it was a black Mercedes. The suggestion by counsel that it was a white Mini is not evidence. It will be for the jury in that case to weigh up whether they were persuaded or not to the requisite standard whether in fact there was a black Mercedes to ponder it and form a view about it with any aspect of the evidence, but on the topic of what was the car outside the bank, the only evidence they have is that it was a black Mercedes.

So, that's an attempt to explain to you that assertions made by counsel or questions put by counsel to a witness, do not make that assertion evidence in the case.

Now, like many things in law there's an exception to that. If counsel makes an assertion to the witness, "I put it to you that X, Y, Z happened," and the witness says, "Yes, you're right that happened." Then the answer of the witness becomes evidence in the case. It is evidence of the witness that a certain thing happened. But if a witness says, "No, it never happened," all you have is a bare assertion by counsel and there is no evidence of that assertion, that assertion is not evidence in the case.

Similarly, statements made by witnesses outside the courtroom and there's been reference during the course of the case to, "Did you say that to the guards, or did you say this to the guards?" And there have been a number of references made to statements made by witnesses, [which] *are not evidence. It is put into a book of evidence as proposed evidence which is served on the accused so he can know what the case against him is. But what is evidence is what they say in the witness box. If counsel puts to a witness, "Did you previously say A, B or C to the gardaí?" And the witness says, "Yes, I previously said A, B or C," then their answer, and it's the answer that's important, makes it evidence in the case.*

So, the statements themselves aren't evidence, but if a witness accepts that they made that part of the statement put to them, then that becomes part of the evidence in the case."

Question by Jury

34. The trial judge charged the jury on the 9th of November 2021, the fifth day of trial. Following the completion of her charge the jury retired at 11:58. The court then dealt with certain requisitions that were raised arising from her charge. Having concluded that she stated:

"The court proposes that the registrar and the jury minder might release the jury at 1 o'clock without the necessity for everybody re-sitting at 1 o'clock with the court. Unless the court hears from the jury in the meantime, the court would propose sitting at 2 o'clock, per chance there's any issues or questions coming from the jury."

35. When the court sat again at 2 'clock (i.e., 14:00) it was advised that the jury had asked for the medical evidence of Dr Derham to be read to them again. The trial judge acceded to that request and duly read out the s. 21 statement of Dr Derham which had previously been entered into evidence. The following exchange is then recorded on the transcript of the 9th of November 2021:

"*FOREMAN: Sorry, your Honour. Is there anywhere mentioned that statement was too much detail for a 14-year-old?*

JUDGE: All I can give you back is the evidence that was given in the report.

FOREMAN: But we all heard ...

JUDGE: Could you just repeat it because I can't hear?

FOREMAN: We all heard it read out in court that the statement was very detailed for a 14-year-old.

JUDGE: That's not --

FOREMAN: That's not ...

JUDGE: That's not on the transcript so I have to confine myself to the transcript.

FOREMAN: That's what we wanted to clarify, your Honour.

JUDGE: Very good. Thank you."

36. The jury then retired again at 15:03 and, in their absence, counsel on behalf of G.O'H volunteered his belief that what the Foreman had in fact been referring to was the question asked by a garda in an interview with one of the accused. He later identified with specificity the question asked by D/Garda Molloy in the course of the second interview with G.O'H, to which we have already referred at paragraph 33 above.

37. Counsel offered the observation:

"it's a typical example of what you said in your charge that questions, that's so often the difficulty with floating propositions in interviews of this (sic)*, denial is the issue, so there's no evidence of that in the case."*

38. In doing so it seems to us that counsel was accepting that the trial judge had properly instructed the jury that a question put in interviews or to a witness in court is not evidence, rather it is the answer received in response to the question which is the evidence. No specific request was made at that point for the judge to recall the jury and recharge them.

39. In circumstances where the jury had copies of the memoranda of interviews with the accused with them in the jury room, the trial judge herself observed that she did not think it was

necessary at that point to bring the jury back and direct their attention to D/Garda Molloy's question.

40. The jury were allowed to continue that their deliberations until 16:01, when they were sent home until the following morning, to resume then at 11.00.

41. At the sitting of the court on the following morning, 10th day of November 2021, while the jury were still in their jury room and before they had assembled in the courtroom for the purpose of being formally instructed to resume their deliberations, counsel on behalf of G.O'H drew the trial judge's attention to the dicta of Charleton J. in *DPP v. Zoltan Almasi* in which the Supreme Court judge had said at para. 18 of his judgment:

> "*Here, the prosecution contend that the interviewing officers were expressing opinions and so that should be excluded. The correct approach, whether the opinions are for or against the accused's case, is not to edit out questions. Rather it is for the trial judge to simply tell the jury that what the gardaí believe about a case, insofar as a belief may be expressed, is neither here nor there and that a jury acts exclusively on the basis of evidence*."

42. Counsel submitted that the assertion of D/Garda Molloy, within the question asked by him, to the effect that the statement of the complainant was very detailed for a young person, was not evidence and that the trial judge should bring back the jury and seek to emphasise that to them in a recharging on that issue. He asked her *"just to remind them if you're intending saying anything this morning, that questions -- the answers are evidence and not questions."* This was the first request in terms for a recharging of the jury.

43. Counsel on behalf of the prosecution did not quarrel with the defence on what the law says in relation to this issue, but expressed reservations as to the necessity for a recharge stating that the court did not know where the jury's question had come from. All that was known was that it was raised in the context of the evidence of Dr Derham being re-read and not during a re-reading of the memos of interviews.

Trial Judge's Ruling on Re-charging the Jury and Subsequent Developments

44. The trial judge, having regard to the transcript of the day before, was inclined to agree with the prosecution, holding "*the Court is looking at the transcript from yesterday which I think is the only basis on which we can look at that and obviously the jury asked the Court to read out the doctor's statement.*" She further held that the question posed by the foreman was "*confined to the doctor's report*", which report had been read out in full. The trial judge, accordingly, decided to leave matters there, indicating that if she didn't hear from the jury before lunchtime she would give them the majority verdict direction at that point.

45. The jury were then assembled in court and were formally instructed to recommence their deliberations. They retired to do so at 11:09.

46. The jury were then brought back at 12:51. The transcript record as to what then occurred is as follows:

> *"REGISTRAR: Jury returned at 12.51. Bill No. CCDP111/2019. The DPP v.* [E O'H & G.O'H]*. Mr Foreman, please answer yes or no to my question; have you reached a verdict on any count upon which you have all agreed?*

FOREMAN: We've reached a verdict on one count.
REGISTRAR: Have you recorded your verdict on the issue paper?
FOREMAN: No, we haven't made a final decision yet.
JUDGE: Yes. Very good. Well, I think then maybe in those circumstances, I'll let you continue your deliberations after lunch. You're making some progress; is that correct?
FOREMAN: We're nearly there, yes, Judge.
JUDGE: Very good. Very good. Then I think I'll let you continue your deliberations. Just out of an abundance of caution, I just want to say to you that you asked me to read the doctor's report yesterday and at the end, you asked me whether there was any detail in that report or that did it refer to any detail. I think that was a memory coming from somewhere else in the evidence. I think that was a memory coming from a question that was posed to [G. O'H] *at the end of his interview and I just want to confirm to you that in memos of interview, just the same way as with counsel and witnesses, questions put by the guards are not evidence. It is the person's answer which is the evidence. You will have that question and answer from* [G. O'H] *at the end of the interview but I have to emphasise the question is not evidence; it is the answer which is the evidence. Very --*
FOREMAN: I believe we just got confused, your honour.
JUDGE: That's fine. That's fine."

47. The jury were then sent to lunch and upon their return they then retired once more at 14.09 to continue their deliberations, returning at 15.14pm to deliver their verdicts whereupon they found E.O'H guilty on count nos. 1 and 2 and found G.O'H guilty on count no. 5. The additional time spent deliberating following the judge's supplementary instructions given to them at 12:51 was one hour and five minutes.

Notice of Appeal

48. In Notices of Appeal lodged on the 28th of June 2022 (E.O'H) and the 1st of July 2022 (G.O'H), the appellants now appeal to this Court against their respective convictions and sentences. In support of the appeals against conviction, G.O'H advances 6 grounds and E.O'H advances 4 grounds. Due to a high degree of overlapping between these sets of grounds of appeal, counsel for the appellants in their joint legal submissions then helpfully summarised and distilled these into three combined grounds of appeal. In advance of the hearing of the conviction appeals, however, it was communicated to this court that counsel would only be making submissions in respect of the first distilled ground of appeal, which was as follows:

"***Failure to Recharge****: The Learned Trial Judge erred in law in failing to accede to a requisition to re-charge the jury when requested to do so. When the Learned Trial Judge addressed the jury on the matter without any prior notice to the parties, the remedy was too late and inadequate in all the circumstances, whereupon the jury had already advised the Court that they had reached a verdict on a single count. [...]*"

49. While it was initially though that this was the only ground of appeal ultimately being relied upon, it was clarified by defence senior counsel at the appeal hearing that a further ground of appeal relating to the failure to give a corroboration warning was still being relied upon. However, in regard to that counsel did not intend making an oral submission and would be relying solely on the written submissions filed.

Parties' Submissions to the Court of Appeal

Appellants' joint submissions

50. The appellants submit that while the trial judge in charging the jury on the 9th of November 2021 addressed the issue of how the jury, in their assessment of the evidence, should approach questions, she had done so only "*in general terms*". They maintain that while she had told them that questions asked of witnesses by counsel were not evidence, and that it was only the witness's answers that were evidence, she did not charge the jury specifically in relation to the status of questions asked of the accused by Gardai during interviews, nor concerning opinions asserted by gardaí in the course of interviewing an accused.

51. The appellants submit that the trial judge had erroneously adopted the prosecution's submission that to accede to the defence's requisition application would be to interpret a question in a way that had not been put to the trial court, and accordingly the trial judge had been wrong to refuse to re-charge the jury as urged by the defence. The appellants submitted that the subsequent discovery that the statement queried by the jury constituted an opinion proffered during questioning of one of the accused by an interviewing garda necessitated the re-charging of the jury. The memorandum which contained it was evidence before the jury and there was a real risk that the jury may not have appreciated that the trial judge's direction regarding questions not being evidence did not only apply to questions asked of witnesses in the witness box, but also applied to questions asked, and opinions volunteered, by interviewing gardai. The memorandum recorded the fact that certain questions were asked as is usual, because this is necessary in order to comprehend the accused's answers, but the questions asked, and any associated opinion proffered by the questioner, had no evidential status *per se*, and the jury needed to understand that. The appellants submitted that the jury foreman's statement left no room for doubt or interpretation as to the true rationale, reason or purpose for the request for Dr Derham's evidence to be read back to them.

52. In this regard, the appellants draw this Court's attention to Ormerod and Perry's *Blackstones Criminal Practice 2023*, paras. D19.22 to D19.23 in which reference is made to *inter alia,* certain English authorities, namely *R. v. Gascoigne* [1988] Crim LR 317 and *R. v. Wickramaratne* [1998] Crim LR 565. The appellants submit that this commentary addresses the procedure to be followed when a trial judge is dealing with a question from a jury and the limits placed on a trial court when answering a jury question. Succinctly put, the following principles as described in this commentary are:

- It would seldom be proper for a trial judge to open up spontaneously with a jury, after they had deliberated for some time, an issue which had not been referred to in the trial or the summing-up. It might be proper to give a supplementary direction, where a matter canvassed at trial had accidentally been omitted from the summing-up. If this were done, it must be carried out with the utmost caution. This, however, is qualified by two exceptions:
    - Where the jury's question reveals that they have forgotten or failed to understand a crucial point, it is incumbent on the judge to remind them of it.

- Where the jury's question indicates that they are considering an irrelevant matter, in particular a matter that has never been suggested by the prosecution, the defence should be given an opportunity to make submissions on it.

- The jury is under an obligation to try an accused and give a true verdict according to the evidence. It is the evidence that the case is decided upon, not feelings or speculation.

53. The appellants submit that the trial judge erred in law by failing to accede to the requisition to recharge the jury in circumstances where the question posed indicated that the jury did not fully understand the trial judge's charge in relation to the evidential value of questions. The appellants submit that in such circumstances it was incumbent on the trial judge to have acceded to this application and that the eventual recharging on the 10th of November 2021 was inadequate and occurred too late, the jury having advised the trial court that they had reached a verdict on one count, and was "*nearly there*" in relation to the other counts on the indictment. Moreover, this recharging occurred without prior notice to the parties, and the jury foreman's reply "*I believe we just got confused*" raises a further cause for concern regarding the verdict.

54. In regard to the issue of a corroboration warning it was submitted that the trial judge had been wrong not to give a corroboration warning in the circumstances of the case and that her reasons for same were inadequate. A corroboration warning had been asked for on the basis that the complainant had not made a complaint in a timely manner, and that this had prejudiced the opportunity to harvest forensic trace evidence. There was also reliance on the complainant's demeanour upon being encountered at the scene, her drunkenness and the absence of any evidence of distress or dishevelment. The appellant's submissions do not elaborate on how the reasons given were said to be inadequate save for a complaint that such reasons as she gave were insufficiently detailed, specific and analytical.

Respondent's Submissions

55. In reply to the appellants' submissions, the respondent submits that the concern on the part of the appellants, that the jury might treat the questions asked on interview as evidence, was speculative and was not grounded on any questions or concerns raised by the jury. The respondent notes that at no time did the jury seek direction on the question of what might or might not constitute evidence nor could any lack of understanding be inferred from any question asked by the jury. While the re-direction given by the judge was given after the jury had indicated that they had reached a verdict on one count, it was nevertheless a re-direction in the terms contended for by the defence and came before the issue paper had been signed or verdict pronounced. The respondent submits that the trial judge's treatment of the question from the jury was correct and appropriate, her charge was comprehensive and correct and served to re-emphasise the necessity to exclude the question as not constituting evidence and was not prejudicial.

56. On the issue of a corroboration warning the respondent says that the trial judge appropriately exercised her discretion not to give a corroboration warning in the circumstances of the case. There was no evidential material which took this case out of the ordinary or provided an

evidential basis for the giving of a warning. There was no impermissible error identified in the approach of the trial judge.

The Court's Analysis and Decision

The lateness of the Re-Charge.

57. We consider that the trial judge's main charge as to what is or is not evidence, reproduced earlier at paragraph 34 of this judgment, was impeccable in so far as it went. It has to be conceded, however, that it did not specifically cover the issue that has arisen in this case, namely the evidential status of a question, and more particularly, an opinion volunteered in the course of a question, by a member of An Garda Siochána when conducting an interview. This is in circumstances where a memorandum of the interview had been exhibited and had been placed before the jury and it contained the question (which in turn incorporated the impugned opinion) complained of.

58. To be completely fair to the trial judge, it was never flagged by anybody before the memorandum in question was allowed to go to the jury that there was a perceived problem with that which would have required that the standard direction concerning what is or is not evidence would need to be tailored to address it. The issue that arose came out of the blue, in a situation where neither judge nor counsel on either side had perceived a potential difficulty.

59. Moreover, it was not immediately clear, despite that the appellant says, as to what the jury was concerned about when they asked their question at 14:00 on the 9th of November 2021. They merely asked for the evidence of Dr Derham to be re-read to them, and the trial judge very properly acceded to that request.

60. The motivation behind the request only became apparent during the exchange that followed upon the re-reading of Dr Derham's evidence. The supplementary question, "*Sorry, your Honour. Is there anywhere mentioned that statement was too much detail for a 14-year-old?"* suggested for the first time that there was an impression on the part of the jury, or some member or members of the jury, that Dr Derham had offered an opinion concerning the level of detail in the complainant's account, and a desire on the part of the jury to be reminded again concerning what Dr Derham had said in his s. 21 statement. It was apparent from the re-reading that Dr Derham had offered no such opinion and the trial judge correctly told the jury, "*That's not on the transcript so I have to confine myself to the transcript",* and it was left at that. Significantly, the foreman indicated contentment stating, *"That's what we wanted to clarify, your Honour."* We think that there can be no possible criticism of how the trial judge dealt with the matter up to that point.

61. It was only after the jury had retired again that it was suggested by counsel that the likely explanation for the question was that it in fact related to the opinion that had been volunteered by the interviewing Garda in the course of the second interview with the appellant G. O'H. in the Garda station. There seems little doubt at this remove that counsel's deduction in that regard was correct. At this point there was no specific requisition to the trial judge to do anything, and in circumstances where the jury had already received the memorandum of interview in question which, notwithstanding that it contained the question (incorporating the opinion) of concern, contained the accused's denial in any event of what was being put to him, she was not disposed to take any action of her own motion. Almost immediately after this the court adjourned overnight.

62. On the following morning defence counsel sought to specifically requisition the trial judge to recharge the jury. As has been rehearsed earlier in this judgment, the trial judge was initially disinclined do so but, approximately an hour and three quarters later, having reflected further on the matter, she indicated a change of mind. This was at a point where the jury were being brought back for the purposes of being sent to lunch. The jury were asked the standard questions to ascertain whether they had reached a verdict, and the exchanges between the foreman and the registrar are set out at paragraph 47 of this judgment. In summary it was indicated that the jury had reached a verdict on one count but had not yet recorded their decision on the issue paper and with respect to the remaining counts that they were *"nearly there".* It was at this point that the trial judge recharged them to the effect that, "*…in memo's of interview, just the same way as with counsel and witnesses, questions put by the guards are not evidence. It is the person's answer which is the evidence*". We have set out the full recharge earlier in this judgement at paragraph 47 and no complaint is being made as to the adequacy or clarity of it.

63. What is being said, however, is that it came too late, because the jury had already reached a verdict on one count and was nearly there with respect to the remaining counts. The concern which has been ventilated by counsel for the appellants is that, in that situation, it was unrealistic to have expected the jury to reopen matters that they had already decided and to reconsider any decisions made at that point in the light of the further instructions received from the trial judge.

64. With great respect to counsel, we simply do not agree. The jury members had taken a solemn oath to well and truly try the issue whether the accused were guilty or not guilty of the charges in the indictment preferred against them. It had been impeccably explained to them in general terms that they had to decide the case on the evidence and the evidence alone. It had also been impeccably explained to them that while the facts were matters for them, they were obliged to follow the trial judge's directions on matters of law. It was impeccably explained to them, albeit when they were at an advanced stage of their deliberations, that questions asked, and opinions of interviewers incorporated in questions asked, by interviewing gardai during interviews with the accused were not evidence of the subject matter. Only the accused's answers were evidence. Juries have to be trusted to follow a trial judge's directions.

65. Moreover, the jury were put under no pressure whatever, be it actual or subliminal, to return verdicts within any time frame. It might have been different in this case, and an eyebrow might have been raised, if they had come back with recorded verdicts within minutes following the recharge, but they continued to deliberate for another one hour and five minutes. It was only at that point that they returned to court to deliver their guilty verdicts.

66. We consider that there is absolutely no reason to believe that the jury, before delivering their ultimate verdicts, failed to take into account the supplemental instructions given to them in the recharge.

67. In exchanges with counsel at the appeal hearing in relation to the issue as to whether the eventual re-charge had been "too late", a member of the Court signalled an awareness of a possible relevant decision of the Court of Criminal Appeal from some years ago in a case that had involved very lengthy requisitions following a judge's charge which had meant that the giving of supplementary instructions to the jury had been significantly delayed, and that this had been

criticised. Neither the members of the Court , nor the parties, could recall the name of the case at the time.

68. For completeness we should say that we have in the meantime identified the case alluded to, and we feel we should say something about it.

69. The case that was alluded to was *The People (DPP) v P.J.* [2003] 3 I.R. 551, a decision of the former Court of Criminal Appeal. It involved an application for leave to appeal in a case where the applicant had been convicted before the Central Criminal Court of three counts of rape and five counts of indecent assault. Leave to appeal was sought on the grounds of the prejudicial nature of the closing speech of prosecuting counsel and the failure of the trial judge to correct this prejudice in his charge to the jury; a number of alleged defects in the judge's charge to the jury, including a failure to give a full corroboration warning and a failure to deal properly with the issue of delay in the case; and a failure of disclosure by the prosecution.

70. A feature of the case was that when the jury had retired at approximately 5:30 PM on a Friday evening to consider their verdict they returned after a very short interval with four factual questions concerning the evidence given at the trial. The trial judge answered the first question immediately, but he seemingly felt it was either not possible, or maybe desirable, to answer the other questions straightaway before he had heard counsel, in circumstances where it had been flagged that there were a number of requisitions arising out of the trial judge's charge to the jury. The jury was informed that the trial judge would consider the record of the evidence and come back to the jury with answers.

71. Counsel for the defence then embarked on what proved to be a very long series of requisitions concerning the trial judge's charge. He did not conclude his submissions that evening and at 6:50 PM the jury were recalled and sent to a hotel for the night with instructions to return to court at 11:00 AM on the following day.

72. Defence counsel resumed making submissions at 10.30AM on the following day and it was initially hoped that requisitions would be concluded before the jury returned. That proved to be hopelessly optimistic. By 12:45 PM prosecuting counsel, who was replying to defence counsel's submissions, had still not concluded and so the jury were sent to their lunch. Requisitions continued after lunch and it was not until 3:20 PM that the jury returned to court, and that the trial judge was able to answer the outstanding questions that had been asked on the previous day by the jury. In doing so he engaged in recharging the jury on certain matters. This gave rise to a further question from the jury, arising out of which counsel for the defence raised further requisitions. The jury were recalled again and were recharged for a second time. There was then yet a further question from the jury foreman, who requested a definition of statutory rape (an offence which was not charged) and the trial judge replied to this question before the jury retired once again. At 6:45 PM the jury were given the majority verdict instruction following which they retired again. At 7:15 PM their returned to court and requested to be allowed to suspend their deliberations. This was agreed to and they were sent to a hotel for a second night.

73. On the Sunday morning the court sat at 9:30 AM. The jury were sent out at 9:40 to recommence their deliberations. They returned with a further procedural question at 12:30 PM. This was seemingly dealt with quickly and they retired once more before ultimately returning with guilty verdicts at 1:07 PM.

74. A major issue on the leave to appeal application concerned how prosecuting counsel had behaved in the case, and whether he had overstepped the mark in terms of exhibiting excessive zeal to obtain a conviction in the course of his closing speech. In addressing that issue, McGuinness J, giving judgment for the Court of Criminal Appeal made the following observations concerning how counsel on both sides had behaved during the case:

> *"It should not be necessary to state here that it is the duty of counsel on both sides to use their best endeavours to assist the Court at all times. In the instant case it appears that counsel, rather than assisting the Court and the jury, permitted their own legal and evidential disagreements to take over the course of the trial from at least the fifth day onwards. This sorry situation, rather than assisting the learned trial judge, served to hinder him and to add to the general confusion of the situation. In particular the requisitions hearing which followed the judge's original charge degenerated into a battle between counsel which can have done nothing to clarify the issues on which it might have been necessary for the jury to be redirected on either the facts or the law. This prolonged argument between counsel on all aspects of the case may have been sparked off by a somewhat inflammatory speech by prosecution counsel but it seems clear that in the heat of battle both counsel lost sight of their primary public duty to the Court.*
>
> *This cannot but have had an adverse effect on the deliberations of the jury. I have already drawn attention to the fact that the jury put a number of pertinent questions to the trial judge at the very beginning of their deliberations, and that these questions did not receive a reply until late the following afternoon, virtually all of the intervening available time having been taken up in submissions by counsel. Much more importantly there was an excessive lapse of time between the judge's original charge to the jury on Day 5 and his recharge to them late in the afternoon of Day 6. Presumably during the entire of the morning and early afternoon of Day 6 the jury were deliberating on their verdicts without the benefit of the redirections of the trial judge, some of which dealt with substantial matters of law, such as, for instance, the definition of rape.*
>
> *These grounds of appeal as put forward on behalf of the applicant are founded on criticisms of prosecution counsel's speech and the failure of the learned trial judge to deal with these criticisms in his charge. Some of these criticisms are justified, others are more doubtful. The prolonged difficulties, however, which arose from counsel's speech, defence counsel's reaction to it, and the numerous applications, submissions and arguments which arose therefrom, all had a damaging affect on the course of the trial and utterly failed to assist either the learned trial judge or the jury in their respective tasks. This contributed to a general unsatisfactory quality in the trial as a whole."*

75. It is relevant to point out that quite apart from the issue just described, the Court of Appeal also found that the trial judge's charge to the jury was inadequate and unsatisfactory in a number of respects. Having elected to give a corroboration warning the form of the warning actually given was unsatisfactory. The court concluded that the wording used by the trial judge was not calculated to convey any clear message to the jury. No proper effort was made to define

what in law was meant by corroboration, nor was it explained in detail how a lack of corroboration might affect the jury's view of the evidence. The trial judge had failed to place emphasis on the specific difficulties which the absence of corroboration gave rise to in that particular case. The corroboration warning was characterised as perfunctory and unsatisfactory.

76. In addition, the trial judge's charge had failed to deal sufficiently with the issue of delay.

77. In all of these circumstances the Court of Criminal Appeal felt it necessary to grant the leave being sought and, as was customary at the time, treated the application for leave to appeal as being the substantive appeal. The convictions were quashed and a retrial was directed.

78. We consider that the case of *P.J.*, does provide us with some assistance but that ultimately the present case is readily to be distinguished from it. We accept the views expressed by the Court of Criminal Appeal as to the general undesirability of a jury being allowed to deliberate on their verdicts for a lengthy period of time without having the benefit of necessary redirections on the law by the trial judge. That having been said, the quotation from *PJ* has to be seen in context. The remarks were offered in the context of admonishing counsel for their conduct during the trial and against a background where it could be said, and was being said, that the trial had been unsatisfactory on numerous grounds. Neither was true in the present case and the same sense of general unease concerning whether the overall trial had been satisfactory does not pervade this case.

79. The trial judge's overall charge in the present case is accepted as having been exemplary and comprehensive, save for the omission of any specific directions addressed to the then unanticipated issue with respect to the question (incorporating an opinion) asked by the Garda who was conducting the second interview with the accused.

80. The issue was unanticipated in this sense. Up until the jury asked their question, it had occurred to no one who was present during the trial that a specific direction was needed from the trial judge concerning the question (incorporating an opinion) asked by the Garda, in circumstances where the memo containing it had been read into the record at trial without anybody having raised any objection with respect to it. No doubt if counsel on either side had raised an objection, or had at a minimum registered discomfort with the fact that it contained the impugned question, the trial judge would have readily addressed that issue in her main charge. However, it struck nobody who was present in court at the time as being problematic and no request was made of the judge to give a specific direction on the evidential status of questions asked by gardai during interviews.

81. We accept that it would have been better if the trial judge in this case had given the jury the supplemental instructions which she ultimately gave to them at the first point at which she was formally asked to do so, which was just after the *Almasi* judgment had been opened to her, i.e., just before she sent the jury out again was at 11:09 on the 10th of November 2021. However, that was only 1 hour and 42 minutes before she had changed her mind and in fact, at 12:51, recharged them. Thereafter the jury went to their lunch and, following their return from lunch and the recommencement of their deliberations, they were deliberating for a further 1 hour and 5 minutes before returning to court to announce guilty verdicts.

82. A major distinguishing feature in our view between this case and the *PJ* case is that in the latter case the Court of Criminal Appeal felt that in a whole range of respects the jury had not

received the assistance they were entitled to and that overall they had not been well served. It was put in terms that there had been an utter failure to assist either the trial judge or the jury in their respective tasks. That cannot be said in the present case. The jury here received clear and, save in respect of this discrete issue, timely and comprehensive instructions. Amongst the instructions they had received in the main charge was a general instruction to decide the case only on the evidence and a detailed explication, admittedly confined to questions asked of witnesses in court, of how questions asked do not represent evidence, and how rather it is the answers given that have evidential value. It is true that the nuance that this general principle applies analogously in the context of questions asked during police interviews was not addressed in the main charge. However, the jury having been introduced to the topic of the evidential status of questions in the main charge they would have had no difficulty in assimilating and applying the supplemental instructions that were given to them later as to the specific scenario of concern, albeit that they were at a late stage of their deliberations. The timeline shows that they took sufficient further time, after receiving the supplementary instructions, to enable this court to be confident that their ultimate verdicts were true verdicts in accordance with the evidence and with all of the instructions that they had received from the trial judge. There is simply no reason to believe that they acted otherwise than in accordance with their oath. We therefore dismiss this ground of appeal.

The lack of a Corroboration Warning

83. It is possible to deal with this aspect of the matter very briefly. While the complaint in relation to the failure to give a corroboration warning was not abandoned, it was not pressed with any great enthusiasm. We think this is understandable having regard to the overall circumstances of the case and the way in which the trial judge dealt with the issue.

84. Responding to the application for a corroboration warning the trial judge said:

> *"Mr Nicholas has set out his view on this. He has stated the law correctly. It is section 7(1) of the Criminal Law (Rape) (Amendment) Act 1990 which did abolish the mandatory requirement for corroboration and does now leave it as a matter for the discretion of the trial judge. Matters that trial judges would normally be looking at in these cases would be the unreliability of witnesses, evidence of lies or previous false complaints. In this case Mr Nicholas points to delay and highlights a forensic gap, and of course he has already highlighted this forensic gap in his cross-examination, and he's free to do so again in front of the jury. But the Court is of the view that this cannot be considered a delay case such that it warrants either a corroboration warning or a delay warning, and the Court will neither give a corroboration warning or a delay warning in this case. Thank you."*

85. We are satisfied that the trial judge legitimately exercised her discretion. She did in fact provide reasons for her decision. It is not necessary for the trial judge to give very detailed or elaborate reasons. Such reasons as she gave indicated that she was cognisant of the reasons being put forward on behalf of the accused as to why it was felt that there should be a corroboration warning. However, she was not persuaded that the circumstances being pointed to had the effect of placing the case sufficiently out of the ordinary as to have justified the taking of that step. That was a view that was legitimately open to her. Her reasons, while not set out

elaborately, were sufficiently stated. We find no error on her part and dismiss this ground of appeal.

Conclusion.

86. For the reasons stated, and in circumstances where we have not been persuaded that the trial was unsatisfactory or that the verdicts are unsafe, we dismiss the appellants' appeals against their respective convictions.