THE COURT OF APPEAL

[216/22]

[233/22]

The President
McCarthy J.
Burns J.

BETWEEN

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

RESPONDENT

AND

KARL REILLY

APPELLANT

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

RESPONDENT

AND

PATRICK McLOUGHLIN

APPELLANT

JUDGMENT of the Court delivered on the 8th day of December 2023 by Birmingham P.

1. Following a trial in the Central Criminal Court, on 11th March 2022, the appellant, Mr. Karl Reilly, was convicted of a single count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 (the "1990 Act"), and the appellant, Mr. Patrick McLoughlin, was convicted of a single count of sexual assault contrary to s. 2 of the 1990 Act, as amended by s. 37 of the Sex Offenders Act 2001. Both Mr. Reilly and Mr. McLoughlin have appealed their convictions.

2. In essence, two issues are raised on the appeal. It is said the judge erred in failing to accede to an application for separate trials and there is a complaint that the judge fell into error in refusing to discharge the jury on foot of an application. In relation to the application for a discharge, it will be noted that, while initially both accused sought a discharge, the appellant, Mr. Reilly, sent a communication to the trial judge at a time when she was giving consideration to the issue withdrawing his request for a discharge, and that position was subsequently confirmed to the trial Court by counsel on his behalf.

Background

3. Before addressing the issues raised in the appeal, we will look at an overview of the factual background. The events in controversy occurred on 6th August 2017, in Galway during Galway Race Week. The appellants were not known to the complainant prior to 6th August 2017, but the appellants and the complainant had made their way separately to Galway to socialise there. The complainant, a woman in her late twenties, along with a close friend, made her way to Galway from the border region on 5th August 2017. It was their intention to stay in an apartment in Salthill which was occupied by a friend of theirs, but who was away and had offered to make it available to them. Two other people, a married couple, were also meeting them in Galway. That couple had booked into a hotel and do not feature further to a significant extent in this narrative. The two appellants, along with a third man, travelled together from Longford to Galway in a white transit van on the afternoon of 5th August. They apparently anticipated that securing accommodation would be difficult and/or expensive and it was their intention to sleep in the van. They fitted out the van for that purpose, providing a couch, a beanbag, an airbed and blankets. Upon arrival in Galway, the van was parked in a carpark adjacent to the Harbour Hotel in the Docks area of Galway.

4. The appellants arrived in Galway around 7pm. As Mr. Reilly put it when interviewed by Gardaí, they made a "[b]eeline to the closest pub on Shop Street." There, they had "a few pints". They went to another pub on Shop Street and then went off a side street to another pub where they had more pints. This pub was called Busker Brownes. Initially, Mr. Reilly was chatting to a girl from Dublin, he says for maybe half an hour, and then he met another girl, the complainant. Mr. Reilly and the complainant left the pub they had been in and made their way to the Harbour Hotel. There, they had more drink before going to the transit van which was parked nearby. Mr. Reilly and the complainant had been kissing in two licensed premises, and on arrival at the van it is agreed that consensual sexual activity including sexual intercourse took place. The prosecution version of events was that while intercourse was taking place, the appellant, Mr. McLoughlin, came back to the van and opened the door. On the complainant's account, at that stage, she withdrew her consent to sexual activity, but Mr. Reilly continued to have sex with her, at which stage the sex was not consensual and thus amounted to rape.

5. When Mr. McLoughlin came back to the van, he was told by Mr. Reilly to go away and did so for a period. He went to the front of the van, but it was cold, so he returned to rear of the van.

On the prosecution account, having come to the back of the van, Mr. McLoughlin sexually assaulted the complainant, the assault consisting of placing either his penis or a finger in her anus; she was unsure which. On Mr. McLoughlin's account, he did not engage in any form of sexual activity with the complainant. After sexual activity, the complainant did not leave immediately but remained in the van for a "while after" before getting out. In the carpark, she encountered a local man who was working on a friend's boat. He noted she was distressed – "distraught" was the word he used – and he came to her assistance. The weather was bad at the time, so she got into his car, and he drove her to the Garda station.

6. The position of the parties might be summarised as follows. The prosecution position was that the complainant had engaged in consensual sex in the van, to which she had gone willingly, but at a particular point, withdrew consent, and thereafter what happened involving Mr. Reilly was non-consensual. The complainant never consented to any form of sexual activity involving "the other man [Mr. McLoughlin]", and she was subjected to a sexual assault by him. Mr. Reilly's position was that the sexual activity in which he was engaged was at all times consensual, while Mr. McLoughlin's position was that he had no involvement whatever in any sexual activity, and more particularly, did not engage in any form of non-consensual sexual activity.

Application for Separate Trials

7. At the commencement of the trial, counsel on behalf of Mr. Reilly, supported by counsel on behalf of Mr. McLoughlin, made an application for separate trials. In doing so, counsel first drew the judge's attention to the account of the incident offered by the complainant. He then turned to the accounts given by the two accused when interviewed by Gardaí. In the course of the interview with Mr. Reilly, the following exchange took place:

> "Q. Were you kissing this girl?
>
> A. Oh, yes. In two pubs she was fairly full-on kissing. Anyway, I got on well with her…I can't believe this.
>
> Q. What about the van?
>
> A. We were kissing going down to it. She started giving me oral sex and that led to normal sex.
>
> Q. Where was this happening?
>
> A. On the couch in the back of the van.
>
> Q. What happened next?

A. We were going at it. The sliding door opened. The wind and rain was howling in. It was [Mr. McLoughlin]. I told him to go away. I was kind of finishing up -- finished up. He was knocking on the door and I finished up and fell asleep and woke up to [Gardaí] next. I was shocked and we were arrested."

Counsel referred to the interview conducted with Mr. McLoughlin who said:

"I didn't know where any of the lads were, so I walked back to the van. I was on the phone to my girlfriend when I was walking back. I got back to the van and I heard [Mr. Reilly] having intercourse with a girl in the back of the van. I was still on the phone to my girlfriend and I got into the front of the van. It was too hard to sleep there, so I got into the back of the van where my blanket was. They were still having intercourse, so I just went to sleep in the blanket."

Counsel drew attention to the fact that at one stage the following exchange took place with Mr. McLoughlin:

"Q. You said when you got back you heard [Mr. Reilly] having intercourse in the back of the van. How did you know it was [Mr. Reilly]?

A. I opened the side door and seen them, then I got into the front.

Q. When you opened the side door what did you see?

A. I seen [Mr. Reilly] having intercourse with a woman.

Q. How did you know they were having intercourse? What did you see?

A. Basically when you opened the sliding door, [Mr. Reilly] was facing the opposite way from the door and she was facing towards me, towards the door.

Q. Were they clothed?

A. I think so.

Q. How can you be sure they were having intercourse?

A. You could hear them -- you could hear them moaning…

Q. So you closed the door. What happened then?

A. I closed the side door, got into the front, waited for them to finish having intercourse. I was on the phone to my girlfriend. The phone went dead. I tried staying in the front but it was too cold. I got in the back to get my blanket. They were still having intercourse. I said, never mind me. I went into the back of the van where the airbed was and went to sleep."

8. Arguing in support for the application for separate trials, counsel said the concern was that while there was a degree of difference, and he would have to acknowledge that it was a degree, nonetheless, it raised a concern in terms of the possibility of separate trials. Counsel referred to *Attorney General v. Joyce & Walsh* [1929] IR 526. He accepted the law states that even if the prosecution evidence contained a statement from one accused implicating another, that might not always be sufficient in itself to outweigh the arguments in favour of a joint trial. Counsel said the concern was arising in circumstances where his client had given his version of events, and insofar as the co-accused Mr. McLoughlin had given a version of events which may be viewed as in some ways different, his concern would be that a jury would pit each of the accused against one another in terms of the accounts they had offered, in order to determine if there was a consistency to be observed between the complainant's narrative and the narrative of Mr. McLoughlin, and would then use the narrative provided by Mr. McLoughlin as evidence against his client. Counsel said he fully appreciated that the Court would warn the jury in the manner required by the case of *DPP v. Madden* [1977] IR 336, but he said in circumstances where a jury might apprehend there was a distinction or some class of a difference, slight as it may be, between the position taken by Mr. McLoughlin in interview and his client, Mr. Reilly, that his concern was that this would ultimately prejudice his client, Mr. Reilly.

9. Counsel on behalf of Mr. McLoughlin joined the application by way of brief submission. She said it was a very different position in relation to Mr. McLoughlin because his account was by a small degree different to that of Mr. Reilly in interview, but the converse issue to that identified by her colleague could arise, wherein a jury might take the view that, by virtue of the account they had been given by Mr. Reilly, and because her client's account was slightly different, that, in fact, would serve to implicate Mr. McLoughlin in a way that the jury might not otherwise have concluded.

10. Opposing the application, prosecution counsel stated it was his submission that there was a general preference that two persons tried in relation to the same incident should be tried together. He said that if it were a case where two defendants had made statements which incriminated one another, and this did not in itself mandate separate trials, then *a fortiori* in a situation where they did not incriminate one another but gave slightly different accounts, this falls very short of what is required to mandate a separate trial. He said the difference appeared to concern whether on the second occasion that Mr. McLoughlin entered the van, sexual activity was still going on. He said the case before the Court was a situation like any case involving multiple

accused where different accounts are often given and the accounts at issue differ only to a small degree.

11. The trial judge took some time to consider the matter. When she returned, she reviewed the accounts given by each of the parties and made reference to well-established law in the area, referring to *Walsh on Criminal Procedure* (Roundhall, Professor Dermot Walsh, 2nd ed., 2016) and to the decision of Kenny J. in *The People (Attorney General) v. Murtagh* [1966] IR 361. The judge said:

> "The differences in the events of the evening, as between [Mr. Reilly's] accounts and [Mr. McLoughlin's] accounts are minimal and differences are to be expected in recalling social interactions across a number of hours."

12. The judge said the jury would be warned in this case, as in similar cases, about how they view the evidence in relation to each accused, and also how, in law, they would have to treat the statements of each accused. She said she was satisfied jurors were capable of understanding such instructions; experience had shown the capacity of jurors to deal with the complexity of multiple accused in other trials once properly instructed in the law. She said, in considering the interests of justice, she was "obliged to consider this as a whole in relation to both the prosecution and the accused." This, she said, was a case where the interests of justice were best served by a trial of both accused. She was satisfied that the difference in the two statements was not sufficient to require her to exercise her discretion to order separate trials, and accordingly, she refused the application to sever the indictment.

13. In *Walsh on Criminal Procedure*, Professor Walsh begins his treatment of this issue at para. 15-115, by saying that, as a general rule:

> "[I]t is desirable that two or more persons charged with the same offences, or separate offences arising out of the same incident, should be tried together. Not only does this save time and expense, it enables the jury to get a more complete picture of the crime or crimes in question."

There is no doubt that a trial judge should direct separate trials if that is required in the interests of justice. In this case, the complaint was essentially of a continuum, of consented to sexual activity, followed by untoward and non-consensual activity on the part of both men. On the prosecution case, consent to sexual activity in relation to Mr. Reilly was withdrawn following the arrival on the scene of Mr. McLoughlin. The prosecution case was that there was further activity, including activity on the part of Mr. McLoughlin, in a confined space, the rear of a transit van,

when both accused were present together and both were engaging in forms of sexual activity. The differences given by the two accused were, as was conceded at trial and made clear in both oral and written submissions before this Court, limited. Indeed, it could be argued there was really no difference at all. Mr. Reilly commented he was "finishing up", while Mr. McLoughlin felt sexual activity was continuing. It does not necessarily follow that there is any difference between these two positions, but certainly any difference there is very minor indeed. Joint trials routinely take place when the potential difficulties for the defence are of a far greater order of magnitude, as when one or more accused has made a statement implicating a co-accused and assigning a role in the crime under investigation to a co-accused.

14. We have no doubt that this was a case where the trial judge was fully entitled to refuse the application for separate trials. We will simply make the observation that in considering where the interests of justice lie, a matter, amongst others, to be considered is the position of a complainant. The Court will need to carefully consider whether a complainant needs to be subjected to the potential ordeal of giving evidence on a number of occasions in separate trials. We reject this ground of appeal.

Application to Discharge the Jury

15. The background to the application to discharge the jury is to be found in the fact that, in the usual way, the prosecution made disclosure in advance of the trial. Among the material disclosed was a two-page document comprising a call log created as a result of analysis of the phone of Mr. McLoughlin and also the phone of the complainant. Details of 29 calls to or from the phone of Mr. McLoughlin and details of ten calls to or from the phone of the complainant were provided.

16. The telephone records did not feature in any way as part of the prosecution case, but the defence – and more particularly Mr. McLoughlin though his counsel – did have resort to the records provided and sought to deploy them. On behalf of Mr. Reilly, the point is made on appeal that, in circumstances where a co-accused was addressing the question of telephone records with a view to damaging the credibility of the complainant, it was unnecessary for him to cover the same territory, as it is the nature of a joint trial that if questions are asked which damage the credibility of a prosecution witness, this inures to the benefit of both accused.

17. In broad terms, the phone records provided indicated the call type, categorising calls by "Missed", "Outgoing", or "Incoming". The timestamp in respect of each recorded call indicated the

date on which it was made; all calls were on 6th August 2017. However, it is of some significance that the date is recorded as 8/6/2017; the American system of month followed by date was used throughout. In each case, time of the call is recorded using the 24-hour clock, and then in brackets appears UTC+0. UTC, Universal Time Coordinated, is the successor to Greenwich Mean Time (GMT). Ireland and Great Britain are one hour ahead of UTC during summertime. The effect of this is that the times of all calls recorded were off by one hour, *i.e.* being recorded as UTC+0 hours when, in fact, actual time in Galway on the occasion was UTC+1 hour. The error in interpretation on the part of the defence was not noticed by the prosecution until a late stage in the trial. When the prosecution did notice, Garda Sergeant Evelyn Barrett was proffered as a witness to clarify the situation; this precipitated the application for a jury discharge.

Evidence of the complainant

18. Before considering the application for a discharge, we will consider to what extent questions in relation to time, and more particularly, how issues in relation to time by reference to the phone records featured during the course of the trial. In her direct evidence, the complainant explained that, upon arrival in Galway, she and her companion first made their way to the house of the friend who was making the apartment available; this was about lunchtime. Having initially dropped their bags in Salthill, they walked into town, had lunch, and then got a taxi back to the house. From the house, they got a taxi back to the city centre around 6pm. Having initially gone to the wrong licensed premises, the Kings Head, they made their way to the Quays public house where they were until about 10pm. After the Quays, they went briefly to the Dáil Bar, and from there to Busker Brownes, where they stayed until about midnight. Having got some food in Supermac's, they made their way to the Radisson Hotel by taxi, from where they went back into the city centre, returning to Busker Brownes after about 1am. She said they were in Busker Brownes, where she met Mr. Reilly, for a good while, and that they went from there to the Front Door, where they had one drink, at which point they started kissing and then took a taxi to the Harbour Hotel. There, they went to the residents' bar. They walked out to the carpark and went to a white transit van. She then proceeded to describe the sexual activity she said occurred in the van. She said she stayed in the van. Asked when she left the van, she said it was "like, a while after". Asked if she had met anyone after she left the van, she explained her difficulties in getting out of the carpark and then that she met a man, Mr. James Rattigan, explaining that she got into his car, and he brought her to a Garda station.

19. Initially, the complainant was cross-examined by counsel on behalf of Mr. Reilly. While there were some questions about the sequence of movements from one licensed premises to another, we think it fair to say that the question of timings did not feature to any significant extent. In the course of cross-examination, the complainant did confirm, in answer to a question, that while there was kissing and touching in the van, sex started straight away, and they were only having sex a short while when the door opened. Mr. Reilly told the man who had opened the door while sex was taking place to get out of there, but within a relatively short period, no more than two minutes, the door opened again. The complainant said that after she had given Mr. Reilly oral sex, he had taken out his mobile phone – she thought he was videorecording her – but it was suggested that Mr. Reilly was only turning on the light so he could see what he was doing, and she accepted that a while after this she got out of the van and met with the other man who brought her to the Garda station.

20. Later, in cross-examination, the complainant referred to the fact that Mr. McLoughlin had asked her to ring his phone, which he was having difficulty locating in the van. Shortly after that, she got out of the van and left.

21. The cross-examination of the complainant by counsel for Mr. Reilly spanned lunchtime. In the relatively brief period taken up by cross-examination by defence counsel after lunch, counsel asked whether he could suggest to the witness that her recollection was that she had got into the van sometime shortly before 3am, to which the witness said yes. Counsel asked her how long she thought she was in the van with the two men, and her first response was to say she did not know. She was asked whether she was with them for an hour, and she said she would say more.

22. The cross-examination on behalf of the co-accused, Mr. McLoughlin, focused to a greater extent on timings, counsel making the point that she wanted to run through a timeline. Counsel asked if it would be fair to say that it was somewhere between 2.45am and 3am when she and Mr. Reilly were heading back towards the van, to which the witness replied she would probably say about 3am. Counsel asked her whether there could be as much as 10 to 15 minutes between the two occasions on which the door of the van was opened, and the witness replied she did not think so – she thought it was only up to five minutes maximum. Counsel asked her about calling the number provided by her client and asked whether it was the case that within a couple of minutes of that, she was out of the van. She was asked how long she was out of the van before Mr. Rattigan came along and the witness replied she felt she was out about 15 minutes. She was

asked could it have been as much as an hour, and she responded, no. It would appear that this question may well have been prompted by counsel's reading of the phone records.

23. Counsel asked the complainant about when she first met the man in the carpark who brought her to the Garda station and the witness replied it was about 5am, to which counsel responded, I think it was closer to 5.30am, to which the witness said, okay. Counsel said that from Garda notebooks, it appeared it was about 6.05am when she arrived at the Garda station, to which the witness said, yes.

24. Counsel brought her through the statement she had made to Gardaí which included "I asked them could I leave a few times. They said, no, just sleep. Eventually at approximately 6 am I asked again could I leave and they said yes. I left and met a man called James Rattigan."

25. Of note is that as counsel drew her cross-examination to a close, she said she should put formally to the complainant that she had given her phone to Gardaí, and insofar as she had made reference to Mr. McLoughlin giving her a number to ring, she had called that number at 4.19am. Counsel said she would put it at 4.25am at the latest when she got out of the van, to which the witness answered, yes. In actual fact, insofar as the phone records were referring to UTC times, rather than UTC+1 Irish summertime, the call to the number provided by Mr. McLoughlin was at 5.19am, which would have meant she was getting out of the van at approximately 5.25am. Counsel referred to the fact that Mr. McLoughlin's phone records showed a 38-minute phone call at 2.19am to his partner, which, it was said, brought him up to 3am, which, it was suggested, would seem to coincide with him talking on the phone outside the van. Counsel said she was asking the witness because she did not want to be unfair, with regard to these things coming into the case without the witness having an opportunity to comment. Counsel also referred to the fact that the records showed a call at 3.02am for seven and a half minutes, to the partner of Mr. McLoughlin. Again, we now know the times referred to were out by one hour and that the phone call lasting 38 minutes was made at 3.19am, and that that lasting seven and a half minutes was made at 4.02am.

26. In summary, so far as the cross-examination on behalf of Mr. McLoughlin is concerned, one question which appears to be based on a false premise was put: that there was a time lag of just over an hour between the phone call to the phone of Mr. McLoughlin and the meeting with Mr. Rattigan in the carpark. The witness' attention was also drawn to the records which indicated a 38-minute phone call at 2.19am – it was in fact 3.19am – and a seven-and-a-half-minute phone call recorded at 3.02am; it was in fact 4.02am. However, these questions were in the context of an

acknowledgement by counsel that the witness could not comment on what calls her client did or did not make, but she was just providing the witness with an opportunity to comment.

27. There was brief evidence of the complainant relating to her making statements to Gardaí which was not contentious. The only observation one would make is that, insofar as she dealt with text messages sent by her, that it is possible, certainly with the benefit of hindsight, that this might have provided a path which would have alerted the parties to the difficulties of the interpretation being placed on the phone records, but that did not happen.

Evidence of Garda Rachel Killeen

28. Phone analysis also featured during the evidence of Garda Rachel Killeen, the first Garda to whom a complaint was made, and who by default became the investigating member. When she was giving evidence, counsel on behalf of Mr. McLoughlin handed her the first page of the phone analysis. The witness confirmed that halfway down the page, what was recorded was a call from a named woman at 2.19am, which lasted for 38 minutes. Attention was also drawn to the record on the page the witness was holding of a call at 3.02am lasting for seven minutes and 34 seconds. There was also reference to a call recorded at 1.04am to a number attached to Mr. Reilly, a call lasting 23 seconds. All the recorded times need to be advanced by one hour.

Garda interviews with the appellants

29. This was a case where neither appellant went into evidence, but for completeness' sake, we should draw attention to what was said by both appellants when interviewed by Gardaí in the course of the investigation.

30. In response to an invitation from Gardaí couched as "if you want to tell us your day yesterday?", Mr. Reilly provided a narrative which began with him finishing work at around 3.30pm and collecting his two friends and going to Galway. At one stage, he said "[t]hen we said we would go to the Harbour. We had one there and back to the van for, you know yourself. I'd say it was roughly 3[am]". The narrative ends "[h]e [Mr. McLoughlin] was knocking on the door. And I finished up and fell asleep and woke up to ye [Gardaí] next, I was shocked, and we were arrested." Asked "[e]xplain how you mean finished up?", he answered "[w]e just stopped, like finished."

31. In the course of his first interview, Mr. McLoughlin was asked about the fact he said there was a stage when they were in Busker Brownes and he lost his friends there, and was asked at

what time he left, to which he answered, "I don't know, about 2 or 3[am]". He said he rang his girlfriend on the way home, that he was talking to her when he got into the van.

Discussion

32. The court session which dealt with the interviews conducted with both appellants finished on a Friday afternoon, and by prior arrangement, the Court then adjourned to the following Tuesday; a decision had been taken earlier not to sit on the Monday to convenience a number of counsel. On Tuesday, when court reconvened, the issue of the phone records emerged. Counsel on behalf of Mr. McLoughlin, initially supported by counsel on behalf of the co-accused, sought a discharge of the jury. One of the arguments advanced we can deal with quickly. It was suggested what had happened meant that the defence had been denied an "opportunity of engaging an independent phone analyst". We are bound to say we see that argument as something of a red herring. The documentation provided states in respect of each and every call that the time recorded was UTC+0 hours. We do not believe an expert was ever required to explain UTC was, or to explain that in summertime in Ireland, the clocks go forward (spring forward), and during that period, we operate on the basis of UTC+1 hour, Irish summertime, sometimes referred to as daylight saving time. We would make the general observation that we do not think it sufficient for a party at an appeals stage to say they were denied an opportunity of investigating, without seeking to conduct the investigation post-trial and establishing whether there was, in fact, any reality to what it is suggested merited investigation. In this case, we are quite satisfied there is no reality to the argument as to investigations. What had happened was readily apparent; there had been a mistake or a misunderstanding.

33. There remains for consideration the question of whether what occurred meant that either appellant was denied a fair trial. We will consider whether either appellant was denied a fair trial, and do so even in circumstances where Mr. Reilly expressly abandoned the point about the need for a discharge of the jury. In the ordinary course of events, if an accused person expressly abandons a point, then it would be unlikely they would be permitted to reinstate the point and rely on it on appeal. However, in circumstances where there had been a joint trial, if the jury was discharged in respect of one accused, it cannot be certain whether the trial could or would have proceeded in the case of the other. Would the judge have regarded this as the appropriate course of action? Would the prosecution even have wanted to do that?

34. While this is not a question of attributing blame, we are struck by the fact that both in the trial Court and before this Court, there has been reference to wrong information being provided,

the defence being misled and so on. We think that is to misstate the position. Certain raw data was disclosed to the defence as part of the disclosure process. The data disclosed, so far as it goes, was accurate and complete. It was misinterpreted by the defence. While the misinterpretation may be an understandable one, and indeed may have been a common misunderstanding for a period, it is necessary to be clear that this is not a case of non-disclosure or false or misleading disclosure.

35. The situation having emerged, the question is whether it could be dealt with only by way of a discharge of the jury. We do not believe that was in fact required. First, there was no difficulty whatever in explaining to the jury what had happened, that a document had been generated where times were expressed in UTC or GMT rather than Irish summertime. We do not see how the emergence of the error would of itself damage either side, and more specifically, the defence, in the eyes of the jury. Our review of the transcript would suggest that only one question was asked which had its origin in the phone records: the question that suggested the complainant was out of the van and in the carpark for an hour before encountering Mr. Rattigan. While the actual times which have now emerged support the position of the complainant, and indeed establish that her estimate was essentially correct, we do not think the emergence of the factual position would have any real adverse impact on the defence case.

36. The question that has to be considered is the extent to which a potentially significant line in cross-examination was closed off.

37. At trial, on the basis that the second phone call made by Mr. McLoughlin ended at 3.09.34am, this had to be seen in the context that both the complainant and the accused, Mr. Reilly, had estimated their arrival time at the van was around 3am. There was the phone call by the complainant to the phone of Mr. McLoughlin, thought to have been at 4.19am, and the meeting with Mr. Rattigan shortly before 5.30am.

38. On the basis of the now established information, Mr. McLoughlin's opening of the van door for the second time and entry into it must have been around 4.10am. On this basis, the complainant would have spent about an hour and ten minutes in the van when both accused were present. At one stage in cross-examination by counsel for Mr. Reilly, she was asked how long she thought she was in the van with the two men, to which she initially responded "I don't know". Counsel asked her whether she was there for an hour, drawing the response from her, "I would say more".

39. Having carefully considered the matter, we are in no doubt the issue which has arisen, arising from the misinterpretation of data provided, while unfortunate, has not caused irrevocable damage to the trial. On the contrary, we are quite convinced it was a matter capable of being dealt with either by recalling the complainant for further cross-examination, a course of action which was offered, and/or through closing speeches. The error, or misunderstanding, was an understandable one which was readily capable of being explained to a jury. In the circumstances, we are satisfied that the trial judge acted well within her rights in declining to discharge the jury, so we are not prepared to uphold this ground of appeal.

Decision

40. In summary, the position is that we have not been persuaded to uphold any of the grounds of appeal which have been argued and so we will dismiss the appeal against conviction.