The People (Director of Public Prosecutions), Prosecutor v. **C.,** Accused [C.C.A. No. 156 of 1999]

Court of Criminal Appeal 31st July, 2001

Criminal law – Sexual offences – Rape – Consent – Personation – Mens rea – Mistake grounding apparent consent – Whether person who consents to sexual intercourse with A. believing that she is having sexual intercourse with B. has consented to that sexual intercourse if there is no active attempt at personation by A. – Criminal Law (Rape) Act (No. 7), 1981, s. 2

Evidence – Admissibility – Statement – Confession – Discretion – Whether manner in which statement obtained fell below acceptable standards of fairness – Whether trial judge exercised discretion correctly in failing to exclude statements.

Evidence – Criminal law – Corroboration – Sexual offences – Warning – Whether trial judge erred in failing to warn jury on need for corroboration – Criminal Law (Rape Amendment) (No. 32) Act, 1990, s. 7.

Section 2 of the Criminal Law (Rape) Act, 1981, provides as follows:-

"(1) A man commits rape if:-

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

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

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

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

Section 7(1) of Criminal Law (Rape Amendment) Act, 1990, provides as follows:-

"Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished."

The accused had been convicted of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981.

The evidence had been that the accused and the complainant were at a party in a house. The complainant was sleeping in one of the bedrooms when the accused went upstairs and got into the same bed as her and had sexual intercourse with her. There

was an argument in the house involving the complainant's boyfriend and the accused. A complaint was made to the gardaí. The accused was arrested and taken to a garda station. He later made some inculpatory statements.

The admissibility of the statements were challenged on the grounds that at the time when they were made the accused had had one hour of sleep in a period of 30 hours and had, in the early hours of the morning at the party, consumed a significant quantity of alcohol.

Counsel for the accused argued that there was an onus on the prosecution to show beyond reasonable doubt that a statement was voluntary. Further, it was argued that the trial judge had a discretion to exclude statements if the manner in which they were obtained fell below acceptable standards of fairness and that the learned trial judge exercised that discretion incorrectly.

Further, counsel for the accused argued that the complainant had given evidence in examination-in-chief of having been woken up by a man on top of her having sex with her but that in cross-examination she accepted that she had told the story to her boyfriend that she had woken when somebody opened the bedroom door and that she had acquiesced in having sexual intercourse with this person but that she had understood it to be her boyfriend.

Further, counsel also relied on the absence of any evidence of personation and submitted that a difference had arisen between the basis on which the prosecution had opened the case to the jury and the evidence as it emerged in the light of the conflict concerning the complainant's evidence. It was also argued that the appropriate charge was to the effect that a woman, who consents to sexual intercourse with A., believing that she is having sexual intercourse with B., has consented where there is no active attempt at personation by A.

Held by the Court of Criminal Appeal (Murray, O'Sullivan. and O'Neill JJ.), in refusing leave to appeal, 1, that the trial judge's ruling found, as matters of fact, that the accused was in a perfectly coherent condition at all stages and perfectly capable of looking after himself and seemed perfectly normal to the doctor. There was ample evidence before the trial judge which entitled him to make the findings of fact which he did.

The People (Director of Public Prosecutions) v. Shaw [1982] I.R. 1 applied.

2. That a conflict in evidence between what a witness said in evidence and what he or she may have said on another occasion did not of itself require the trial judge to direct that a jury should accept one version, even the most favourable version, over another. To direct the jury to rely on one version rather than another would be to usurp its function.

3. That the trial judge had not erred in refusing to withdraw the case from the jury. The mere fact that a conflict of evidence emerged which was not reflected in the opening of the case by the prosecution was not a basis for directing a verdict of not guilty.

4. That the submission that a person who consented to sexual intercourse with A. believing that she was having sexual intercourse with B., has consented to that sexual intercourse if there was no active attempt at personation by A. was unfounded. If A. knew that consent to sexual intercourse was given because the woman concerned believed him to be another person then he knew that there was no consent by the woman to having sexual intercourse with him.

R. v. Dee (1884) 15 Cox C.C. 579; *R. v. Barrow* (1868) 11 Cox C.C. 191 and *R. v. Elbekkay* [1995] Crim. L.R. 163 considered.

5. That s. 7 of the Criminal Law (Rape Amendment) Act, 1990, left it entirely to the discretion of the trial judge to decide whether to give a warning on the dangers of convicting on uncorroborated testimony, "having regard to all the evidence given". Corroborative evidence did not mean that the evidence of the complainant must be corroborated in every material respect. The fact that there was a conflict of evidence between witnesses did not mean that a trial judge was required to give a warning.

The People (Attorney General) v. Trayers [1956] I.R. 110; *R. v. Baskerville* [1916] 2 K.B. 658; *The People (Director of Public Prosecutions) v. Reed* [1993] 2 I.R. 186; *The People (Director of Public Prosecutions) v. J.E.M.* (Unreported, Court of Criminal Appeal, 1st February, 2000) considered.

Cases mentioned in this report:-

R. v. Barrow (1868) 11 Cox C.C. 191.

R. v. Dee (1884) 15 Cox C.C. 579.

The People (Director of Public Prosecutions) v. J.E.M. (Unreported, Court of Criminal Appeal, 1st February, 2000).

The People (Director of Public Prosecution)s v. Reed [1993] 2 I.R. 186.

R v. Baskerville [1916] 2 K.B. 658; 115 L.T. 453; 12 Cr. App. R. 81.

R v. Elbekkay [1995] Crim. L.R. 163.

The People (Attorney General) v. Trayers [1956] I.R. 110; (1954) 89 I.L.T.R. 23.

The People (Attorney General) v. O'Brien [1965] I.R. 142.

The People (Director of Public Prosecutions) v. Shaw [1982] I.R. 1.

Application for leave to appeal.

The facts are summarised in the headnote and are fully set out in the judgment of the Court of Criminal Appeal delivered by Murray J., *infra*.

The accused was charged with rape of the complainant contrary to s. 4 of the Offences Against the Person Act, 1861, and s. 2 of the Criminal Law Rape Amendment Act, 1981, as amended by s. 21 of the Criminal Law Rape (Amendment) Act, 1990. The accused was convicted on the 26th April, 1999, and sentence was passed by the Central Criminal Court (Carney J.) on the 23rd July, 1999.

An application for leave to appeal was lodged by the accused on 9th August, 1999. The matter was heard by the Court of Criminal Appeal (Murray, O'Sullivan and O'Neill JJ.) on the 16th October, 2000.

Hugh Hartnett S.C. (with him *Fergal Foley*) for the accused.

Anthony Salmon S.C. (with him *Mary Ellen Ring*) for the prosecution.

Cur adv. vult.

In accordance with the provisions of s. 28 of the Courts of Justice Act, 1924, the judgment of the court was delivered by a single member.

Murray J. 31st July, 2001

This is an application for leave to appeal against conviction. The accused was arraigned before Carney J. and a jury at the Central Criminal Court on the 19th April, 1999, on a charge of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981. He was thereupon tried for the offence and found guilty by the jury and sentenced to imprisonment for four years, suspended unconditionally on him paying compensation in the sum of £7,000 to the injured party. The particulars of offence set out in the indictment were that the accused, "a male person, on the 5th January, 1997, at …, in the city of Dublin had sexual intercourse with [A], a woman, who at the time of the intercourse did not consent to it or at the time knew that she did not consent to the intercourse or was reckless as to whether she did or not consent to it."

The grounds as relied upon by the accused at the hearing of the application were as follows:-

1. the trial judge erred in law and in fact in holding that the statements of the accused tendered in evidence by the prosecution were made in accordance with the principles of constitutional fairness;
2. the learned trial judge failed to charge or adequately charge the jury in relation to the facts of the case and in particular failed to charge them correctly in relation to the conflict between the evidence given by the complainant in evidence in chief and the admissions made in cross-examination;
3. the learned trial judge erred in law and in fact in refusing to withdraw the prosecution case from the jury at the close of the prosecution case;
4. the learned trial judge failed to address the jury properly or at all in relation to the *mens rea* of the offence as regards the issue of impersonation;
5. the learned trial judge erred in law in the exercise of his discretion when he refused to warn the jury on the need for corroboration and in failing to hear the arguments of counsel on this question.

Before addressing the grounds of appeal as argued at the hearing of the application for leave to appeal, it may be useful to outline certain facts of the case.

On the evening of the 4th January, 1997, the eve of the date of the commission of the offence for which the accused was convicted, the complainant joined about five or so friends in a Dublin pub for the purpose

of celebrating the birthday of one of those friends, a Mr. K. She went there with her boyfriend Mr. H. The group left the pub sometime after midnight and walked to Mr. K.'s house to continue the festivities, arriving there at approximately 1.00 a.m. This had been planned and the complainant and H. had made arrangements to stay in the house that night, sharing the same bedroom.

The accused had been invited to the party. He had been working late that evening and had not gone to the pub. He had known K. for a long time. He was married but separated and was at the time back living with his mother in the house next door to K.'s. He knew that it was intended that the party would continue in K.'s house and it was his intention to go to it if it was still going on when he got home to his mother's house. This he did. He brought with him a 1 litre bottle of vodka from which he had taken one drink after work. He arrived at the party in the small hours of the morning. It is not necessary to examine in detail the precise time of arrival of the applicant at the party or that of the subsequent events since nothing material turned on these times which, in any event, are not very clear. What is relevant is the sequence of events. The party was described in the evidence as being good fun, chat, music and people were drinking. The complainant herself did not take alcoholic drink when she returned to K.'s house. The accused was drinking his own vodka. Sometime between 3.00 a.m. and 4.00 a.m. the complainant decided to go to bed and went up to the bedroom that she had arranged to stay in. H. went up with her. They had sexual intercourse and subsequently spent a considerable period chatting to one another until she decided that she would go to sleep as she had to be at work that day at midday. H. then went back downstairs and rejoined the party.

In the meantime, the accused had, according to his evidence, drunk the best part of the litre bottle of vodka. In his evidence at the trial the accused said that, as he was getting low on cigarettes, he decided to pop upstairs and see if K.'s sister had any. From having lived next door to the K. household for many years he was familiar with the layout of the house. He knocked on K.'s sister's bedroom door but received no reply. At that point, according to his evidence at the trial, "the door across was open so I said I would go in and lay my head down on the pillow for a few minutes and get a little bit of rest. I got onto the bed, lay on the bed and there was a girl - [the complainant] in the bed." At this point it maybe relevant to note that neither the complainant nor the accused had met one another prior to that evening.

One of the issues of fact at the trial concerned what happened from the moment when the accused entered the bedroom in which the complainant was in bed. According to the evidence given at the trial by the accused,

when he laid down to have a rest he put his hand on the shoulder of the complainant, they began to snuggle and they had consensual sexual intercourse. The complainant for her part gave evidence that she was asleep and woke up to find someone having sexual intercourse with her which for a second she thought might be her boyfriend and then suddenly realised that he was not. In cross-examination it was put to her that her boyfriend had made a statement to the gardaí based on an account which she had given to him shortly after this event. That statement was to the effect that the complainant had seen the bedroom door opening. She thought it was her boyfriend coming in and turned towards the wall. She felt somebody lifting the duvet and getting into the bed beside her. She felt him removing her pyjama bottoms and he started to have sexual intercourse with her. It was not suggested that she knew who it was and consented to sexual intercourse with the accused. She acknowledged that, generally an account given shortly after the event is more likely to be accurate than one given a considerable time later. Apart from the issue as to whether the complainant had consented to sexual intercourse with the accused, an issue arose concerning a conflict of evidence as to whether she was awake when the accused entered the room or whether she woke up at a point when she found a person having sexual intercourse with her. A number of the grounds of appeal relate to this issue.

Subsequently in the house there was a row, particularly between the complainant's boyfriend and the accused arising from what had occurred. Subsequent to this a complaint was made to the gardaí who commenced their investigations. In the meantime the accused had returned to his mother's home next door at about 8.00 a.m. He was not able to go to sleep because of the events which had happened, the whole matter having caused a "hive of activity" in his mind. He did manage just one hour's sleep before the gardaí arrived to interview him in the early afternoon. He was arrested and taken to a garda station. He subsequently made statements initially denying that he had any sexual intercourse with the complainant. Finally he made a statement admitting to having sexual intercourse with the complainant. In that statement he stated that the complainant had responded to his advances after he had got into the bed. He said "I think she thought it was her boyfriend." He said she consented to having sexual intercourse with him. There was no conversation between either of them from the time he entered the room until he was leaving. He then said "Sorry" "because I think she thought I was her boyfriend. I did not ask her for permission to have sex with her and I know what I did was wrong, I shouldn't have done this." The admissibility of the statements were challenged on the grounds that, at the time when they were made the accused had had one hours sleep in a period of thirty hours and had, in the

early hours of the morning at the party, consumed a significant quantity of alcohol.

First ground

Counsel for the accused submitted that the trial judge erred in ruling that the statements of the accused, which were tendered in evidence by the prosecution, were made in accordance with the principles of constitutional fairness. For this submission counsel relied on the fact that the accused had not had any sleep, apart from approximately one hour since he had got up the day before the afternoon on which he was interviewed by the gardaí, that is to say one hours sleep in approximately 30 hours. It was also submitted that the learned trial judge failed to take sufficiently into account the fact that the accused had consumed a significant amount of alcohol when he was at the party in the early hours of the morning. It was submitted that the primary onus on the prosecution was to show beyond reasonable doubt that the statement was voluntary, that there was no physical or psychological pressure placed on the accused or that there was excessive questioning. However, even voluntary statements should be excluded if the manner in which they were obtained fell below acceptable standards of fairness. The trial judge had a discretion to exclude such statements. The learned trial judge exercised that discretion incorrectly in failing to take sufficiently into account the lack of sleep and the amount of drink which the accused had previously consumed.

In support of his submission counsel relied on the *The People (Director of Public Prosecutions) v. Shaw* [1982] I.R. 1 and in particular the judgment of Griffin J., at pp. 60 to 61, where he held, in relation to statements of admission or confession that:-

> "The primary requirement is to show that the statement was voluntary in the sense in which that adjective has been judicially construed in the decided cases. Thus, if the tendered statement was coerced or otherwise induced or extracted without the true and free will of its maker, it will not be held to have been voluntarily made. The circumstances which will make a statement inadmissible for lack voluntariness are so varied that it would be impossible to enumerate or categorise them fully. It is sufficient to say that the decided cases show that a statement will be excluded as being voluntary if it were wrung from its maker by physical or psychological pressures, by threats or promises made by persons in authority, by the use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of a diversity of methods which have in common the result or the risk that what is tendered as a voluntary statement is

> not the natural emanation of a rational intellect and a free will … Secondly, even if a statement is held to have been voluntarily obtained in the sense indicated, it may nevertheless be inadmissible for another reason … Although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or of the circumstances in which it was obtained, it falls below the required standards of fairness … whether the objection to the statement be constitutional or other grounds, the crucial test is whether it was obtained in compliance with basic or fundamental fairness, and the trial judge will have a discretion to exclude it 'where it appears to him that public policy, based on a balancing public interest, requires such exclusion' - per Kingsmill Moore J. at p. 161 of *The People (Attorney General) v. O'Brien* [1965] I.R. 142."

With regard to this submission, the court notes that the learned trial judge heard extensive evidence on this issue in the absence of the jury including that of the accused himself who acknowledged that he made no complaints against the gardaí who had not threatened him in any way. As regards his condition generally, he gave evidence that he was "extremely tired and hung-over and sore". In answer to his counsel he said he was very tired and stressed. The learned trial judge also had the benefit of evidence from the garda officers involved in arresting and interviewing the accused as well as a doctor who had observed the accused when in custody. Although the doctor had gone to the garda station for the purpose of taking certain samples from the accused, he carried out a general examination of the accused with regard to some soft tissue injuries which he had received prior to his arrest in the altercation with the complainant's boyfriend. His evidence was that the accused appeared perfectly normal and didn't show any signs of suffering from intoxication. The effect of the garda evidence was that the accused was sober, did not show any signs of undue tiredness and was well able to deal with the matters which arose during his interviews. In any event it was the trial judge who heard the evidence and it was exclusively for him to make findings of fact based on that evidence.

The principles cited by counsel from the judgment of Griffin J. in *The People (Director of Public Prosecutions) v. Shaw* [1982] I.R. 1, as the judgment itself states, fall to be applied according to the facts of each particular case.

The court considers it appropriate to cite in full the ruling of the trial judge on the issue of the admissibility of the statements made by the accused. The trial judge's ruling was as follows: -

> "Mr. Justice Carney: Very good. What has to be reconciled here is, first of all, the gardaí had received a credible complaint of rape which was, until recently, classified as one of the most serious felonies in the

criminal calendar. The term 'felony' has now been removed from the law, but nobody doubts the severity of that particular crime and the duty which the police are under to investigate it and to investigate it vigorously and promptly in the case of a credible complaint being made to them. That has to be balanced against the accused's rights under the Constitution, under statute law and under the Regulations for the Treatment of Persons in Custody to fair procedures and not to be oppressed.

Counsel for the accused doesn't contend for any physical ill treatment of the accused in this case, but he says he was oppressed and not given fair procedures because he was interviewed in a situation where the gardaí knew or ought to have known that he had not slept for a long period of time and had taken a substantial quantity of vodka. I would have no hesitation in excluding statements if I found any wrongdoing or oppression or lack of fairness on behalf of the policy. There is no absolute rule that a particular length of time about sleep deprives the gardaí of an opportunity of performing their statutory duty or that the consumption of a particular quantity of spirits deprives them of that until a night's sleep has been had or until alcohol has metabolised itself out of the system.

We are dealing with the factual situation in each particular case and I have no doubt that a traumatic event such as, for example, a death, sudden death, which doesn't arise in this case, but other matters such as sudden personal violence or an accusation of rape are capable of dissipating any effects which there might be of a current station of tiredness or consumption of a quantity of alcohol. What I am concerned with is the factual situation; was he unfit to be interviewed and was he oppressed by being interviewed? I find the evidence of the gardaí to be impressive. The custody record was maintained and the injuries of the accused were fully detailed in the custody record. I have no doubt that were there any sign of alcohol, that would have been detailed also.

I have the evidence of each of the members of the gardaí who gave evidence on the issue as to the condition of the accused at that time; one even went so far as to say that, from his observations, he would not have breathalysed the accused. I accept that that is truthful evidence. I accept the evidence that the accused was in perfectly coherent condition at all stages and perfectly capable of looking after himself and I accept the evidence of Dr. Williams that he seemed perfectly normal to the doctor and there were no signs of exceptional excessive consumption of alcohol.

> Had I any doubts in the matter whatsoever or find the slightest degree of impropriety, I would have excluded the statements, even in circumstances where exclusion was not mandatory on me but I was left with a discretion in the situation. Having heard each of the gardaí who has given evidence in this case, I am satisfied to accept their evidence to the extent of that beyond reasonable doubt.
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> I also accept the evidence of Dr. Williams. I find that the statements which are being offered by the prosecution were voluntary statements, that the accused was not oppressed in any fashion, was not subject to any unfair procedures and they are admissible."

As appears from the learned trial judge's ruling he found, as matters of fact, that the accused was in a perfectly coherent condition at all stages and perfectly capable of looking after himself and seemed perfectly normal to the doctor. There was ample evidence before him which entitled him to make the findings of fact which he did. Having regard to the facts as so found the court is satisfied that the learned trial judge's ruling on this issue is impeccable, he took into account all relevant factors and is entirely consistent with the principles expressed in *The People (Director of Public Prosecutions) v. Shaw* [1982] I.R. 1.

At one point it was suggested by counsel for the accused that if investigating gardaí had deprived a detainee of his or her sleep for one hour in a period of 30 hours that any statement obtained in such circumstances would be inadmissible and that the same approach should be adopted in a case where a detainee has suffered from lack of sleep for reasons nothing to do with the investigating gardaí. The two situations are not the same. If investigating gardaí had resorted to such tactics, statements so obtained would be excluded on the grounds of public policy and breach of fair procedures by the prosecution by reason of the use of such methods independent of any question concerning the voluntariness of a statement. The trial judge has properly addressed the question of fairness in his ruling by explaining that the gardaí have a duty to investigate serious crime and the question to be determined is whether, having regard to the actual circumstances and condition of the accused, based on the facts of the particular case, there was oppression or unfairness.

Finally on this ground, counsel for the accused took issue with the observation of the learned trial judge to the effect that a traumatic event such as death, or as in this case an accusation of rape was capable of dissipating the effects of a current situation of tiredness or consumption of alcohol. He said there was no medical evidence to support such a conclusion.

At best counsel is reading too much into this observation. The trial judge made a general observation on the effect which a sudden trauma can have on a person who is tired or who has consumed alcohol which did not

require medical evidence. While it is not necessary to refer to it, it can be noted in passing that the accused, when giving evidence at this stage of the trial, himself stated that when he went home around 8.00 a.m., after the allegation of rape had been made and the confrontation with the complainant's boyfriend, his mind was such a hive of activity that he could not sleep. The important point is that immediately after making this observation the trial judge went on to say, "What I am concerned with is the factual situation: Was he unfit to be interviewed and was he oppressed by being interviewed?" His ruling was based on those findings of fact and not on the observation. In view of those findings of fact the learned trial judge could only have exercised his discretion in one way, by admitting the statements.

Second ground

Counsel for the accused submitted that the learned trial judge failed to charge or adequately charge the jury in relation to the facts of the case, and in particular, failed to charge them correctly in relation to the conflict between the evidence given by the complainant in evidence in chief and the concessions made in cross-examination. This submission was based, first of all on the fact that the complainant gave evidence of having been asleep in her bed alone, after she had left the party, when something woke her up. She was woken up by a man on top of her having sex with her. She said it took a minute or two to realise what was happening and just for a second she thought it might be her boyfriend, then she realised it was not him. When she woke up the man got off her and left the room saying something to the effect "sorry, wrong room." In cross-examination it was put to her on behalf of counsel for the accused that she had given a different version of those events to her boyfriend soon after the incident. The cross-examination was based on a statement made by her boyfriend in which he outlined to the gardaí an account of what had occurred in the bedroom and which he had stated was based on what he had been told by the complainant. The account which the boyfriend gave was to the effect that the complainant had seen somebody opening the door in the bedroom. She thought it was her boyfriend. She turned towards the wall. She then felt somebody lifting the duvet and getting into bed beside her. That person then removed her pyjama bottoms with her consent. She had indicated that she had acquiesced in having sexual intercourse with this person but that she had understood that it was her boyfriend.

It was submitted on behalf of the accused that the complainant had accepted that a version of events different to that given in examination-in-chief was more likely to be accurate and that therefore the jury should have

been directed to accept the latter version of events and that it was not open for the case to proceed to the jury on the basis that they should decide which version of those events actually occurred. It was submitted that the jury should have been instructed that they were obliged to accept the version of events as accounted by the complainant's boyfriend and reject the account which she had given in her examination-in-chief. Counsel in particular relied on responses given by the complainant in cross-examination when it was put to her that her memory a short while after the event would be the most accurate to which she replied "Yes, it would I suppose". Although she could not remember saying to her boyfriend about seeing somebody coming into the room, she agreed that "in the run of the mill" what she told her boyfriend was probably more accurate than what she told the police. Having said that she persisted later in her evidence in saying that she was asleep, that she could not remember anybody taking off her pyjama bottoms. They were already on the ground when she woke up.

The court considers that this ground of appeal must first of all be considered in the light of the actual charge given to the jury by the trial judge after requisition for counsel for the accused. In this respect the trial judge stated:-

> "Now, I have been asked to refer to a conflict in the evidence of [the complainant] in that her evidence in chief, that is her evidence before cross-examination, she described how she was asleep and woke up to find herself been penetrated and there is a different version given to her boyfriend as you heard. She awoke watching a man entering the room and snuggling up to her and she had consensual sex with that person. Now I am asked to tell you that in cross-examination she conceded that the version given to her boyfriend was probably the more accurate."

That direction to the jury must also be seen in the context that the complainant did not resile from her own evidence that she was asleep up to the point when she was awoken by a man having sexual intercourse with her. There was certainly a conflict between her evidence and a statement she was said to have made on an earlier occasion. That conflict was undoubtedly given greater emphasis by her concession that an account given shortly after the events in question would generally be more accurate than one given a considerable time later.

The fact that there is a conflict in evidence between what a witness said in evidence and what he or she may have said on another occasion does not of itself require the trial judge to direct that a jury should accept one version, even the most favourable version, over another. To direct the jury to rely on one version rather than another would be to usurp its function. The jury were properly directed as to the onus of proof in such

matters. This included a proper direction where in relation to a particular piece of evidence they should accept the evidence or the inference which is most favourable to the accused unless they were satisfied beyond reasonable doubt that the other evidence or inference should be relied on.

In the circumstances the court is satisfied that the trial judge did not err in his direction to the jury on this matter.

Third ground

It was also submitted on behalf of counsel for the accused that the trial judge erred in law in refusing to accede to the defence request at the close of the prosecution evidence that he direct the jury to find the accused not guilty.

For this submission counsel relied, as he did in his application to the trial judge, on the conflict which arose concerning the evidence of the complainant when she was cross-examined. He also relied on the absence of any evidence of personation and he submitted that a difference had arisen between the basis on which the prosecution had opened the case to the jury and the evidence as it emerged in the light of the conflict concerning the complainant's evidence. The court is satisfied that the trial judge was entirely correct in ruling that "insofar as conflicts have emerged it is a matter for the jury to resolve them." As regards the question of personation, which will be referred to in more detail later, when the court is dealing with another ground of appeal, the trial judge was entirely correct in pointing out, in his refusal of the application, that the real issue to be considered by the jury "is the presence or absence of real consent and not an uninformed or artificial one". The issue in the case, as the charge laid specified, was one of consent not personation, that is to say whether the accused in having sexual intercourse with the complainant, which was not in dispute in the trial, did so knowing that she did not consent or was reckless as to whether she did or did not consent. The trial judge also observed "I am not aware of any case which does not change from the opening speech of counsel as it proceeds through evidence to a greater or lesser degree." It is in the very nature of the trial process where evidence is presented and tested, that new facts or elements may emerge as the trial proceeds. As the learned trial judge indicated the mere fact that a conflict of evidence has emerged which was not reflected in the opening of the case by the prosecution is not a basis for directing a verdict of not guilty. If something emerges during a trial which goes to the very root of the prosecution case rendering it tenuous or dangerous upon which to convict then such an issue, having been addressed on its own merits, would be a grounds for such a direction to a jury. The mere fact that the prosecution, in

opening the case, did not anticipate a particular conflict of evidence is not such a ground. No basis has been established upon which the trial judge should have directed the jury to acquit and this ground of appeal must be refused.

Fourth ground

It is submitted on behalf of the accused that the learned trial judge failed to address the jury properly or at all in relation to the *mens rea* of the offence in question on the issue of impersonation. It was submitted that if a woman consented to sexual intercourse because she was mistaken as to the identity of the person having sexual intercourse with her, then that person cannot be guilty of the crime of rape. In this case there was no evidence of the accused having personated or attempted to personate the boyfriend of the complainant. Counsel made reference to the trial judge's statement to the jury in the following terms "The second proposition I want to put to you is, that a person who has sex with A., believing that she is having it with B., is not consenting to sexual intercourse with B.". (As counsel for the accused properly pointed out it is self evident that the latter reference should be taken as a reference to "A." and nothing turns on this). He submits however, that the statement by the trial judge, properly understood, was incorrect in law. He submitted that the appropriate charge to the effect that a woman, who consents to sexual intercourse with A., believing that she is having sexual intercourse with B., has consented where there is no active attempt at personation by A. and the jury should have been told that unless they find beyond reasonable doubt that there was an active attempt at personation by A. and that it was this which led to the sexual act of intercourse, then the accused cannot be found guilty of rape.

This submission seems to be based on a misconception of the law and the issues which arose in the trial having regard to the evidence before the court and jury and which the jury had to decide.

The case was not about personation properly understood and counsel for the accused was correct that there was no evidence of personation. It is about consent. As counsel for the accused put it in legal submission on the 5th day of the trial "no evidence was given by her [the complainant] to suggest that there was an active attempt by the person beside her to engage in personation of her boyfriend." Later in the same submission counsel stated, "There is no evidence that he, in any way, attempted to arrange a situation or say something to suggest he was the boyfriend". As the charge on the indictment and the evidence given at the trial indicates the central issues in the case were whether the accused had sexual intercourse without

her consent and at the time he knew she did not consent or was reckless as to whether she did or did not consent.

The statement of the learned trial judge must be read in its context. At that point in his charge he gave two particular directions to the jury in the following terms:-

"1. A person who is asleep cannot give a consent to sexual intercourse being had with her during that sleep.

2. A person - I am saying this not knowing, I mean, adapt what I am saying to you to the facts as you find them, I am not suggesting anything to you, I am just trying to cover the run of the facts of the case, in whatever way you might find them. The second proposition I want to put to you is that a person who has sex with A., believing that she is having it with B., is not consenting to sexual intercourse with B. (*sic*). And then I want to make it quite clear to you that apart from the question of consent, the other essence of this crime, and I emphasise this to you very strongly, is that before there can be any conviction, the accused person must know that there is an absence of consent. Now, he must not be reckless as to whether there is an absence of connect or not. You can blind yourself to anything, but it is of the essence of the crime of rape not only that there is no consent to the act of intercourse, but, secondly, that the accused person knows there is not a consent".

The passage of the trial judge's direction to the jury to which counsel for the accused refers arises in context of one possible interpretation of the evidence, that is to say, when the complainant became aware that a person was in her bed having sexual intercourse with her, she thought, or may have thought, that it was her boyfriend. All the trial judge was saying is that insofar as she may have acquiesced or consented to what was happening in the belief that it was her boyfriend who was in the bed, that did not constitute consent on her part to have sexual intercourse with a totally different party, the accused. The trial judge then went on to explain and emphasise, which he also did in greater detail elsewhere in his charge, the substantive issue that the accused person must know that there is an absence of consent and that he must not be reckless as to whether there is an absence of consent or not. In elaborating on this matter later in his judgment, he directed that a subjective test should be applied to the state of the accused's knowledge of consent or recklessness as to whether there was consent or not.

Section 2 of the Criminal Law (Rape) Act, 1981, pursuant to which the accused was convicted, provides:-

"(1) A man commits rape if:-

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,

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

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

It is not the law that if a woman consents to sexual intercourse with A. believing him to be another person that A. cannot be convicted of rape even though he knows she does not consent to having sex with him or is reckless as to whether she does or does not consent to it.

Consent means voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.

In stating that a person who has sex with one person believing it to be another person, that person is not consenting to sexual intercourse with the former, the court is satisfied that the trial judge made a correct statement of the law. The submission by counsel that a person who consents to sexual intercourse with A. believing that she is having sexual intercourse with B., has consented to that sexual intercourse if there is no active attempt at personation by A., is unfounded. If A. knows that consent to sexual intercourse is given because the woman concerned believes him to be another person then he knows that there is no consent by the woman to having sexual intercourse with him. On the other hand, in such a situation, notwithstanding a mistake of identity on the part of the woman, the man may have reasonable grounds for believing that she was consenting to have sexual intercourse with him, depending on the circumstances of the case. All these are questions for the jury on which the trial judge properly directed them and in particular that the prosecution must establish beyond reasonable doubt that the accused either knows there is an absence of consent or is reckless as to whether there is an absence of consent or not. He accordingly, properly directed the jury on the question of *mens rea* on this issue.

Insofar as counsel for the accused relied on s. 4 of the Criminal Law Amendment Act, 1885, which states:-

> "Where as doubts had been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband, is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

The court does not consider this to be relevant to the issues in this case. Furthermore, if authority is required for the learned trial judge's statement of the law in this matter, it is to be found firstly in *R. v. Elbekkay* [1995] Crim. L.R. 163. In that case the Court of Criminal Appeal of England and Wales upheld a trial judge's ruling that consent by the complainant to sexual intercourse in the mistaken belief that the accused, who had got into her bed while she was asleep, was her boyfriend did not constitute consent. That court also endorsed the view that s. 4 of the Criminal Law (Amendment) Act, 1885, was solely declaratory in nature and did not make new law.

Perhaps more pertinently the Court of Criminal Appeal referred to a decision of a court in this country in *R. v. Dee* (1884) Cox C.C. 579. In that case it was held that where a married woman consented to the accused having sexual intercourse with her under the impression that he was her husband, it was not a consent to the act. In that regard, May C.J. stated at p. 587:-

> "The act she permitted cannot properly be regarded as the real act which took place. Therefore the connection was done, in my opinion, without her consent, and the crime of rape was constituted."

Insofar as counsel for the accused has relied on *R. v. Barrow* (1868) 11 Cox C.C. 191, this does not reflect the law as laid down in *R. v. Dee* (1884) 15 Cox C.C. 579 nor in *R. v. Elbekkay* [1995] Crim. L.R. 163, where *R. v. Barrow* (1868) 11 Cox C.C. 191, was expressly rejected as part of modern law.

The court is satisfied that this ground of appeal should be rejected.

Fifth ground

It was submitted on behalf of the accused that the trial judge erred in failing to exercise his discretion when he declined to give a warning to the jury on the issue of corroboration. It was also submitted that the trial judge was incorrect in failing to hear the argument of counsel on this issue.

As counsel acknowledged, it is no longer a rule of law or practice that a jury must be warned of the dangers of convicting on the uncorroborated evidence of a complainant in a trial concerning a sexual offence by reason of the nature of the offence. This results from s. 7 of the Criminal Law

(Rape Amendment) Act, 1990, which leaves it entirely to the discretion of the trial judge to decide, "having regard to all the evidence given, whether the jury should be given the warning". In *The People (Attorney General) v. Trayers* [1956] I.R. 110, Maguire J. at p. 114, defined what was meant by corroboration namely:-

> "Independent evidence of material circumstances tending to implicate the accused in the commission of the crime with which he was charged."

The nature of evidence and corroboration was explained by Keane J. in delivering a judgment of this court in *The People (Director of Public Prosecutions) v. Reed* [1993] 2 I.R. 186 at p. 197, when he adopted the following passage from *R. v. Baskerville* [1916] 2 K.B. 658 at p. 667:-

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

As s. 7 of the Act of 1990, makes clear and as counsel properly acknowledged, whether a warning should be given to the jury of the risk of convicting uncorroborated evidence is a matter for the discretion of the trial judge.

This is not a case in which the only evidence against the accused rested on the word of the complainant. In this case there was a vast range of evidence capable of constituting corroboration of the complainant's evidence including his own evidence given to the jury that he was at the party in question, that he went upstairs and lay on the bed where the complainant had already gone to bed, where they began to "snuggle into one another". In his evidence he accepted that he had sexual intercourse and maintained that she fully consented. There was also his admission to the gardaí that he had got into her bed where she was lying face to the wall and then had sexual intercourse with her while she thought he was her boyfriend. Corroborative evidence does not mean that the evidence of the complainant must be corroborated in every material respect. The fact that there is a conflict of evidence between witnesses or between what one witness has said on one occasion or on another occasion does not mean that a trial judge is required to direct the jury on the dangers of convicting or uncorroborated evidence. This is a matter for his discretion. It has not been demonstrated to the court that there is any ground upon which the trial judge could be said to have exercised his discretion in this case improperly.

Counsel for the accused also submits that the trial judge erred in failing to hear arguments from him on the issue of corroboration.

Before counsel for the accused addressed the jury, he raised the matter with the trial judge, as the transcript discloses:-

"Counsel: What I wanted to inquire of your Lordship is as to whether your Lordship intends to direct the jury that there is corroboration in this case. Because it might affect the way both in which counsel for the respondent and myself would address the jury. We must take your Lordship's direction in relation to that.

Carney J.: I will dispose not to enter into corroboration.

Counsel: Not?

Carney J.: Yes.

Counsel: Not to, very good, could I ask your Lordship does your Lordship intend to charge the jury this evening?"

What is clear from the foregoing exchange is that counsel for the accused sought a statement from the trial judge as to his intentions with regard to the directions, if any, which he proposed to give on the question of corroboration. The learned trial judge responded appropriately, indicating what he proposed to do. Counsel did not seek to submit, let alone present arguments, that the jury should be given a particular direction on the question of corroboration.

After the conclusion of the trial judge's charge to the jury, counsel for the accused again raised the question of corroboration with the trial judge. He states:-

"Counsel: Your Lordship had indicated yesterday that your Lordship did not intend to give a warning in relation to corroboration.

Carney J.: And I didn't.

Counsel: And I would just submit at this stage, My Lord, having heard the evidence and assessed it, it is an appropriate case in which corroboration is required and in particular because of the stark conflict between the versions of evidence given in the witness box, My Lord, in examination-in-chief and what was admitted to be more probably accurate, which was a conflicting version of events.

Carney J.: Well you canvassed me as to whether I was going to give this or not.

Counsel: Yes, My Lord.

Carney J.: And I told you what my approach would be and you had absolutely no objection to that course at the time. It is a bit late in the day."

As can be seen from the foregoing, counsel for the accused raised the question of a direction corroboration before the judge delivered his charge

to the jury. He invited the trial judge to exercise his discretion or to indicate how he proposed to exercise his discretion on this question. No objection was raised and the trial judge charged the jury accordingly. Such a situation would not necessarily preclude counsel for the accused seeking to reopen a question concerning the trial judge's charge subsequent to the charge particularly should the interests of justice require it. This is not such a case. The trial judge had already exercised his discretion without objection. Since the court is satisfied that the trial judge acted correctly and within the bounds of his discretion, the court does not find there is any basis for calling in question the jury's verdict on this ground. Moreover, the grounds upon which counsel sought, in his requisition to the trial judge, a particular direction on the question of corroboration, because of a conflict in the complainant's evidence, was in substance the same argument which he placed before this court. The court would add that in principle a trial judge should of course allow counsel to argue in full any question arising concerning the kind of direction, if any, which he should give to a jury and it is desirable that this occur in the absence of the jury before final speeches (see *The People (Director of Public Prosecutions) v. J.E.M.* (Unreported, Court of Criminal Appeal, 1st February, 2000)). However, for the reasons stated the court does not consider that the trial judge erred in this case in the manner in which he dealt with this issue or that it gives rise to any ground for interfering with the verdict.

Accordingly, the accused's application for leave to appeal is refused.

Solicitor for the applicant: *Michael E. Hanahoe*.

Solicitor for the respondent: *The Chief State Solicitor*.

Stephen O'Sullivan, Barrister