



## THE COURT OF APPEAL

**UNAPPROVED**

Neutral Citation Number: [2021] IECA 27

[85/2019]

**Birmingham P.**

**McCarthy J.**

**Donnelly J.**

**BETWEEN**

**THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]**

**RESPONDENT**

**AND**

**ALAN HANLEY**

**APPELLANT**

**JUDGMENT of the Court delivered by Mr Justice McCarthy on the 4<sup>th</sup> day of February 2021:**

1. After a trial in the Central Criminal Court the appellant was convicted on the 22<sup>nd</sup> of February 2019 of one count (count no 1) of rape, contrary to s.2 of the Criminal Law (Rape) Act, 1981, as amended by s.21 of the Criminal Law (Rape) (Amendment) Act, 1990. The appellant had been arraigned on three such counts. The jury failed to agree on counts 2 and 3. This judgement concerns his appeal against this conviction. That trial was his third on those counts arising out of the same event or sequence of events. A charge of assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act, 1997 was also laid arising from the same circumstances and the appellant had pleaded guilty to that offence at the first of the three trials. The first the jury disagreed. At the second

the appellant was convicted of all three counts of rape, but the convictions were quashed by this Court on appeal. The appellant now appeals against conviction arising from the third trial.

2. The appellant met the complainant at a social gathering in approximately April 2012 and they continued to spend time together afterwards. At that time the complainant was suffering from problems relating to addiction to alcohol and prescription medication. The complainant had previously been prescribed Xanax but continued to take it by purchasing it from street dealers. As a result of her addiction she attended a treatment centre in the west of Ireland. While she was there the appellant stayed in the house in which the complainant resided with her brother. This arrangement was agreed between the parties.
3. On Wednesday the 2<sup>nd</sup> of May 2012 she had been drinking with the appellant and others at a park in Limerick city. The appellant and the complainant then proceeded to Dunnes Stores to purchase more alcohol when an incident arose about alleged shoplifting of some food items. As a result of this the complainant was briefly brought to Henry Street Garda Station. The appellant was waiting for her outside the station when she was released. She said she was intoxicated at this point. She asked the appellant if he had put the food into her bag as she said she did not take the items. This resulted in an argument between the two parties. The appellant became abusive, he was hitting the complainant, shouting at her and pulling her bag. Two young people came to her assistance. The complainant then returned to her house without the appellant but the appellant later returned to her house. She described him as being angry. The appellant and the complainant's brother had a physical engagement which resulted in the attendance of Gardaí.
4. The following day, the 3<sup>rd</sup> of May 2012, the appellant attempted to call the complainant a number of times. After rejecting his calls she spoke to him on the telephone and told him to leave her alone. On the following evening, the 4<sup>th</sup> of May 2012, the complainant was in her home when she sent a message to the appellant asking him to phone her. He did so and she again asked him to leave her alone. She described him as being calm during the phone call. The complainant later went to an off-licence and purchased wine - she was expecting a friend of hers to visit that evening. At approximately 11.00p.m there was a knock on her door; she believed this to be her friend but when

she opened the door she was confronted by the appellant who was angry and abusive, both physically and verbally. The appellant knocked her backwards, kicked her and punched her. She said she was “terrified” and that she thought he would kill her. The appellant had a bottle of vodka and he began to drink it. After hitting her head on a table she fell on to the living room floor where the appellant continued to assault her. The appellant tore off her clothing (she was wearing a grey top, leggings and underwear) and he proceeded to rape her on the rug in the living room. She said that the appellant raped her twice in such circumstances, further grabbed her by the hair, dragged her upstairs after each offence, and hosed her down in the shower in an upstairs bathroom. The complainant was bleeding at this time. She said the appellant did not ejaculate on these occasions. He dragged her downstairs again (for a second time) where the third rape occurred on the living room rug. She had said originally that, on this occasion, the appellant ejaculated inside her and onto the rug (an issue to which we will make further reference below). The appellant then threatened her with a knife, and then cut up the rug, which he proceeded to attempt to burn in the fireplace, along with her outer clothing and underwear. He did this in her understanding in order to destroy evidence of the rape; he also cleaned the bannisters of the staircase for a similar purpose. After the appellant started the fire the fireplace began to smoke and caused a smoke alarm to sound upstairs. While the appellant went upstairs to manage this the complainant was able to flee the house via the front door. She was wearing a blanket from the living room couch and a black towel. The complainant ran up the street and approached persons on the street in a state of distress and raised the alarm. She was brought into a house nearby and emergency services were called. The Gardaí were called and the complainant was brought to a Sexual Assault Treatment Unit; an examination was carried out: *inter alia* her vaginal area was swabbed with a view to recovery of forensic evidence. During the subsequent Garda investigation the appellant was arrested and interviewed in the course of which he admitted what amounted in law to assault causing harm but denied the allegations of rape. Medical evidence presented at trial was consistent with the complaint of assault without sexual implications – it was not in debate but that the complainant suffered extensive injury. On examination of the swabs of the vaginal area no semen was found - the latter fact led to issues of credibility of the complainant.

5. The appellant was sentenced on the 9<sup>th</sup> of May 2019 to twelve years imprisonment, back-dated to the 5<sup>th</sup> of May 2012, with six years post-release supervision. It is necessary to refer relatively briefly to the factual or evidential background touching on issues of credibility against which the criticism of the charge on the topic of corroboration is based.
6. The background in legal and evidential terms which the appellant says is relevant to his case here and which rendered a corroboration warning essential in the first instance (and when not given meant the conviction was quashed) can be seen shortly from a portion of the judgment of Birmingham P. in the appellant's earlier appeal as follows:-

*“The evidential basis for a warning was very strong. The complainant, in statement to the Gardaí made soon after the incident, was unequivocal that the appellant had ejaculated inside her vagina. Ordinarily, there would be an expectation that she would give evidence at the trial to that effect. Instead her, in her direct evidence that the first time, where she used the formula “I’m not fully convinced whether it [ejaculation] was inside me” represented a retreat from that position. The defence, of course were aware that the forensic evidence did not support the suggestion of my vagina ejaculation, were quick to probe the issue. In particular, the defence was keen to explore whether the complainant was modifying evidence to take account of what she had learnt of the outcome of the forensic examination. Her position is that at that stage with that she was unaware of the state of forensic evidence, yet at the October 2015 trial [second trial] she accepted that she had been aware that no traces of semen had been found and had middleware well before the first trial. In those circumstances, in the courts view, the points raised about tailoring or modifying evidence to accord with the forensic were points of substance. Indeed, the court has concluded that they were points of sufficient substance as to require, as distinct from a warning, a corroboration warning.”*

7. The appellant asserts that certain evidence given at the trial giving rise to this appeal strengthens the case for a warning; that which the appellant submits is of most relevance appears to be that at the third trial, in February 2019, the complainant reiterated her allegation of three successive rapes and on this occasion, as regards the third alleged rape, she told the jury in her direct evidence: “Yes, when

*he finished he ejaculated and some went on the rug and he got really, really angry and that's when he went to the kitchen and he got a knife*". The complainant was once again challenged on the shift away from the positive claims of ejaculation in her statements to Gardaí and her evidence at previous trials. When asked if she recalled testifying at the original trial that she knew nothing about the forensic results prior to the trial the complainant's response was to say "vaguely" and "not really, no", although she took no issue with the accuracy of the transcript.

8. Furthermore on being asked if she remembered telling the second jury that, in fact, she knew about the forensic results well before the original trial, again, the complainant's memory failed her. When the relevant portion of the transcript was produced, she again took no issue with the accuracy of the same. An exchange between the complainant and defence counsel then took place as follows:-

*"Q. So, would it be fair to say then that before the first trial you knew there was issue in relation to the forensic science's report in relation to semen being found or not being found in yourself; isn't that correct?"*

*A. Yes.*

*Q. And you weren't truthful about knowing about that in advance of the first trial in the first trial; isn't that correct?"*

*A. That's what it says, yes.*

*Q. Yes, but I know that's what it's says there, but you weren't being truthful in the first jury; isn't that fair to say?"*

*A. Well, that's what it says on it.*

*Q. Okay. And --*

*JUDGE: And what do you have to say about it? Do you agree that you weren't being truthful?"*

*A. Well, at that time, the first trial, your honour, I was in a very bad space, I was still in addiction, I can't -- I have no recollection of it.'*

### *Grounds of Appeal*

The appellant pleaded the following grounds of appeal:-

- i) The learned trial judge erred in his rulings, determinations and directions with regard to the issue of corroboration;
- ii) The learned trial judge erred in his rulings, determinations and directions in respect of recent complaint evidence;
- iii) The learned trial judge erred in undermining the defence by entering the arena in a manner adverse to the appellant;
- iv) The learned trial judge failed to adequately explain the defence case and his summary of the evidence was one-sided in favour of the prosecution;
- v) The learned trial judge's charge to the jury in relation to the onus of proof, standard of proof and the presumption of innocence insufficiently clear;
- vi) The learned trial judge erred in his rulings, determinations and directions in respect of the requisitions raised;
- vii) The cumulative effect of the trial judge's errors rendered the trial and verdict unsafe in all the circumstances;
- viii) The verdict of the jury was perverse;
- ix) The sentence imposed was disproportionate and excessive.

At the appeal hearing counsel for the appellant relied on one only – ground (i).

#### ***Ground (i)***

***The learned trial judge erred in his rulings, determinations and directions with regard to the issue of corroboration***

9. The appellant submits that the learned trial judge erred in his rulings, determinations and directions with regard to the issue of corroboration; in particular, the appellant submits that the trial judge erred in refusing to accede to the defence request to warn the jury that evidence of the complainant's distress, as witnessed by members of the public, amounted only to weak corroboration in the circumstances of the case.
10. Prior to the charge discussion took place between counsel and the judge as to the legal issues which arose in the present context. The judge ruled on the corroboration issue as follows:-

*“Now, in relation to the legal issues that were being discussed yesterday, of course I have decided to give a corroboration warning...The areas that I feel are capable of amounting to corroboration in the strict and rather technical sense of the term are as follows. Firstly, the fact of [the complainant] running naked down the street and being seen naked. Secondly, her distress, if that is what it was, and the jury conclude that that it was distress. Thirdly, as an external item I consider capable of being corroborative the fact that there was a wet and blood with wet on it on the shoe of [the Appellant] when the Gardaí visited him at about 1.55, and fourthly in relation to lies I am going to state to the jury that lies are capable of amounting corroboration but only lies in respect of, if you like, a fundamental element of the case where they can find as a finding of fact that there was a lie and where they can find as a finding of fact that the purpose of that lie was to distance himself from rape as opposed to anything else. The case can't degenerate into a case where the issue isn't where [the Appellant] raped [the complainant] but whether he's a liar and I'm going to give them a very careful warning in relation to that because it's possible for juries to get confused on that particular area. [The Appellant] has given an account of what has happened to the Gardaí. The jury may ultimately reject that particular account but that particular account is as I say, his account becomes evidential. It doesn't become added, so to speak, to the end of the case as an additional element of corroboration. So, it's only in a discrete area where the jury can point to something of great significance in the case and in that I'm going to say to the jury that in my view a lie on an area of great significance in the case might be a lie and again it's a matter for them. This is the one that I'm going to point out to them and leave for their consideration a lie as to whether [The Appellant]*

went upstairs and that really comes back around in a way in a circular way to the question about the shoe being corroborative.

....

The next thing I'm going to do is I'm going to heavily contextualise the corroboration warning and I'm going to point out in relation to matters that they may have regard to external circumstances which do not amount, in law, to strict corroboration as giving support to any piece of evidence in the case including the evidence of [the complainant]. So, I might have referred to her as [---] a minute ago but [---] I meant to say. So, it will be a heavily contextualised corroboration warning. I'm going to make clear to the jury in relation to the aspect of distress that weight of evidence is a matter for them. I will point out of course in relation to signs of distress that signs of distress, while they're as much a fact as any other state of mind or the state of one's digestion, if I might put it like that, emanate from a particular person and that they may choose to exercise caution there but they're entitled to give that signs of distress if they feel they're genuine such weight as they see fit and it may be that this distress is persuasive. There may be circumstances in any case or in any set of cases where evidence of distress in one case may carry more weight than distress in another. So, they'll be able to evaluate the evidence in that regard. So, I hope that's clear to everybody.”

- 11.** In due course the judge dealt very comprehensively with the general principles pertaining to corroboration, including the issue of what was or was not capable of constituting corroboration and that whether or not given evidence was, in fact, corroborative was a matter for the jury. He referred *seriatim* to each piece of evidence which was so capable and when dealing with the capacity of distress to be corroborative he put the matter as follows:-

“.. The first item [of evidence capable of being corroborative] under this heading is the fact that [the complainant] is seen apparently fleeing, if you accept that that is the evidence, from [named address] in distress. There is evidence of distress as given by [T.R.] the proprietor of [a local licensed premises] who saw her to be distressed and agitated, [M.R.] described her as shaking, crying and in hysterics.



*[R.S.] described her in the same way, and I go through that now because I don't intend to go back over a lot of this particular evidence... ”*

**12.** He elaborated on it as follows:-

*“With regard to distress now, I've indicated that distress is capable of being corroboration at law, and I'm telling you that it's up to you to decide whether it is or is not corroborative in this particular case. Distress is, if you like, a visible manifestation of mental condition which manifests in outward behaviour, sets out in outward behaviour such as crying, incoherence, hysteria, and so forth. There are other -- you have to consider whether distress was genuine and look at the potential causes. It's often said in relation to the matters that the state of a man's mind is as much a fact as the state of his digestion, and if I look as if I have indigestion, well, then it might be inferred that I have indigestion. So, you can assess in relation to that, and you're taking there not [the complainant's] evidence but the evidence essentially of again [W] I think his name his, and the two ladies, as to whether or not [the complainant] was in genuine distress. A jury may find the existence of distress as they may find any other fact. Independent evidence that a person is in acute distress is capable of supporting an account of events which are stated to have given rise to the distress. **It is up to you again to decide the weight you give to this evidence and if you accept it. It's up to you also to consider whether in relation to the evidence there might reasonably be some other explanation for the distress, such as that it wasn't genuine, that the story was made up, or that it all could be accounted for by the assault which had taken place. Now, it's sometimes suggested that little weight should be given to the fact of distress [our emphasis].** Again, I'm going to say to you that the weight or significance which you give to any particular piece of evidence is a matter for you and only you. You can place it with the other evidence such as the fact that [the complainant] was also naked on the street and see where that takes you. Are you satisfied that the distress was genuine? Was an act being up on for the benefit of the CCTV cameras and the bystanders? Was it explicable as a reaction to being beaten up or nothing more? These are all questions which, I would suggest to*

*you, that if I was deciding the case that I would be asking objectively in relation to pieces of evidence like that, and you might find it useful to engage in a similar, if you like, mental exercise in relation to the evidence. Was it a pretence to accompany a false allegation of rape? You have to consider these matters very carefully and come to a conclusion in relation to them.”*

**13.** The following day (the charge went into a second day) the judge returned to the topic in this extent:-

*“.... For instance, signs of the distress, as given by witnesses, rely on -- and the appearance of the witness appearing to be distressed. **This may, depending on your view of the evidence, give strong support or weak support [our emphasis]** for you to draw an inference as to the cause of the distress or in assessing the weight you give to it, as potential corroboration if you accept the evidence, depending on the circumstances. So, you have a look at each piece of evidence, you weigh it carefully, you see in relation to it and ascribe what I would describe in your own minds, a probative value to it.”*

**14.** Counsel for the appellant requisitioned the judge on this aspect in these terms:-

*“But I will just mention for the purpose of the record is that (sic) I notice that when the court dealt with the area of distress and corroboration the court didn’t say anything about whether it was a weak class of evidence, and we’ve been through this already.”*

To which the judge replied:-

*“Oh, I’m certainly not going to do that. That’s a matter for the jury”*

**15.** Given that this is a case where a corroboration warning was given the issue is whether or not what the judge told the jury, viz, “now, it’s sometimes suggested that little weight should be given to the fact of distress” was sufficient and that what was required as a matter of law was the use of a somewhat different (and arguably stronger) form of words, namely, a statement to the effect that evidence of distress “will frequently be regarded as providing only weak corroboration”. It is not, accordingly, a case where there was no reference at all to the supposed element of infirmity in evidence of distress. In truth the *crux* of this appeal is whether or not (to use the appellant’s phrase) the judge did not go “far enough”.

16. Counsel for the defence submitted that such a warning was required in the circumstances where the distress displayed by the complainant could have been reasonably explained by the physical assault committed against her. It was submitted further that against the background of the substantial credibility issues that had emerged in, or as a result of, the earlier trials which mandated the need for a corroboration warning in the first place it was an error not to so expressly warn the jury. It was pointed out that this Court in allowing the appeal against the earlier convictions had held, to put the matter shortly, that the complainant may have tailored or changed her evidence as to whether or not ejaculation had taken place in the light of the fact that the forensic evidence as to the absence of semen or as to when she first became aware of the state of the forensic evidence. Hence the submission that he “*did not go far enough*” by merely saying, as referred to above, that: “*Now, it’s sometimes a suggested that little weight should be given to the fact of distress*”: this was insufficient. At the hearing, counsel on behalf of the appellant expressly accepted that the distress was genuine and not feigned and abandoned any argument based upon such a contention; an issue of credibility did not accordingly arise as to whether or not the complainant was in a state of genuine distress within minutes if not seconds of completion of the *actus reus* (as she escaped from the house) but rather whether or not, as a fact, that distress was corroborative - it was not of course in debate but that it was capable of being so.

17. The appellant argued that the rationale for the corroboration warning in the first place was precisely because of the serious credibility concerns pertaining to the complainant and the dangers associated with convicting a person on the uncorroborated evidence of such an impugned witness. That was why a retrial had been ordered. Any charge in relation to the corroboration in the case was always going to be one where special care was required to guide the jury. In that context and against the background of the particular facts of the case, the potential for fabrication alone should have mandated the trial judge exercising his discretion in favour of a further warning about the weakness of the evidence of distress; it is contended that there was “good evidential reason” to faithfully follow the language in *DPP v TE* [2015] IECA 218 on distress and corroboration. It is to that decision that we now turn.

**18.** There, one of the issues was whether or not the observed distress of the complainant was capable, on the evidence, of amounting to corroboration – on the facts of the case it was contended that this was not so even if in principle that type of evidence might be so . The factual contention was that such was the lapse of time from the rape to the observation that it lacked the necessary quality of independence. The trial judge took the view that the evidence was capable of being corroborative saying to the jury *inter alia* that “*a distressed state, ladies and gentlemen, is capable of amounting to corroboration but it is considered by the courts to be weak corroboration*”. Edwards J., for the court, having held that the relevant evidence of distress was capable of being corroborative referred to the fact that:-

*“Moreover, the jury was properly charged concerning the fact that evidence of distress is capable of constituting corroboration. It was also correct to add that even if particular evidence of distress is assessed to be corroborative it will frequently be regarded as providing only weak corroboration.”*

**19.** The appellant also relied on *DPP v B.S* [2020] IECA 95 where the issue of whether evidence from a hotel porter about the state of the complainant (who had allegedly been raped in a bedroom) to the effect that at the reception desk in the hotel she seemed “*kind of may be a bit panicked, that might be the right word, but she was in a hurry to get out the door*” was capable of being corroborative. This Court, per Kennedy J. having held it was so capable went on to add that:-

*“Moreover, it is quite clear from the trial judge’s charge that he gave an expansive corroboration warning and in so doing, firmly highlighted to the jury that the corroborative material, that is WG’s testimony on demeanour, was not strong corroboration by stating:-*

*“And certainly if you did find it as such, the law would oblige me to say – to remind you that that would be regarded certainly as not strong corroboration at all.”*

**20.** The most significant decision, however, in the present context is that of this court in *DPP v M.G* [2019] IECA 241 where Birmingham P., for the Court, addressed the issue of a failure by the trial judge to tell the jury that if the jury considered that evidence of distress was corroborative it “*provided only weak corroboration*”. He did so in the following terms:-

*“Counsel says that the approach of telling a jury that a distressed state offered only weak corroboration was approved by this Court in the case of DPP v. TE [2015] IECA 218. In the Court’s view, there is no absolute requirement on a Judge to tell a jury, as a matter of course, that the distressed state of a complainant, if capable of amounting to corroboration, offers only weak corroboration. Whether to do so is a matter for the judgment of the Trial Judge and it is a judgment that will be exercised against the background of the particular facts of the case. There may be cases where it would be regarded as appropriate to do so. Examples that come to mind would be situations where a credible alternative explanation for the distressed state is advanced, or where those giving evidence of having witnessed the distressed state might seem other than independent, and indeed, as having an axe to grind. In this case, the Court does not see the need for such a warning or categorisation emerging from the evidence. On the contrary, there is a degree of coherence to the evidence..”*

Accordingly, on the most recent authority on this point [*T.E.* and *B.S.* do not decide the point but merely approve on their facts the references to the weakness of evidence of that class] the warning need not extend to characterising the evidence in the way the appellant submits. On this basis the appellant must be taken to be saying that this is a case where one of the examples taken by Birmingham P. of such cases is directly relevant; in particular that where there is a “*credible alternative explanation for the distressed state*”. The fact, clearly, that Birmingham P. gave examples does not detract from the general principle which affords a discretion to the judge as to the use of the forms of words approved in *T.E* or *B.S.* The facts and circumstances are fundamental, and the examples taken are just that – they cannot be understood save in the context of the case in which the dispute arises.

- 21.** Reference was also made to a number of earlier authorities where the description of evidence of distress as being weak has, it is contended, been held to be mandatory. We were referred in particular to what is now a somewhat dated authority, *viz - DPP v Mulvey* [1987] IR 502. There the issue, however, was whether or not distress could constitute corroboration at all and having so held the Court of Criminal Appeal, (per McCarthy J.) had this to say:-

*“Here, the real issue was consent or no consent; the distressed condition might, in the jury's view, lend credence to the complainant's account but having regard to the circumstances at the time, the jury should be wary of relying upon it. The formula to be used in making that clear to a jury would vary from judge to judge; it is undesirable that a trial judge should be obliged to use any particular formula, so long as he conveys the problem correctly to the jury. In the view of the court, in the instant case, the trial judge more than adequately conveyed to the jury the proper method of approach to the resolution of the real issue in the case. The jury were adequately warned of the need for corroboration, the weakness of evidence of a distressed condition as corroboration in cases of this kind, and the danger of convicting in the absence of such corroboration.”*

- 22.** In our view it is debatable on a proper reading whether that is authority for the proposition that the judge must tell the jury of the (supposed) *“weakness of evidence of a distressed condition as corroboration so in cases of this kind”* but, if it is, it is not binding upon us and the law has plainly developed since 1987 as can be seen from *DPP v M.G.* The Court's understanding of sexual offences and the reactions of victims has greatly developed since then.
- 23.** It was submitted that “it was worth considering” that the explanation offered to the trial judge that she was in addiction and in a “bad place” at the time (of the first trial) does not explain why her evidence on the issue of the ejaculation at all three trials does not correspond with the positive and definitive assertions in her statements of complaint to Gardaí, and as we now know, assuming she was being truthful at the second trial, she did know in advance of the trials that the forensic findings did not support her allegations of internal ejaculation. It was further submitted that the complainant's inability to remember the testimony she gave at the first and second trials on this most contentious evidential issue is “concerning”. It is “worth observing” that when questioned about another “potentially damaging” aspect of her evidence, namely; an allegation of rape made against another man in Co. Cork, in February 2012, she was again unable to recall any details (an apparently collateral matter which we find difficult to see the justification for it being raised at all). These are all evidential matters which triggered the need for a warning in the first place – they do not add to the argument made here by the appellant. Furthermore, it was argued that the jury may have convicted

the defendant, on a majority verdict, following a (supposed) misdirection on corroboration was a real possibility as the imprimatur of the words of a judge in his charge is important: this is possible in any case but of course begs the question whether there was a misdirection in the first place.

24. In reply, the Director stressed the discretion of the trial judge as to the form of words to be used and the fact that that sought by defence was not mandatory apart altogether from what had actually been said - on the facts of the case the evidence warranting a corroboration warning did not extend to the necessity for use of the form of words sought.
25. It seems to us that the ultimate basis for the proposition (we speak generally), if it is a well-founded proposition at all, that distress can be corroborative but is weak is due to the potential for it to be feigned and hence its independence is compromised. In this instance it is not suggested that it was so feigned but rather attributable to a physical assault only. Furthermore, the jury was placed in the position of being able to view on CCTV the conduct of the complainant, undressed but covered with a towel or blanket, running and looking backwards towards the house where, on the appellant's own omission, she had been assaulted. They had the evidence of three individuals whose reliability or credibility was not in question as to her state. Distress in this instance, accordingly, does not suffer from the principal potential infirmity that it might be feigned and therefore that the attribute of independence is doubtful; strong emphasis was placed in the appellant's written submissions on the risk of feigned or fabricated distress; it was submitted that this risk alone necessitated the use of the form of words contended for by the appellant, but it does not exist in this case – the appellant has abandoned this, what he considered one of his strongest, if not his strongest, point. Neither does what one might describe as the subsidiary reason that the witnesses might be mistaken as to the fact of distress arise – ignoring for a moment the fact that their reliability or credibility has not been challenged- and the availability of CCTV. Nor is it a case of any meaningful lapse of time between the *actus reus* and its manifestation. The jury in this case were in an exceptionally strong position to make a judgement as to the significance of the distress. We must emphasise yet again in this case that a charge is not a “shopping list” of defence requirements and, most importantly, it must be viewed as a whole. We cannot repeat, here, the portions of the charge on the issue of corroboration

where the judge, as seen from what we have quoted, repeatedly emphasised the necessity for the jury to be satisfied, before they relied upon it, that the distress was attributable to the rape rather than the assault and the potential for it to be weak. The mechanical use of the form of words advanced on behalf of the appellant, in terms, is not essential even in cases where some reference is appropriate to the supposed weakness, and certainly not in this case. The law as we have held it to be does not require, in principle, reference to weakness; the example of a case where it might be given taken from *M.G* is no more than that; the form of words to be used in giving a warning is a matter for the judge and he will have a wide discretion -well established on the authorities - which we think was properly exercised here. This is also the case by virtue of the provisions of s.7(2) of the Criminal Law (Rape) (Amendment) Act, 1990. Furthermore, the jury would have been entitled to use the fact of the distress with other pieces of evidence to reach the view that even if any one of the relevant pieces was not corroborative the whole when taken together was capable of being so – there was ample, indeed more than ample, evidence warranting the conviction.

- 26.** The judge was right in this case to tell the jury that evidence of distress can be strong corroboration and to emphasise their role. We do not think that the ground advanced is well founded.
- 27.** Accordingly, we dismiss this appeal.