THE COURT OF APPEAL

Record Number: 72/2020
Neutral Citation No: [2022] IECA 15

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

JOSE LACERNA PENA

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 1st day of February 2022 by Kennedy J.

1. This is an appeal against conviction. On the 13th December 2019, the appellant was convicted of a single count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. A sentence of six years was imposed on the 3rd April 2020.

Background

2. The conviction relates to an event which occurred in the early hours of the 26th September 2017 in Dublin City Centre. The complainant had been out in a nightclub on the evening of the 25th September with some friends, whose company she left in order to meet other friends in

town. She had had some alcohol taken. She was observed on CCTV at various locations in the area of Grafton Street and Wicklow Street, and appeared a little unsteady or stumbling in the footage. The appellant was seen in the same area, walking in the direction of the complainant. He went over to join her. The complainant stated that a person came up to her speaking what she thought was Spanish and she, with limited Spanish, had a conversation with him. She does not remember for how long they were talking. The appellant was observed on CCTV footage, linking the complainant's arm, while the complainant's arm was seen around the appellant's back.

3. The complainant remembered the appellant kissing her and being placed against a wall. She recalled the appellant putting the palm of his hand on the back of her head and putting her head down towards his lower body. She reported that he shoved his penis into her mouth. She said that when she realised this, her head came back up, and that he forced her head down again and placed his penis into her mouth. She stated that he had his hand on her head and forced it down towards his penis. She reported gagging at this stage, and said she could not catch her breath because his penis hit the back of her throat and was causing her to choke. The appellant did not appear to be wearing a condom and did not ejaculate. The complainant said she did not consent to his putting his penis into her mouth.

4. In the course of this, two young men came upon the scene. They reported seeing a girl who was very upset, and one said he saw the appellant's penis in the complainant's mouth, that she was distressed, and trying to scream. The other man said he could see the man's penis protruding from his fly, that the girl was crouched over and that the man had his hands on her, and she again appeared to be in distress and trying to get away. They intervened, and some pushing and shoving ensued.

5. The girl ran a short distance away and members of the Gardaí came upon her, having observed her crying. Her friends, having been contacted by one of the young men using her

phone, joined soon after. The appellant stayed in the area, and when the Gardaí had established what had happened, he was arrested and interviewed by the Gardaí. Over the course of the interviews, he indicated that he could not remember what had happened and simply did not believe that he would behave in that manner. He expressed some sorrow and sympathy for the complainant. After having viewed the CCTV footage, he said that he believed that what he was viewing was consensual. He later said that he knew that what happened should not have happened. The complainant made a formal statement to the Gardaí. When she went home, she also texted one of her friends, and this message was given in evidence before the jury.

6. The investigating Garda noted that the appellant appeared to be drunk on the night, and could be observed stumbling on the CCTV footage. He was seen by a Doctor in the Garda Station, who indicated that he was fit for interview. He was interviewed three times in total. He engaged with the interviewers and answered all questions that were put to him, alternating between denying that the incident had happened and saying that he did not remember.

7. The appellant's original Notice of Appeal, dated the 7th April 2020, contained an appeal of his conviction and sentence. A second Notice of Appeal dated the 14th January 2021 was filed appealing the conviction only and setting out seven additional grounds of appeal. The appellant is proceeding with an appeal against conviction on just two of these grounds.

Grounds of appeal

8. Whilst the appellant has filed seven grounds of appeal, he is proceeding solely on grounds one and three, both of which pertain to the judge's charge and are as follows:

1. "The learned trial judge erred in law in failing to adequately charge the jury in respect of the issues of consent and intoxication as they applied to the circumstances of this case"; and,

2. "The trial judge erred in law in charging the jury, in particular failing to put forward the appellant's case and, in doing so, made remarks which were unfairly prejudicial to the appellant and the appellant's defence."

Ground 1: The judge's charge to the jury in respect of the issues of consent and intoxication

9. The first issue concerns that of actual consent and the capacity to consent. Ms. Lawlor SC, on behalf of the appellant, contends that the prosecution's case at trial was that there was no actual consent given by the complainant to the sexual activity. It is contended that the trial judge expressly left the issue of capacity to consent to the jury which resulted in an unsafe verdict for the following reasons:

(A) The "two routes" argument: by law, it is not available to the prosecution to raise both the issues of actual consent and capacity to consent simultaneously. Moreover, the prosecution did not actually raise incapacity to consent as a possible route to conviction.

(B) As capacity was not raised by the prosecution at trial, it was inappropriate for this to be addressed in the charge.

(C) Raising of capacity to consent during the charge prejudiced the appellant in that no opportunity was given to the defence to address the issue in cross-examination and/or in closing address.

(D) The manner in which the jury were actually charged on capacity to consent was insufficient in that:

(i) it was not explained that one can be intoxicated and still nevertheless consent; and,

(ii) it was not explained that a finding of incapacity to consent was a separate route to a verdict of guilty than a finding of no actual consent.

The evidence

10. The relevant portions of the trial in relation to this ground of appeal concern the defence submission on the issue of capacity on day 3 (prior to speeches and charge), the prosecution and defence closing on the issue of consent, the judge's charge in relation to consent, and the defence requisition in respect thereof.

11. On day 3, defence counsel contended that both capacity to consent and actual consent cannot be raised simultaneously by the prosecution. Counsel for the prosecution disagreed with this submission. The trial judge indicated that:

> "So, in terms of the issue of consent, I will simply -- I simply propose to direct the jury in accordance with the law in relation to consent and if you have requisitions about that afterwards –-"

12. In the course of his closing address, prosecution counsel mentioned the capacity to consent in the context of the absence of actual consent:

> "The prosecution must prove that she was not consenting. She said she wasn't consenting. In fact people can be incapable of consenting as a result of alcohol. If somebody was so drunk they can be incapable of consenting. But her evidence of a lack of consent is supported in this case. So, she says that she was not consenting and there is no positive evidence that she was consenting.
>
> So, a proposition was put to her by counsel and, as I said to you, counsel -- counsel's questions are not evidence, a proposition was put to her that she was consenting, you may recall this, and she said no. That is the evidence, she was -- there is evidence that she was

not consenting. Now, if you accept it or reject it, that's a matter for you, but there was evidence that she was not consenting. There is no positive evidence in this case that she was consenting, none. So, a question was put, that question was not agreed with and there is no positive evidence of consent."

13. In the course of her closing address, defence counsel noted:

"Ultimately what you have to decide is whether there was consent and Mr. Condon flagged to you that there is. I suppose a feature of the law that says a person can be deemed if she is incapable of consenting because of the effect of alcohol or some other drug. I would suggest to you that the evidence in this case does not support the proposition that the complainant is incapable of consenting because of the effect of alcohol or some other drug. The extent of the evidence that you have seen in relation to the effect of alcohol on [the complainant], it seems to me, is some stumbling as she walks down the street and some stumbling as she walks past the Louis Vuitton window in Brown Thomas and I'd ask you just to bear in mind that I don't know why, but for some reason that footage has been slowed down, so it may look more pronounced but ultimately that's a matter for you.

There's also no medical evidence of the extent to which she was drunk and how that might have had an effect on her, and I'd ask you to bear that in mind. More than that, it seems to me that if you reach a point where you don't accept the account that she gave in relation to being forced, then you are in a position where the only reasonable view you can take is that it was a consensual act."

14. In relation to the issue of consent, the trial judge directed the jury *inter alia* as follows:

"They must also establish that it was done without consent and in terms of the -- the issue of consent, the position is that in terms of a sexual assault of the type we're describing, a person consents to a sexual act if he or she freely and voluntarily agrees to it, that is to

say to engage in that act. Now, consent is at the heart of this case. Consent to a sexual act therefore is something that happens in human life and there's no difficulty, sexual intercourse is normally a lawful -- or engagement is normally a lawful occurrence, but the absence of consent brings it into the criminal area and a person consents therefore to a sexual act if he or she freely and voluntarily agrees to engage in it."

15. It is with the following passages that Ms. Lawlor takes the most serious issue. She contends that these passages clearly indicate that not only did the judge raise the issue of capacity and place it front and center, but that he definitively aligned the issue of capacity to the facts of the present case:

"So, what is not consent? A person does not consent to a sexual act if he or she submits to it or permits it to take place because of the application of force to her or because of a well-founded fear that force may be applied to her. A woman does not consent if she's incapable of consenting due to the effect of alcohol or some other drug at the time of the sexual act.

In this instance the -- evidence has been advanced that [the complainant] was very drunk, which is admitted by her, accepted by her as given in her evidence, as a matter for you entirely as seen from the CCTV, but that's a matter for you to interpret because you've seen the CCTV, you can have it again if you want but the understanding or an interpretation of that is your function, you're looking at it, you're seeing it and you determine what inferences you can draw from what you see, if any. So, the condition that [the complainant] was in is that she is intoxicated and that is a relevant circumstance to an understanding of whether she was in a position to consent or did not consent. You might consider the different types of case that can arise, a case where a person is completely overwhelmed by alcohol that they're no longer awake or conscious, they couldn't consent. A case where there's a verbalised acquiescence or consent but where

the person was completely incapacitated from alcohol might be regarded as not consent. A case where there's a high level of intoxication, but no evidence of verbal communication of consent but the girl states that there was no consent to sexual activity may also constitute evidence of lack of consent. You assess the evidence in relation to this. You determine whether you are satisfied beyond reasonable doubt whether there was no consent to what is said happened in this case."

16. Following the charge, defence counsel unsuccessfully requisitioned the judge in relation to this aspect of the charge:

"I was going to ask the Court that the Court made reference to the effect of alcohol being such -- sorry, in section 9 [of the 1990 Act] and just I appreciate the way the Court has dealt with it and obviously the law is the law, but I would ask the Court maybe to indicate to the jury that it's not the case that someone who has been drinking heavily cannot consent to a sexual act. I'm just concerned that the jury may be of a view that once somebody is drunk, they are simply not in a position to consent. I think the section requires more than that, the section requires that there must be some evidence that she was incapable of consenting because of the drunkenness."

17. Prosecution counsel replied to this requisition on the following terms:

"Well, I have a submission in reply to my friend, that in its overall terms the Court actually read out the section, which is the appropriate law that the Oireachtas saw fit to introduce and in my respectful submission I don't think the Court went anywhere beyond what was -- I mean, the law actually from *Bree* is that you can be well short of essentially being passed out when drunkenness effects your capacity, well short of it."

(A) The "two routes" argument

18. The appellant contended both at trial and on appeal that the law does not permit both a lack of actual consent and an incapacity to consent to be raised simultaneously in a trial, and,

as noted above, the trial judge did not appear to agree. In truth, counsel for the appellant conceded that it was not the strongest of her points.

Discussion

19. This issue appears to be premised on the basis of *R v. Shehu* [2001] EWCA Crim 1381. There the prosecution case was that there was no actual consent, and capacity was not considered. In the judge's charge, and in a final document called a "route to verdict", the judge included for the jury the possibility that one can be found unable to give consent by reason of intoxication. Although it was stated that the judge should not have included this, the appeal was dismissed as it was stated that had capacity to consent been raised earlier, cross-examination would not have been materially different. Further, the inclusion of the reference should have been addressed by counsel at trial when the route to verdict was supplied. It was concluded also that the reference to incapacity was not the gravamen of the summing up.

20. *Shehu* does not say anything specifically about the viability of the prosecution putting its case in terms of the absence of consent on alternate bases; that is i) a lack of consent or ii) the lack of capacity. The issue there seemed to be more aptly in relation to the raising of incapacity at the final hour, where it had not been a live issue in the case, and without giving a chance to the defence to address it. In other words, its relevance is that capacity is not left to the jury where the prosecution have not relied upon it, and where the defence were denied the opportunity to cross-examine on that issue, or indeed to close to the jury on the issue.

21. In *Shehu*, the UK Court of Appeal was satisfied that capacity had not been an issue at trial, and that where an issue is raised and put to the jury, a question that goes to the essence of conviction, and where counsel have been thus deprived of cross-examination and of making submissions, a conviction may be rendered unsafe. However, the court then proceeded to assess

the charge as a whole to determine whether the judge had left capacity as an issue for the jury. Ultimately, the court decided that the judge had not done so.

22. It may be the contention here that there was an implicit finding in *Shehu* that the raising of lack of actual consent in the context of a situation where a complainant had been drinking heavily does not automatically mean a question of capacity is raised, if it is not done so explicitly. The judges in *Shehu* found that an observation should have been made by the trial judge that capacity was not a live issue and, moreover, that the trial judge should have omitted reference to capacity in his charge and in the "route to verdict" document. The appellant seems to be taking as a corollary that this means a lack of actual consent and an incapacity to consent cannot ever be raised simultaneously. In reality, Ms. Lawlor simply contends that *Shehu* deprecates the idea of the alternate routes being advanced simultaneously.

23. We do not believe that *Shehu* provides support for such a proposition for the reasons set out above. Alternate routes were not in fact the absolute focus of that case. We also observe many cases where a complainant may lack capacity to consent due to different factors, such as concussion, sleep, or, indeed, intoxication. In some situations, the issue may be more obvious than in others, and much will depend on the facts of any given case. What will be in issue is whether a complainant *actually* consented to the sexual activity alleged. In a suitable case, this may fall to be determined by a jury on the alternate basis; that is the absence of consent or the lack of capacity. They are not mutually exclusive in our view. Moreover, the concept of a "route to verdict" document is not one that has been adopted in Irish criminal procedure to date.

24. The respondent's case was that the complainant did not in fact consent; capacity was not part of her case. The defence to the allegation is that the complainant consented to the activity, although the appellant also indicated in interview that he did not remember whether there as consent, and that he would not behave in such a way without consent. Ultimately, however, the primary issue was one of consent.

25. Whilst we believe that the two routes as described above are not mutually exclusive, that of course is not dispositive of the appeal. The appellant contends that the first occasion the issue of capacity was raised was during the charge which gave rise to the type of unfairness identified in *Shehu* and, thus, the conviction was rendered unsafe. These complaints are addressed hereunder at (B) and (C), and will be considered together.

(B) Raising capacity to consent in the charge only

26. It is argued that, as capacity to consent was not a live issue at trial, it should not have been mentioned in the charge. In this regard, the appellant references *Shehu* again. The UK Court of Appeal in that case did not approve of the fact that the judge had not explicitly told the jury not to consider capacity, but looking at the charge as a whole, it was found that capacity had not been left to the jury. Therefore, if following *Shehu*, it must be considered whether the judge's charge as a whole left the possibility of a finding of incapacity to the jury, given that, according to both the appellant (and indeed the respondent) a lack of capacity on the part of the complainant was not the prosecution case. This point is argued on the basis of the judge's references to capacity in his charge. A corollary to this complaint is the said inability of the defence to cross-examine or make submissions in closing on the issue of capacity which is set out at (C) hereunder.

27. It is argued that, although on day 3 of the trial, the prosecution disagreed with the defence as to the possibility of raising the alternatives of a lack of actual consent and an incapacity to consent simultaneously, the respondent's case was that of a lack of actual consent. This was maintained by the respondent on appeal. The extract from the transcript is as follows:

> "JUDGE: He or she is incapable of consenting because of the effect of alcohol or some other drug is the one that really is being pointed to.
>
> MS. MURPHY: Yes. And if that is to be, I suppose, put forward to the jury and ultimately I can only, I suppose, highlight it, it seems to me that that doesn't and can't sit next to

somebody who's saying I did not consent because she is either capable of consenting and therefore withholding consent or she is not capable at all.

JUDGE: All right, very well. Thank you.

MR. CONDON: Sorry, can I just briefly reply, just in – well, in fact, it is possible to both not consent and be incapable of consenting, that's factually possible but it's a matter for the jury."

28. It is said that the judge's raising of incapacity to the jury in the charge only resulted in an unfairness to the accused. The appellant contends that the judge expressly left open to the jury the possibility that they might come to the conclusion of an absence of consent, not only on the basis of an *actual* lack of consent in accordance with the closing speech on the part of the prosecution, but, alternatively, on the basis of incapacity to consent due to intoxication.

29. The Director submits that it is possible to raise the alternatives simultaneously. Counsel maintained that if capacity to consent were to be raised, it could only be raised if there was some evidence of a communication as to consent by the complainant, wherein it could have been argued that those statements were as a result of intoxication, meaning she had no capacity to give them. As a result, because the prosecution contends capacity was not left to the jury, Mr. Condon SC, counsel for the respondent, says issues (C) and (D) do not arise.

(C) Prejudice as a result of the raising of capacity during the charge

30. A corollary of the previous point is that a prejudice was created as a result of the unfairness to the accused, due to capacity to consent only being raised in the judge's charge. This is also argued on the basis of *Shehu*.

Discussion

31. As we see it, the first issue to be determined is whether, in fact, on a consideration of the charge as a whole, the trial judge left to the jury the issue of capacity to consent, as a means of considering the absence of consent, where it was not a live issue at trial. It is common case that

capacity was not a live issue, and that the issue was whether the complainant had in fact actually consented to the sexual activity.

32. We have set out a summary of the evidence in this trial and have set out portions of the judge's charge on the issue of consent, in particular highlighting the portions with which the appellant takes the greatest issue.

33. In order to properly contextualise the judge's charge, it is necessary to identify the case for the prosecution and for the defendant at trial. Simply put, the prosecution case was that the complainant did not consent to the sexual act. It was conceded that her evidence was replete with memory gaps, but that this did not necessarily render her unreliable. Moreover, there was other evidence which supported her testimony. Evidence of her intoxication was to be seen from the CCTV, as was her contact with the appellant. Mr. Condon in his closing speech asserted that the appellant took advantage of her condition. The complainant stated that she did not consent. Specifically, when asked about this issue in direct testimony, she said:

> "Q. …Did you give him permission to do what he did to you?
>
> A. No.
>
> Q. In terms of putting his penis into your mouth?
>
> A. No.
>
> Q. Did you consent to that?
>
> A. No."

34. In cross-examination, the issue of consent was canvassed, and it was suggested that the complainant did consent. The following is a relevant extract:

> "Q. …You see I have to put it to you that all of the activity between yourself and [the appellant] was consensual, that you were both very amorous with each other and through drink, maybe you don't recall it, but that you did consent to the activity?
>
> A. Was that a question?

Q. I'm asking you to answer me, am I right about that?

A. Is there consent?

Q. Yes?

A. No.

Q. And I'm suggesting to you that because you were so drunk you simply don't recall, one way or the other, and you were so embarrassed when the two men came along and that's why you're now saying that you didn't consent?

A. I didn't give consent."

35. Two young men passing by saw the complainant. One of the men, a Mr. K, gave evidence *inter alia* that:

"….we saw a man and a girl, a girl in distress, so we walked back and we stopped the man.

Q. Okay. How did you—what caused you to think that the girl was in distress?

A. She was making noises of distress. So, she was basically shrieking.

Q. And in what position were these two people?

A. So, she was hunched over, he was standing up and he had his penis exposed and even at one stage his hand was on his penis."

At a later stage, the witness said that he and his friend intervened and then he went on to say:

"A. It was – for me it was clear that there was some kind of sexual assault taking place.

Q. All right. What did the girl say when you intervened or how did she react?

A. Originally, I'd say she was in state of shock so one of the first things she said was: "He just grabbed me."

Q. All right?

A. And to be honest, she was inconsolable…"

36. The stance taken by the appellant is, as stated earlier in this judgment, effectively that he had no recollection of the events of the evening, that he would not have engaged in that type of conduct, but that if it happened, he was sorry. At trial, in cross-examination, it was made clear that the issue was one of consent.

37. The starting point for the consideration of the judge's charge is s. 9 of the Criminal Law Rape (Amendment) Act 1990, as substituted by s. 48 of the Criminal Law (Sexual Offences) Act 2017, the relevant portions of which are as follows:

> "9. (1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.
>
> (2) A person does not consent to a sexual act if–
>
> (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,
>
> (b) he or she is asleep or unconscious,
>
> (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,"

38. There can be no doubt that the charge was considered and comprehensive. Prior to summarising the evidence, the judge directed the jury on the fundamental principles applicable in every criminal trial. In this respect, he instructed the jury on the assessment of witness' testimony, and specifically, in light of the circumstances of the night in question, the effect alcohol can have on a person's ability to accurately recall events:

> "You have to consider the opportunity that they had to form and retain a clear and accurate picture or account of what they say happened. You must consider whether each

of the prosecution witnesses as to fact have an accurate memory of what they say happened. Do you consider the witnesses in the situations which are being described to you should have an accurate memory of these serious events? You may consider that a witness should be able to demonstrate much more consistency than they're -- than they have demonstrated in their accounts. You may not be satisfied that witnesses have reliable or accurate recollection of important events. You could decide that they're accurate on some matters and not on others, it's a matter for you. You could accept or reject all testimony given by a witness, part of the testimony given by a witness, it's up to you, you decide but just because you don't accept one aspect of their evidence doesn't mean you necessarily have to reject another aspect. It's a matter entirely for you what you accept or reject from any particular piece of testimony that you've heard from the witness box.

You may consider, therefore, that witnesses are accurate on some matters and not accurate on others. You may consider that alcohol or the passage of time or confusion as to detail or exact sequences are unclear or muddled for whatever reason and that therefore the witness is not reliable or you may consider that those -- that those features exist in a particular witness's testimony, nevertheless on core elements of their testimony they are to be believed. That again is a matter entirely for you."

39. The trial judge then proceeded to emphasise where the burden of proof lay and the requisite elements of the offence which the prosecution were required to prove. In this regard, he then directed the jury at some length on the issue of consent. In so doing, the judge incorporated aspects of s. 9 of the 1990 Act, as amended, into his charge, and advised the jury that consent must be freely and voluntarily given. He then went on to explain what is meant by consent, again in terms of the 1990 Act. Thereafter commences the portions of the charge with which the appellant takes issue:

> "So, what is not consent? A person does not consent to a sexual act if he or she submits to it or permits it to take place because of the application of force to her or because of a well-founded fear that force may be applied to her. A woman does not consent if she's incapable of consenting due to the effect of alcohol or some other drug at the time of the sexual act."

40. Thus, the judge explained in terms of the 1990 Act what may not constitute consent. The concern expressed at trial on this aspect of the charge and raised in requisition related not to the accuracy of the judge's explanation in terms of the section, but to a concern that the jury be informed that a person who is heavily intoxicated may nonetheless consent to sexual activity.

41. The judge then went on to say:

> "In this instance the -- evidence has been advanced that [the complainant] was very drunk, which is admitted by her, accepted by her as given in her evidence, as a matter for you entirely as seen from the CCTV, but that's a matter for you to interpret because you've seen the CCTV, you can have it again if you want but the understanding or an interpretation of that is your function, you're looking at it, you're seeing it and you determine what inferences you can draw from what you see, if any. So, the condition that[the complainant] was in is that she is intoxicated and that is a relevant circumstance to an understanding of whether she was in a position to consent or did not consent. You might consider the different types of case that can arise, a case where a person is completely overwhelmed by alcohol that they're no longer awake or conscious, they couldn't consent. A case where there's a verbalised acquiescence or consent but where the person was completely incapacitated from alcohol might be regarded as not consent. A case where there's a high level of intoxication, but no evidence of verbal communication of consent but the girl states that there was no consent to sexual activity

may also constitute evidence of lack of consent. You assess the evidence in relation to this. You determine whether you are satisfied beyond reasonable doubt whether there was no consent to what is said happened in this case.

At the core of the case is the fact that consent to the sexual activity described must be freely and voluntarily given in the ordinary sense of those words and how -- in terms of consent being voluntary or freely given, what does that mean then? Well, consent -- we're dealing with human beings interacting with each other here, if there was interaction, and consent can be communicated. That's what we do, we communicate with each other. We convey to each other by word or gesture what our particular approach is to a particular matter. It's not something that consent -- it's something that's engaged in by two parties. This lady says that she did not consent.

One might expect, therefore, it's a matter entirely for you, some communication in the course of a sexual act from a woman that sexual activity is permitted by them, that could be by word or by gesture. Force may exist in some cases where that -- to establish that there is no consent in a particular case. There's some reference to forceful action in this case but that's a matter for you to interpret and draw such inferences as you think appropriate from it in the course of the -- as heard in the course of the evidence, but force is not essential to establish an absence of consent. Physical trauma or injury isn't necessary to establish a lack of consent. Consent is a voluntary agreement or acquiescence to sexual activity by a person with the requisite capacity to do so and knowledge or an understanding of the facts material to the acts consented to is necessary for the consent to be voluntary or to constitute acquiescence. So, you have to consider the elements of this case in terms of the consent; was there a lack of consent on the part of [the complainant] in this case? Are you satisfied of that beyond a reasonable doubt? That is another element of the case that the prosecution must prove to your satisfaction

beyond reasonable doubt.

And if there is no consent -- if the prosecution have not established that fact beyond a reasonable doubt, that there was a lack of consent, you must acquit. If there's any reasonable possibility on the evidence as you've considered it, consistent with consent, you must acquit. So, the prosecution, if they fail to establish lack of consent beyond reasonable doubt, have failed in the case to establish guilt.

The -- if you're satisfied beyond reasonable doubt that the physical act occurred of penetration of the mouth by the penis, if you're satisfied beyond reasonable doubt that there was an absence of consent, you must then move on to consider well, in what state of mind was the accused? Have the prosecution established the next element of the proofs that they must establish to convict in this case, that the sexual act of penetrating the mouth with the penis was committed by the accused without the consent of[the complainant], knowing that she was not consenting and did not consent or reckless as to whether she was consenting or not.

There are two elements to that then. In terms of the elements that I've described to you, they're essentially -- these particular elements are the mental state -- the mental condition or state of the accused, what was his mental state in doing these acts? If you're satisfied the act of penetration of the mouth with the penis occurred, that there was an absence of consent on the part of -- of [the complainant], was it done knowing -- on his part, knowing that she did not consent? And that's a matter for you on the evidence and what you're satisfied of in relation to the evidence.

If he knew that she did not consent when he carried out the act, if you're satisfied beyond reasonable doubt of that, you're -- you then are in a position to convict in relation to the offence and how do you determine whether somebody has knowledge, apart from them saying that they did which is the obvious way, but it doesn't exist in this case? You infer

it from the surrounding circumstances, as to the evidence that's been put forward to you in support of that proposition. It's open to you, I should say, to infer it from the surrounding circumstances. You may think that it can't be inferred from the surrounding circumstances or it's not open to you to do so or there is a reasonable doubt about it, about his knowledge in relation to her consent -- her absence -- the absence of her consent.

And basically, when one talks about surrounding circumstances in terms of sexual activity, one might consider well, what was said, what was done, how it was done, the time span within which it was done, where it was done, these are matters from which you can -- which you must consider and you can draw such inferences as you think appropriate from the surrounding circumstances. If you have a reasonable doubt about the -- that aspect of the case also, well it's -- therefore knowledge is not established and therefore you would not convict on the basis of knowledge.

You would -- you should consider also the other state of mind. If you're satisfied that there was no consent to the sexual intercourse, which is essentially a matter of objective fact to be determined on the evidence, if you find that, as I say, the penetration is established beyond reasonable doubt, you have to -- you should consider -- if you've considered that you're not satisfied he had knowledge, whether he was reckless and you must consider, on the evidence, whether the accused had what is known as an honest, though unreasonable belief that[the complainant] was consenting to intercourse -- to oral sex. You may consider that on the facts of this case that from the surrounding circumstances there is sufficient evidence to give rise to that reasonable possibility, that he had an honest belief in that aspect of the case."

42. We have set out the charge *in extenso* in order to properly reflect the judge's direction on consent. It is true that, at the outset, he directed the jury in terms of s. 9 of the 1990 Act, with specific attention to the issues of capacity and alcohol. However, he did not leave the matter

there. In bringing the terms of the statute to bear on the evidence, he directed the jury of a number of scenarios which may arise, including unconsciousness, where a person is asleep, where a person is completely incapacitated from alcohol *and* – perhaps of the most relevance to the facts of this case – where there is a high level of intoxication, "but no evidence of verbal communication of consent but the girl states that there was no consent to the sexual activity may also constitute evidence of the lack of consent." He then clearly stated to the jury that it was for them to determine if they were satisfied to the requisite standard that there was **no** consent in the present case.

43. In addition to the direction pursuant to statute as to what may not constitute consent, the judge made it clear that the complainant said she did not consent. He repeated on a number of occasions in different ways that the jury had to consider on the evidence whether there was a lack of consent on the part of the complainant and the consequences of their view of this. He then proceeded to address s. 2(2) of the Criminal Law (Rape) Act 1981, and the appellant's state of mind.

44. In our view, while the judge certainly mentioned incapacity in the context of intoxication in terms of the meaning of true consent, the jury can have been under no illusion whatsoever on taking the charge as a whole that the issue for their determination was whether there was in fact an absence of actual consent. The sequence of the charge is important. Having advised the jury in terms of s. 9 of the 1990 Act, the judge then outlined the evidence concerning the complainant's intoxication with reference to the CCTV footage. In that regard, it was preferable on the evidence that the judge would have omitted reference to intoxication being a relevant consideration of whether she was *in a position* to consent, which points to capacity. However, he then went on to further explain certain scenarios which may apply, and concluded by instructing the jury that they should determine whether they were satisfied to the requisite standard that there was no consent. This he repeated several times, leaving the jury in no doubt

as to where the issue on consent lay.

45. As in *Shehu*, we look to the charge as a whole and, on doing so, we are quite satisfied that while the judge did mention capacity, the jury can have been in no doubt that capacity was not left to them as an issue to consider. The judge made it very clear that the appellant said she did not consent to the sexual activity. As in *Shehu*, it would have been preferable if the judge had indicated to the jury that capacity was not in issue in the present case and it was unnecessary for them to consider it, however, by instructing the jury that the complainant said she did not consent and that it was necessary for them to consider whether there was a lack of consent, it was made quite clear that the lack of consent was the issue for their consideration and not the capacity to consent.

Conclusion on (B) and (C)

46. As we have found the judge did not leave the issue of capacity to the jury, it is somewhat unnecessary to address these two aspects of this ground. However, for the sake of completeness, we will deal with them in brief.

47. Prior to closing speeches and charge, Ms. Murphy SC, counsel for the appellant at trial, contended that both actual consent and capacity to consent could not be raised simultaneously; Mr. Condon was of a different view. Both counsel mentioned capacity in their closing arguments. However, Ms. Lawlor says that prosecution counsel's submission made it clear that capacity was not part of its case and she is indeed correct. Mr. Condon made it clear to the jury that the complainant's evidence was that she did not consent and that there was no positive evidence that she was consenting. Ms. Murphy dealt with the issue of capacity as follows:

> "Ultimately, what you have to decide is whether there was consent and Mr. Condon flagged to you that there is, I suppose, a feature of the law that says that a person can be deemed, if he or she is incapable of consenting because of the effect of alcohol or some other drug. Now, I would suggest to you that the evidence in this case does not support

the proposition that [the complainant] is incapable of consenting because of the effect of alcohol or some other drug."

48. It cannot therefore be said that the first mention of capacity came about in the judge's charge. The issue was ventilated to some limited degree by both counsel if only for the purpose of excluding it from the case. Certainly, counsel did not cross-examine on the basis of capacity, although alcohol was undoubtedly a central feature of the case.

49. As in *Shehu*, let us assume for the moment that the judge did leave capacity to consent to the jury. This then raises the question of unfairness arising to the appellant in circumstances where there was no cross-examination on this basis. Would the cross-examination have been any different? We think not. The cross-examination proceeded on the basis that the complainant consented to sexual contact, that she was heavily intoxicated, and that her memory was impaired. We ask rhetorically: what more would have been included if capacity had been in the case? It can be surmised that the cross-examination would have proceeded along the same lines. Moreover, it cannot be ignored that, in this case, unusually, there were witnesses to the event in question, both of whom testified to the complainant's verbal and physical distress and to the appellant's state of dress.

50. We do not therefore see any unfairness arising either in terms of the cross-examination or in terms of the closing speech on the part of the appellant. Even on the assumption that the judge raised capacity with the jury (which we do not believe), examining the issues of fairness, and the safety of the conviction, we do not find that the conviction is unsafe on these grounds.

(D) The manner in which the jury were charged on capacity to consent

51. It is argued, in accordance with *R v. Bree* [2008] QB 131, that the judge should have explained to the jury that a person may consent even if intoxicated. Ms. Murphy requisitioned the judge in terms set out hereunder; the judge refused to re-charge the jury on the subject. Mr.

Condon contends that this further underscores the Director's view that the judge did not charge the jury on capacity, meaning it was unnecessary for him to re-charge the jury in this manner.

52. The appellant relies on *Bree*, and argues that the jury should have been given some explanation as to the possibility that an intoxicated consent is nonetheless consent, and that incapacity as a result of intoxication is fact-specific. In *Bree*, the defence case was that the complainant was drunk and therefore acting out of character, but that she did consent to the sexual activity, therefore, the jury should have had proper direction on how to deal with voluntary intoxication and incapacity. It was noted at para. 43:

> "In a trial in which the issues of consent and voluntary intoxication were fundamental to the outcome, the jury were given no or no sufficient directions to enable the verdict which they reached be regarded as safe."

Discussion

53. We are satisfied that the judge did not raise the issue of capacity for the jury as an issue and, consequently, there was no necessity for him to elaborate on the alternate routes to verdict. However, the second issue bears careful scrutiny. Following the judge's charge, he was requisitioned as follows:

> "MS. MURPHY: I was going to ask the Court that the Court made reference to the effect of alcohol being such -- sorry, in section 9 and just I appreciate the way the Court has dealt with it and obviously the law is the law, but I would ask the Court maybe to indicate to the jury that it's not the case that someone who has been drinking heavily cannot consent to a sexual act. I'm just concerned that the jury may be of a view that once somebody is drunk, they are simply not in a position to consent. I think the section requires more than that, the section requires that there must be some evidence that she was incapable of consenting because of the drunkenness.

MR. CONDON: Well, I have a submission in reply to my friend, that in its overall terms the Court actually read out the section, which is the appropriate law that the Oireachtas saw fit to introduce and in my respectful submission I don't think the Court went anywhere beyond what was -- I mean, the law actually from *Bree* is that you can be well short of essentially being passed out when drunkenness effects your capacity, well short of it."

54. It is important to observe that this case proceeded on a very different basis to that in *Bree*. In the present case, it was always maintained by the prosecution that the complainant did not consent, not that she lacked the capacity to consent. In *Bree*, the situation was quite different, in that, at the start of that trial, the prosecution alleged that the complainant was raped whilst effectively unconscious – that she lacked the capacity to consent, and therefore did not consent. However, at the conclusion of the evidence, the case had changed. At that point, the prosecution accepted that the gaps in the complainant's recall were probably due to intoxication, rather than unconsciousness, and the case moved to that of a lack of consent, not capacity to consent. The criticism of the charge in that case was that the judge failed to address not only the general problems that can arise, but also the specific application of those problems to the case itself.

55. In the neighbouring jurisdiction, consent is defined by s. 74 of the Sexual Offences Act 2003, which provides:

"…a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

In his charge to the jury in *Bree*, the judge merely informed the jury of the definition and did not elucidate further. That cannot be said of the present case where the judge fully explained consent, and gave examples of situations where intoxication may impact on consent. He specifically stated:

"A case where there's a high level of intoxication, but no evidence of verbal

> communication of consent but the girl states that there was no consent to sexual activity may also constitute evidence of lack of consent. You assess the evidence in relation to this. You determine whether you are satisfied beyond reasonable doubt whether there was no consent to what is said happened in this case."

Thus, it can be said the judge in the present case specifically gave assistance to the jury as to the interplay between consent and intoxication in the context of the complainant.

56. The criticism in *Bree* as stated above was further compounded by several factors:

1. the judge did not address the alteration of the prosecution's case against the defendant;
2. the complainant asserted, more than once, that she was unconscious at times; and,
3. the prosecution conceded that her said periods of unconsciousness should be treated as memory deficit brought about by intoxication.

No assistance was given to the jury as to how to deal with those factors, and moreover, the judge referred to the complainant as being unconscious, but did not refer to the prosecution's concessions in this regard. Therefore, the court was of the opinion that it was possible that the jury had proceeded on the basis that the complainant was unconscious, contrary to the prosecution's modified case, and so the jury would have had no difficulty in concluding that she did not consent.

57. This is far removed from this case, both in terms of facts, and in terms of the judge's comprehensive charge. The jury can have been under no illusion other than that this was a case of actual consent, and that intoxication was a factor in that assessment. It was never the prosecution's case that the complainant was unconscious due to intoxication, thereby lacking capacity, and indeed, the independent evidence could be said to be to the contrary. Moreover, in *Bree*, the judge addressed the issue of voluntary intoxication in the context of the defendant's

state of mind, but the direction on intoxication insofar as the complainant was concerned was only referred to in terms of the possible impact on her reliability.

58. The penultimate paragraph of the *Bree* judgment clearly summarises the problems in that case:

> "In short, the only specific feature of the complainant's alcohol consumption identified by the judge was its possible relevance to her reliability as a witness. Beyond that, if the jury were able to derive anything from what the judge said, it was vague in the extreme. The context, after all, was that although the defendant conceded that the complainant had been drunk, it was a fundamental part of his defence that she was conscious throughout and did in fact consent to sexual activities and intercourse with him. From the defence point of view, the drink she had consumed was a factor which may have led her to behave in a way which, if sober, she would not. She had drunk far more than she was accustomed to. This critical aspect of the case was not sufficiently addressed in the summing up, indeed it was not addressed at all. The questions whether she might have behaved differently drunk than she would have done sober, and whether, although and perhaps because drunk, she might have behaved as the defendant contended, and the way in which the jury should consider these important issues, were not mentioned at all."

59. Section 9 of the 1990 Act places well-recognised common law principles on a statutory footing. These principles bear the hallmarks of common sense. The judge in the present case explained the relevant portions of the section in clear terms. He directed the jury on the legal principles, and ensured that those principles were fact specific – he interwove the facts with the applicable law.

60. It is certainly the position that a person who has consumed alcohol, even a vast quantity of alcohol, may consent to sexual activity; but it is highly fact- and individual-specific. It is also so that the quantity of alcohol consumed may be such so as to render a person incapable

of consenting to sexual activity. However, the latter was never the prosecution's case, and it was never suggested at any point that the complainant was unconscious due to alcohol consumption, and indeed, how could it have been so suggested in light of the independent evidence of the two passers-by?

61. It may have been preferable if, having directed the jury in terms of the 1990 Act, the judge proceeded to say that this was not a case where the prosecution was saying that the complainant was incapable of consenting because of alcohol, but where the case was not opened or closed on that basis, and as it was not a feature of the evidence, it would defy common sense if this were not readily apparent to the jury.

62. However, the question of consenting even while intoxicated does not, in our view, require any specific formulaic direction. It is very much fact-specific and it is for a judge in any given case to properly explain the position to the jury. In our view, given the very lengthy exposition on consent to the jury, it was made clear to them that the issue in contention was that of the presence or absence of consent, that the onus rested with the prosecution to prove the absence of consent, and that all the circumstances – including the complainant's consumption of alcohol and her condition as a consequence – were factors to be considered in assessing the absence or otherwise of actual consent.

63. One must look to the primary concern expressed in requisition in clear terms by Ms. Murphy at trial, which was that the jury might conclude that once somebody is drunk, they are not in a position to consent. However, on reading the charge as a whole, with particular focus on the directions with regard to consent, this concern is not borne out.

64. Accordingly, and for the reasons stated, this ground fails.

Ground 2: Prejudice in stating the appellant's case

65. It is submitted on behalf of the appellant that his case was put to the jury in loaded terms by the trial judge, and that this was not done fairly. Reference is made to the following passage from the judge's charge:

> "It was suggested to her that she was so drunk she simply didn't recall or that she was so embarrassed when the two men came along that she was now saying that she did not consent. **Well, that's a suggestion that she's making it up, the absence of consent, because of embarrassment, both on that occasion and in terms of the testimony she's given in court. Now -- and that this is all being done because of embarrassment. That's a matter for you to determine, whether you give any weight to that suggestion or not**." [appellant's emphasis]

66. Complaint is made that the manner in which the defence case was put to the jury left the jury with a clear view that it was a defence which ought to attract little weight. It is argued, on the basis of *DPP v. Hanley* IECCA 5/11/1999, that the defence case must be put to the jury, or the conviction is deemed unsafe. It is said that based also on *McGreevy v. DPP* [1973] 1 WLR 276, and *R v. Jones* [1987] Crim. LR 701, the case of the defence must be given fairly to the jury.

67. The respondent rejects the contention that the above-mentioned part of the trial judge's charge was given in "fairly loaded terms", as asserted by the appellant. The respondent submits that this extract describes exactly what the appellant's case was, and advises the jury that it is a matter for them to decide what they make of it. It is argued by the respondent that the jury are triers of fact, the trial judge told them that his view of the evidence was not binding on them, and, moreover, if the charge as a whole is considered, the defence's case was presented to the jury in full. In relation to the defence's assertion that the complainant was embarrassed, the respondent notes that the jury was further charged in this respect, in relation to the distress

expressed by the complainant. It is noted that no requisition occurred at trial as to this particular ground.

Discussion

68. One must look to the defendant's case, and how matters progressed from interview to trial. In interview, he stated that he did not recall the events, and then, on viewing the CCTV footage, he indicated that the activity looked consensual. At trial, consent was the focal point of cross-examination. In that regard, it was suggested to the complainant that she was embarrassed when the two passers-by observed the appellant and the complainant.

69. It is without doubt that the judge must put the defence case fairly to the jury. This is fact- and case-dependent, and it is for the judge in any given case to ensure that this is done in a manner which the judge considers appropriate in terms of the evidence in the case. The charge must be fair and balanced, and how that is best achieved is within the judge's remit.

70. The appellant takes issue with the portion of the charge emphasised above. However, this ignores the balance of the charge, where the judge addressed the cross-examination in some detail. The extent of the charge in terms of addressing the cross-examination and the defence case is not dispositive of the complaint made, as a brief summary of a defence case may be as fair or unfair as a lengthy exposition. It is, however, worthwhile to point out that, in the present case, the charge on the cross-examination of the complainant extends to some three pages in the transcript. The summary of her direct testimony extends to some two pages, so, whilst not dispositive of this complaint, it certainly is one possible indicator of balance in the charge. We of course must examine the content of the summary of cross-examination, and it is quite clear that the judge summarised the evidence in a most fair manner, commencing with the primary focus of the defence case, *i.e.* that the activity was consensual. The complainant's recall of the events of the evening was brought to the jury's attention, as to where she had been in the earlier part of the evening, the approach by the appellant, her recollection that he linked her arm, the

CCTV footage and what that showed, the absence of a mention of kissing in her statement, and the incident itself, which led then to the impugned paragraph.

71. In that regard, it was suggested to the complainant in cross-examination that she was embarrassed when the two men approached, and that that was the reason she was saying that she did not consent:

> "Q. And I'm suggesting to you that because you were so drunk you simply don't recall, one way or the other, and you were so embarrassed when the two men came along and that's why you're now saying that you didn't consent?"

72. We do not accept the appellant's contention that the impugned extract is "fairly loaded", as it reiterates this aspect of cross-examination. The defence case was one of the existence of the complainant's consent, and it was therefore for the judge to highlight the relevant material as he considered it to be on the evidence. It was also properly made clear to the jury that this was a suggestion put by counsel, and the legal effect of questions posed by counsel was also clarified. The evidence elicited in response to the question asked to the complainant was that she did not consent. It was for the jury to consider the facts and to assign the appropriate weight to the evidence.

73. We reiterate that a judge's charge must be considered as a whole; this is particularly so when assessing whether the charge is a fair and balanced one. We have no hesitation in concluding that the charge in the present case was both fair and balanced and, accordingly, we dismiss this ground of appeal.

Decision

74. The appeal against conviction stands dismissed.