THE COURT OF APPEAL

Record No: 146/2021

McCarthy J.
Kennedy J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

S.L.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of July by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 31st May 2021, the appellant was convicted of one count of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, as amended concerning LM (count 1), one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, concerning RM (count 4) and one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, in respect of CD (count 5).

Factual Background

2. The offences alleged occurred in an apartment shared by the appellant and his partner in October and December of 2015. The appellant's partner is the older sister of the complainants LM and RM. CD is a friend of RM's.

3. The incident the subject of count 1 occurred in October 2015. LM went to visit her sister, the appellant's partner, as she had just given birth to a baby. That evening, the appellant's partner was admitted to hospital, leaving LM alone in the apartment with the appellant. The appellant placed a mattress on the floor of the living room of the apartment. LM developed a headache, and the appellant gave her unidentified tablets. She became dizzy, weak and sick and developed difficulties with her vision and the appellant gave her two more tablets. LM laid down on the mattress, shortly after which, the appellant removed her clothing, opened her legs and put his penis in her vagina. She pleaded with him to stop but he continued to hold her down forcefully. After this ended, he told her to go for a shower. The following morning, the appellant told LM that she was to act as if nothing happened. The appellant was acquitted of attempted s. 4 rape and rape. These three offences were alleged as a continuum.

4. The incident the subject of counts 4 and 5 occurred in December 2015. RM and her friend CD went to visit her sister's new baby in the apartment. Late in the evening, RM retired to a spare

bedroom and went to bed. The appellant entered the room and began shaking the blanket and pulling her legs. RM asked him to leave the room. The appellant left and CD entered. RM asked CD to lie in the bed next to her for protection. The appellant returned to the room and crawled up from the bottom of the bed next to RM. He then started rubbing the top of her legs and trying to put his hands inside her pyjama bottoms and underwear. She told him to stop but he ignored her. RM nudged CD and noticing this, CD turned to face RM and wrapped his legs and arms around her in an attempt to impede the appellant. At this, the appellant jumped over RM and pressed his two knees against CD's chest and started choking him.

Grounds of Appeal

5. It was indicated in oral hearing that grounds 5, 6, 8 and 10 were being abandoned. The appeal proceeds on the following grounds:-

> *"1. The Learned Trial Judge erred in law in failing to accede to an application to sever the indictment and direct a separate trial of the Appellant on Counts 4 and 5 of the indictment. Further the Prosecution grounded the resistance to the Application to sever on system evidence in respect of the 5 Counts on the Indictment to include the 'similarity' of the description of features of the Rape charged on Count 2 given by the Complainant L.M (on which Count the Appellant was acquitted) to the description of the Assault Causing Harm given by the complainant [CD] on Count 5 of the Indictment. The Appellant was unfairly prejudiced in the conduct of his Defence in respect of all the 5 Counts on the indictment charged in respect of the complainants L.M (Counts 1,2,3) and R.M (Count 4) and [CD] (Count 5)*
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> *2. The Learned Trial judge erred in law in failing to discharge the jury in the light of the prejudicial evidence placed before the jury in the Evidence in Chief given by [CD]*
>
> *3. The Learned Trial judge erred in law in later failing to discharge the jury:*
>
> *[a] on being informed by the Court Registrar that two of the jurors complained of being photographed or perceiving that they were photographed in the car park by one or two of the witnesses for the Defence and/or*
>
> *[b] failing to hold an inquiry of the jurors to establish the particulars of the alleged incident and the jury members' perception of same*
>
> *[c] failing to later inquire of the Prosecution or Investigating Gardai of the outcome of the Garda investigation of the phones of the two witnesses which was completed on the 27 day of May 2021 and before the learned Trial judge's charge to the jury although informed by the Defence (on information from the investigating Garda) that a forensic investigation of the mobile phones of the two witnesses by Gardai revealed that no photographs had been taken by the two witnesses*
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> *4. The learned trial judge erred in law in failing to accede to an application to discharge the jury on the basis of the cumulative effect of the prejudicial comments made by [CD] in his evidence-in-chief and the subsequent concerns expressed by some jury members of being photographed or perceiving themselves as being photographed by one or two of the witnesses for the Defence*
>
> *7. The learned trial judge erred in law in refusing an application by the Defence to include the totality of an answer by the accused in interview and acceding to an application by the*

Prosecution to omit same albeit that the Prosecution had previously objected to the Defence questioning of the complainant L.M. on the basis that the notes of memorandum of interview had not been agreed with the Prosecution although agreed with the previous Prosecution team which withdrew on the 28th April 2021

9. The trial was unsatisfactory and unfair in all the circumstances."

6. This judgment is confined to grounds 2, 3, 4, 7 and 9 which concern the failure to discharge the jury and the editing of the appellant's memorandum of interview. For the reasons stated hereunder, we intend to quash the conviction.

Failure to Discharge the Jury – Grounds 2, 3 and 4.

Submissions of the Appellant

7. The appellant points to two incidents which it is said should have resulted in the discharge of the jury.

8. Firstly, that CD in his direct evidence about the assault on him by the appellant stated that:-

"*Q : So, you wanted to leave, is that what you're saying ?*

A : Yes, but there was no way, like at the time obviously if we had called someone it would have been , like, well why are you….my thoughts at the time anyway were, like, why did you call us, like, this late, like did something happen and, like from stories I had heard about [the appellant] is that…"

9. In response to this incident, defence counsel applied for the jury to be discharged on the basis that the evidence given was prejudicial to the appellant, which application was refused, the trial judge stating that it was a measure of last resort.

10. The second incident concerned a complaint from the jurors to the jury minder and conveyed to the Court that a defence witness, DL and two other young people appeared to be taking photographs of the jury as they were leaving the carpark. In response to this incident, defence counsel applied for the jury to be discharged on the basis that same had prejudiced the jury against the appellant as they now had a "*perception of intimidation from that witness*." This application was refused.

11. The prosecution submitted that there should be a general inquiry of the jury as to whether they had any concerns to express to which the judge agreed. The judge expressed this inquiry in the following terms:-

"JUDGE: Good afternoon, [foreman], ladies and gentlemen of the jury. It has come to my attention in the course of the day that one or more of your number may have expressed some concern this morning about something that happened as you were assembling to resume jury duty this morning. So I wanted to acknowledge that and what I propose to do in that regard is this, I'm going to ask you to retire again briefly to discuss among your number whether there is any concern that any one or more of your number wish to bring to the Court's attention concerning anything that may have happened before you assembled to resume the trial, of the trial of these offences this morning. If that is so, in the context of the discussion you have when you retire to the jury room, when you reassemble and obviously take as long as you wish, within reason, when you reassemble, I will ask [foreman] to articulate on your behalf any concern there may be. And obviously in

the absence of any concerns, I would simply propose to continue the trial. So that's what I propose to do, I'm going to ask you oh yes, I'm sorry, it seems that [foreman], I don't know whether it might be simpler to reduce anything you wish to say to writing in a note."

And:- "*JUDGE: And then you can hand up the note to me, I'm going to ask you to do that right now unless it's a very short note indeed. I was going to give you an opportunity to discuss matters in the jury room, unless it's something you feel in a position to address right now, [foreman]? Thank you."*

The jury foreman replied:-

"FOREMAN: Yes, sorry, Judge that's been resolved."

12. The defence then submitted that it was not known what had been resolved with the jury and that the court should embark on an inquiry into the matter. The judge rejected this submission.

13. It is submitted on behalf of the appellant that directions by the judge were unlikely to remedy any potential prejudice on the part of the jury and the jury ought to have been discharged.

14. It is emphasised by Mr Bowman SC, now appearing for the appellant, in relation to the first incident, that the answer given by CD gave the clear impression that the appellant was someone to be feared. It is important, Mr Bowman says to look at the context of the answer which was given in the context of his expressing a desire to leave the apartment. This, it is said renders the answer prejudicial.

15. Mr Bowman submits in relation to the second incident that the trial judge erred in refusing to enquire into what had been resolved and how it had been resolved as the defence were entitled to that information so that they could examine the potential consequences of it on the defendant.

16. He emphasises the pivotal role played by DL's evidence in relation to the offending the subject of count 1 of which the appellant was ultimately convicted. LM gave evidence that DL had been at the appellant's apartment on the night in question but left before the offending took place whereas DL gave evidence to the contrary, that he was present throughout.

17. Mr Bowman submits that as a result of the incident in the carpark, the appellant could have no confidence that the jury who ultimately convicted him of three counts in this matter did so in circumstances where they had not taken a negative view of the defence case and by extension, the defendant, by virtue of what they perceived to be the intimidatory actions of DL.

18. He says that a Garda investigation was launched and the phones of DL and the two other young people in his company were forensically examined and while it was concluded that no photographs were taken, he submits that the launch of the investigation in and of itself is indicative of the jury's concerns in this regard.

Submissions of the Respondent

19. In relation to the first incident, the respondent notes that no objection was taken at the time and the evidence continued until lunchtime uninterrupted. It is submitted that a brief passing reference to an unspecified matter could not be described as significant prejudice which, in accordance with *People (DPP) v Gierlowski* [2021] IECA 13, would require the discharge of the jury.

20. In relation to the second incident, the respondent submits that the very fact that the jury acquitted the appellant of two of the five charges show that they abided by their oath and decided the case on the evidence before them and not on any other matters.

21. Ms O'Leary SC says that a sufficient inquiry was made into the jury's concerns and that should the jury have had any continuing concerns, the opportunity was there for them to express them, but they chose not to take it. She says that in those circumstances, the trial judge was entitled to continue with the trial.

Discussion

22. We do not find merit in the argument that the judge ought to have discharged the jury on the basis of the evidence given by CD. This, in and of itself is not sufficient to render the conviction unsatisfactory.

23. However, the second matter causes this Court disquiet. The background to the jury minder raising the issue before the court is set out above. At the point when the foreperson indicated to the trial judge that the matter had been resolved, we are of the view that further queries ought to have been raised. However, the trial proceeded without the judge or the parties being informed as to how the matter had been resolved.

24. This is not a question of the deliberations of the jury being sacrosanct, this is a matter which is said to have occurred extraneous to the jury room and thus meriting potential inquiry.

25. The witness in question was a defence witness. The difficulty lies in that neither the judge nor the legal teams on behalf of their respective clients knew precisely what had occurred or the impact that may have had on the jury. When the judge raised a question as to their potential concerns, an indication was given by the jury that the matter had been resolved, but real questions remained outstanding. First, what had actually occurred and second, how had it been resolved.

26. Venturing into the area of speculation at this stage or at any stage is somewhat pointless. But for the purpose of analysing the impact on the fairness of the trial, it is necessary to do so to a limited extent.

27. The possibility lies that the jury may have been told that they would now assemble in an area to which witnesses to the case did not have access. This, of course, might mean that the immediate issue had been resolved, but the underlying problem (if there was a problem) still remained. Indeed, if the jury were removed to another area, this would possibly have served to compound the difficulty, it being necessary to remove them from the witnesses, thus reinforcing the perception of potential intimidation by the defence witness on behalf of the appellant.

28. The other possibility is that the jury were informed that no photographs were taken, although we understand this information became available at a later stage. If that is how the matter was resolved, then again, with appropriate instruction, it is possible that the matter could have rested there without difficulty.

29. If, however, the issue had been resolved by the juror indicating that they were in error and that on reflection, no photographs were taken, that would have actually resolved the issue.

30. Even if they thought that photographs were taken, but it was of no import, that too would have resolved the issue, because of course, it is well established that jurors are robust and may withstand issues with appropriate instruction where needed.

31. The real concern, as can be seen from the above, is that because no inquiry was made, everyone is left in the dark, including this Court, requiring us to venture into the speculative realm. This is not desirable.

32. While in and of itself, this issue may be insufficient to cast doubt on the fairness of the trial, but when viewed in conjunction with the editing of the appellant's interview, we have concerns as to the fairness of the trial. We now proceed to deal with that issue.

Unfairness – Grounds 7 and 9

Submissions of the Appellant

33. These grounds concern the editing of the appellant's memorandum of interview, which it is argued was unfair to the appellant and rendered the trial unsatisfactory. It seems that agreement was reached regarding the excision of certain aspects of the memoranda of interview, however, the respondent sought to exclude portions of a particular answer in one interview, which it is said by the appellant was of considerable significance to the defence case. According to the appellant, the offences in question were bookended by the provision of tablets and the taking of a shower. The alleged provision of tablets was very much integral to the rape offences. The portion of the answer sought to be excised related to the provision of tablets by the appellant.

34. The prosecution and defence had agreed to certain edits to the appellant's interviews, however, one quite lengthy answer remained in issue and the ruling of the trial judge was sought. The application proceeded as follows:-

> *"MS O'NEILL: Yes, Judge. Myself and Ms Flynn made great efforts yesterday evening and this morning and I can tell the Court that the vast majority of the memos, the three memos of interview, are agreed between the parties. There are just two matters that we require a ruling on.*
>
> *JUDGE: Oh I see, very good, yes.*
>
> *MS O'NEILL: My solicitor is firstly going to hand you in two draft copies of the second memo of interview which started at 14.16. The Court will see at the side of those I have put two yellow stickies.*
>
> *JUDGE: Yes.*
>
> *MS O'NEILL: I have put the defence on one and prosecution on the other.*
>
> *JUDGE: Mm hmm.*
>
> *MS O'NEILL: They're the versions that each side are advocating for and on the prosecution one I have put in blue brackets what the prosecution thinks should be removed so that the Court can see it. So, if I read the question is, Question: "These red tablets, where would you have kept them in the house at the time?" Answer: "I have a press in the kitchen where I would have kept them most of the time with all of the rest of the medicines that I have. And one more thing as well, the red tablets are 300 milligrams each. All I have in my press is Zispin and Lyrica. So [if] I gave her those. She would have been asleep till the next day." There's no difficulty as far as there. The prosecution think the next part should come out. "And if I gave her four 300mg tablets of Lyrica that would have been 1200mgs and she would have probably overdosed and I would never give*

her tablets like that because she probably would have died. She was grand the next morning. She is catching herself out in the lies." The prosecution has no difficulty with the next sentence. "When I take Lyrica they relax my nerves and help with my anxiety and I never feel like I am drunk so I don't know where she is getting this allegation from." And then the prosecution

JUDGE: Yes.

MS O'NEILL: say the final sentence should come out. "If she did take four Lyrica, which is not the truth, she would have probably been off her head the next day with bloodshot eyes and when she went into my parents' house there wasn't a thing wrong with her. She is catching herself out in her own lies." Now, I say that those matters that I have identified to the Court are inadmissible for four reasons.

JUDGE: Mm hmm.

MS O'NEILL: Firstly they are matters that are not in evidence in the trial. Secondly they were not matters that were put to the complainant and she has not had a chance to deal with them. Thirdly they are speculative in nature and fourthly [the appellant] does not have--is not an expert witness and in my respectful submission is not in a position to opine as to the effect of the medication on another person. So, if I deal with those in turn. The Court may recall that when Ms—"

35. According to the appellant, the significance of the tablets in the case is underlined in that following the judge's charge and on the second day of deliberations, the jury requested the transcript of LM's evidence. The judge explained that he could not provide them with a copy of the transcript but that he could read them any extracts they wished to hear from the evidence of LM. The jury requested to hear LM's evidence in full but after being told that this would take two days and being given a final opportunity to refine their request, the jury requested to hear:-

"(1) [LM]'s testimony directly detailing the alleged assaults by both the prosecution and the defence, from the time [LM] was allegedly given the tablets to the point where she went to have a shower. (2) [CD]'s testimony about [LM]'s disclosure about what he heard in the [M]'s house around the Christmas period."

36. The arguments made by the prosecution can be seen above. In summary, the four points raised were:-

- The material objected to by the prosecution was not in evidence.
- The material was not put to the complainant.
- The material was speculative in nature.
- The material was the provision of an opinion by a non-expert.

The trial judge rejected the first argument advanced but had concerns regarding the remaining arguments.

37. Defence counsel then submitted as follows:-

"MS FLYNN: Yes, Judge. Well, in relation to what was put to [LM], Judge, I didn't put that to her, other than asking her if she was aware that he took Lyrica, because I didn't want to in any way put questions to her that would suggest that she had any familiarity with drug taking at that point or [the appellant's] given that she said she wasn't aware of him taking Lyrica."

38. The trial judge ruled as follows:-

> *"Now, no question was put to [LM] in cross examination about whether she was familiar with the drug Lyrica, whether she had ever had prescribed or had reason to ingest the drug Lyrica and, if so, what the effects of that drug upon her might be, whether she accepted that if she had ingested four 300 milligram tablets of Lyrica that that would have represented inevitably an overdose or alternatively that, at the least, she would have been off her head the next day with bloodshot eyes so that self evidently she could not have been administered Lyrica by [the appellant] in circumstances where he was indeed prescribed Lyrica to help him about his nerves and anxiety and did indeed have Lyrica in the kitchen press in the house. None of that was put to [LM]. It seems to me in those circumstances it would be entirely unfair, and significantly more prejudicial than probative, to permit that aspect of [the appellant's] statement to be placed before the jury for their consideration just prior to the conclusion of the prosecution case. It's speculation of course. It seems to me that goes without saying. I don't know, there appeared to be some dispute about it to some extent, but of course it is speculation. It appears to be predicated, as I understood Ms Flynn to submit, on the drawing of an inference that in making these statements [the appellant] was extrapolating from the effect he has experienced in relation to his ingestion of the Lyrica that has been presumably prescribed for him and taken by him in the past and appears to have been suggesting that he could therefore, by reference to his own personal experience, extrapolate what the effect of the administration of those tablets upon [LM] might be. But of course [LM] wasn't invited to comment upon what the effects of the administration of that particular medication to her would have been or indeed to comment on the suggestion that that was the -- that those were the tablets that she was given. Those questions quite simply weren't asked but in any event [the appellant] speculates about the effect that the administration of those tablets to [LM] would have and that speculation, the result of that speculation is very much of course in [the appellant's] own interest but as mere speculation I think it has limited probative value, if it is evidentially admissible at all. A significant potential prejudicial effect, particularly in circumstances where none of the relevant questions were put, the issue was quite simply never canvassed with [LM] and of course we all agree that one thing [the appellant] cannot possibly have been doing was offering an expert opinion about the pharmaceutical effects of the ingestion of the drug Lyrica in the dosage described. So, for all of those reasons I propose to accede to the application to excise those portions of the written cautioned record or statement of the relevant interview with [the appellant]."*

39. Mr Bowman says that a significant part of the defence's case was unjustifiably excluded. He explains that it was suggested to LM in cross-examination as to whether she was aware of the fact that the appellant was taking this medication and in circumstances where she was unaware, no further questions were pursued. She had no personal knowledge of that particular fact. He therefore submits that the criticism that the proposition contained in the answer was not put to her, is unfounded as she would have been unable to offer an informed position one way or the other.

40. The relevant portion of the cross-examination is as follows:-

"Q. And now you're saying that [the appellant] had given you, you say, he gave you two tablets; is that right?

A. That's right, yes.

Q. And what did you understand them to be?

A. Well, I didn't know what they were. I probably -- I thought they were just painkillers.

Q. All right?

A. Sure I didn't -- I didn't ask him but obviously like I was only a kid so I'm not going to ask what they are like. I obviously trusted him at the time.

Q. Well, you did know that he was on antianxiety medication?

A. No.

Q. Because had you seen him take them before I suppose is what I'm saying to you?

A. I didn't know he was on any medication."

41. Mr Bowman further submits that the issue of the tablets was very much a live issue in the trial, the tablets and the shower acting as bookends of the incident involving LM, and that therefore, the appellant was entitled to have his experience and his view of the effect of the dose on LM put before the jury.

42. This Court pointed out that the relevant law on this matter is to be found in the Supreme Court decision of *People (DPP) v Almasi* [2020] 3 IR 85 which was not opened by either party in the court below. Mr Bowman submits that while dealing with a slightly separate mischief, *Almasi* confirms that no interference can take place in relation to interviews.

Submissions of the Respondent

43. Ms O' Leary makes the submission that the excluded portions of the answer were inadmissible as being opinion evidence of a non-expert. She further says that the excerpts contended for should have been put to LM, giving her an opportunity to comment.

44. She distinguishes the case of *Almasi* from the present case on the ground that in *Almasi*, the memoranda of interview were edited in such a way as to omit expressions of opinions on the part of the interviewing Gardaí. She says that *Almasi* is not authority for the proposition that all answers given should remain unedited in a memorandum of interview. She refers to para. 15 of *Almasi* as follows:-

> *"Certainly, issues can come up where despite the ostensible relevance of an answer given by the accused, the existing rules of evidence can require a statement to be edited. But, there has to be a rule of law to enable relevant evidence to be excluded."*

45. She submits that should the portions of the memorandum of interview in question have been admitted, the court would have had to warn the jury to ignore the appellant's opinion of the effect of the medication on LM as it was a non-expert opinion. In this regard she relies on para. 20 of *Almasi*:-

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

46. Further reliance is placed on the following portion of para. 19:-

> *"What is correct on the prosecution submission is that the mere expression of an opinion, which is not the view of an expert on an arcane discipline outside the common experience of a jury, is not admissible in evidence. While an exception is made as to the opinion of an expert, this is less of an opinion as it might seem. An expert has education and experience in spheres of knowledge closed to those untrained in his or her discipline. In putting forward an opinion, an expert's view is rarely merely that a fact is as he or she states it."*

47. This Court expressed doubts as to whether the evidence at issue was opinion evidence at all. Ms O'Leary in response submitted that it is an opinion for the appellant to have said that if the complainant took the medication, she would have had bloodshot eyes. She says that that is an opinion of the effect of the medication on a person.

Discussion

48. It is unfortunate that the decision in *Almasi* was not opened to the judge in the Central Criminal Court. Whilst not directly on all fours with this case, it is nonetheless instructive. In *Almasi*, the court edited many questions posed by the Gardaí, but with the answers by the accused remaining in evidence, thus giving the jury much truncated memoranda of interview.

49. Para. 28 of the judgment of this Court in *Almasi* is of assistance where it was said:-

> *"We see no reason why, equally, redaction of material that might unfairly prejudice the prosecution's case should not also be permitted, provided that that can be done without significant impingement upon the ability of the accused to defend the charge by all legitimate means open to him/her."*

50. We do not agree that because the content of the memorandum of interview was not put to the complainant, the material within the answer was rendered inadmissible in the present case. Questions were put concerning the appellant's medication to which the complainant indicated she had no knowledge. Certainly, the Rule in *Browne v Dunn* (1894) 6 R 67 requires that counsel must put matters to a witness to enable a witness to comment on the contention, which of course also ensures a fair trial to all concerned. However, the situation is somewhat more nuanced in the context of criminal litigation and in particular regarding the status of unchallenged evidence.

51. This was addressed by Baker J. in *DPP (Kelly) v Burke* [2014] 2 IR 651 where she stated at p. 662-663:-

> *"I accept his argument that in a criminal context to impose a duty on an accused person to cross-examine the witnesses for the prosecution could impact on the right to silence at trial, and could displace the burden of proof in practice, and prevent an advocate from making tactical choices in the conduct of the defence. It seems to me that this must be the case having regard especially to the unique and singular combination in a criminal trial of the higher standard of proof, and the fact that the burden lies on the prosecution, which together give concrete effect to the presumption of innocence.*
>
> *I accept this general proposition and it seems to me that there is no rule of law that requires a party to enter upon cross-examination of a witness. If the evidence is not cross-examined, it seems to me the person choosing not to test the evidence is faced with an inevitable consequence, namely that the evidence is before the court*

> *in an untested form. The untested evidence may in due course be given more weight merely on account of the fact that it was untested. However, the evidence remains admissible even if it is not cross-examined, albeit a court might, and probably will, take the view that the weight of evidence lies with the uncontroverted evidence which was not tested."*

52. This is instructive as far as it goes in the context of the present case. It must be recalled that what is contained in a memorandum of interview is, in fact, evidence and while the respondent objected on the basis that there was no evidence of the impugned portion of the interview, the answers in the interview constituted the evidence. The trial judge properly rejected this argument.

53. However, the suggestion that the material had not been put to the witness is not a basis to exclude the answers in interview in the context of the present case. Certainly, the complainant did not have the opportunity of commenting on all aspects of the content of the answer, but she was asked about whether she knew that the appellant took certain medications. It is clear that the excluded portion formed a central plank of the appellant's case. We venture to suggest that the matter could possibly have been addressed by not redacting the extract from the memorandum of interview, but by a trial judge instructing the jury that the matter was not put in cross-examination, thus the witness did not have the opportunity to comment. It is of course a matter for the trial judge.

54. We do not believe there is any rule of law which means that the answers in interview must be redacted as the content thereof was not put to a witness.

55. On the issue of this constituting non-expert opinion evidence, we comment that *Almasi* concerned the questions asked by Gardaí and the opinions about an investigation that sometimes may be posed. However, para. 15 of *Almasi* is again instructive where Charleton J. said in the context of editing memoranda of interview:-

> "*But, there has to be a rule of law to enable relevant evidence to be excluded. That relevance here is the requirement that where evidence does not substantially advance any side's version of a fact in issue but causes marked prejudice against the accused, that evidence should not be admitted. This is a balancing exercise since relevant evidence is always admissible unless there is a countervailing rule which requires the exclusion of that evidence."*

56. Whilst it is absolutely correct that the stating of a non-expert opinion, which is outside the common experience of an individual is not admissible in evidence and material which contravenes that rule of law may be excluded, in the present case however, we find ourselves with a different view of the answer to that of the trial judge. The answer given by the appellant in interview could not, in truth, be said to be an opinion in the real sense. This was an individual offering his own experience of how one might feel or appear in the aftermath of taking the medication in question. That is, that medication which he ordinarily took would have had a particular impact but that the complainant did not appear impacted the following day.

57. The respondent had the memoranda of interview of the appellant, and if they wished, expert opinion could have been obtained as to the impact of the particular medication. The provision of

medication was of significance to the trial as was its said impact on the complainant, it was the precursor to the offending in question.

58. Taking the issue raised by the jury minder and the issue concerning the editing of the memorandum of interview, while each issue gives us cause for concern, individually, each would not be sufficient to render the conviction unsafe and unsatisfactory.

59. However, when considered together, and while it is a finely balanced case, given that we have an element of disquiet as to the safety of the conviction, we will quash the conviction and order a re-trial.