APPROVED **REDACTED**

THE COURT OF APPEAL

Neutral Citation: [2024] IECA 313
Court of Appeal Record No. 207/23

Edwards J

McCarthy J

MacGrath J

BETWEEN/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

A.T.

APPELLANT

JUDGMENT of the Court delivered on the 10th day of December 2024 by Mr Justice Patrick McCarthy

1. This is an appeal against conviction. A.T, the appellant herein, was on the 29th of May 2023, after a trial at the Central Criminal Court, convicted by a jury of one count of rape contrary to section 48 of the Offences Against the Person Act, 1861 and section 2 of the Criminal Law (Rape) Act, 1981, as amended by section 21 of the Criminal Law (Rape) (Amendment) Act, 1990, and one count of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended by section 37 of the Sex Offenders Act, 2001, on Bill No: CCDP0150/2020. On the 29th of June 2023, the appellant received a sentence of eight years and three months' imprisonment, with the final nine months suspended, for the rape offence, and a sentence of three years' imprisonment for the sexual assault offence (to run concurrently) with twelve months' post-release supervision.

Factual Background

2. We will now outline the facts of the matter insofar as they relate to this appeal. The appellant, then aged 21, was alleged, on the prosecution case, to have raped the complainant, who was 17 years of age at the time, in the early hours of the morning on the 31st of December 2018. In the days preceding the alleged rape, the complainant and her sister, were staying at the house of their friend, referred to as 'O' herein. On the 30th of December 2018, O hosted a party at her house which was attended by a large group of people, including the complainant and the appellant, and continued into the early hours of the morning of the 31st of December 2018. The evidence was that the complainant had become intoxicated during the course of the party. The complainant provided evidence that she had fallen in a toilet, which led to her sister becoming concerned and telling her to stop drinking. She was subsequently assisted to bed on several occasions. There was evidence of some consensual sexual activity, not including sexual intercourse, between the complainant and a male referred to as 'D' in an upstairs bedroom. When this activity had concluded, the complainant said that she "passed out" in the upstairs bedroom. She awoke to allegedly being digitally penetrated by another male (referred to as 'S' herein)—this being the subject of separate proceedings. In an interview with specialist gardaí the complainant described her discomfort at being digitally penetrated and described feeling a "scraping" sensation. There was evidence that the appellant became aware of this alleged sexual assault and intervened. The jury heard that the appellant later returned to the room where the complainant was sleeping and then sexually assaulted and vaginally raped her.

3. The appellant was observed by O on the side of the bed with his underwear and trousers halfway down, and his hands covering his genitals. Another witness observed the appellant with his belt not tightened and the zip of his trousers down.

4. After the sequence of events upstairs, alleged to be unlawful, the complainant confronted S. In her evidence, the complainant described being told, by another, that she had

gone downstairs to the kitchen and shouted, “oh you raped me”, which precipitated what was described as “a big fight” downstairs. The complainant recalled being brought back upstairs and seeing S. She said that she turned around and struck him. Evidence of the complainant striking S was also given by O, who thought this was an “odd” occurrence. During cross-examination the complainant accepted that she had not accused the appellant at the party and that she had assaulted S at the time. The appellant sought to rely on the fact that the complainant had only confronted S at the party—and not the appellant—as part of his defence. The evidence of one D is relevant to this alleged confrontation and hence the issues on appeal: we will deal with this below.

Relevant events at trial

5. One of the submissions advanced by counsel for the appellant during this appeal was that the jury may have been placed under pressure to reach a verdict as ‘evidenced’ by various matters which occurred during the period the jury spent deliberating. Counsel further contended that the jury ought to have been instructed by the trial judge on its right to disagree and cited the length of time spent deliberating by the jury (as well as the overnight breaks during this period) in support of that submission. Accordingly, we think it necessary to outline the chronology of events at trial, especially those events which counsel suggested may have placed ‘pressure’ on the jury.

The trial judge’s charge

6. The trial judge commenced her charge to the jury on the 23rd of May. It was contended that the wording of the trial judge’s charge (and later majority direction) may have left the jurors confused, and that it was necessary to recharge the jury regarding the concepts of the presumption of innocence, reasonable doubt and the necessity to give the benefit of any reasonable doubt to the accused, and the onus and burden of proof following a question

submitted by the jury to the trial judge (we put the matter shortly). We cannot, because of its length, set out the relevant portions of the charge *in extenso*, but, in the words of counsel for the respondent, "[t]he transcript of the judge's charge reveals an emphatic explanation of the standard of proof and a pellucid demonstration of the concept of reasonable doubt." We would also describe the judge's charge as comprehensive, leaving nothing to be desired.

7. The jury began deliberating at 15:28 p.m. on the 24th of May and returned at 16:12 p.m. whereupon the judge instructed the jurors to stop deliberating for the day.

Relevant proceedings on the 25th of May

8. The trial recommenced on the 25th of May and the jury retired at 10:06 a.m. The judge informed counsel that the jury had requested a shortened lunch break at one o'clock that day—a common request by juries. The judge proposed sending the jury out for lunch at 12:45 p.m. and asking the jurors to return for 13:30 p.m. Counsel for the appellant asked the judge to let the members of the jury know that they are permitted to take smoke breaks, which she did.

9. The jury returned at 11:27 a.m. and asked two questions; the judge informed counsel that the jury had requested copies of the transcripts of the testimony of one Dr Cochrane (who had given medical evidence about the complainant's condition in the aftermath of the alleged offences), the testimony of O, and the oral testimony of the complainant in court. She ruled that two copies of the transcripts of the testimonies of Dr Cochrane and O should be given to the jury, as well as two copies of the transcript of the cross-examination of the complainant. The jury returned at 11:40 a.m. and were informed that the transcripts would be provided to them as soon as each one was prepared. The trial judge also reminded the jury at this point that the entirety of the DVD of the complainant's evidence-in-chief (or any part thereof) could be replayed to the jury upon request. The jury retired to deliberate at 11:42 a.m. and they concluded for the day at 2:19 p.m.

Relevant proceedings on the 26th of May

10. On the 26th of May at 10:08 a.m., the jury retired to deliberate. After this, the judge stated that given that the jury had been deliberating for two hours and fifty-five minutes at that point (the jury had, in actual fact, been deliberating for a period of three hours and twenty-four minutes) she would canvass the views from counsel regarding the provision of the majority direction. Counsel for the appellant, though not in terms, effectively submitted that such a direction should not then be given and submitted that the jury needed more time to consider the transcripts of the evidence which had recently been provided to it. Counsel for the appellant further submitted that since the task of the jury was to reach a unanimous verdict the provision of the new instruction at that point could place pressure on the jurors but he did not oppose the decision to give it. The judge gave the majority charge 11:09 a.m. in these terms:

> "… At this point I can indicate to you that I can accept what is referred to as a majority verdict from you. Now, I should tell you and it is important that you realise that a majority verdict in relation to a criminal trial is a verdict of 11/1 or 10/2. So it is a verdict upon which 11 of you must be agreed or it can be ten of you must be agreed. It can go no lower than that. So there are three possible verdicts in relation to this case in view of the majority warning that I'm giving you. I can accept a unanimous verdict, where all 12 of you are agreed or I can accept a verdict of 11/1, that is where 11 of you are agreed or a verdict of 10/2, that is where ten of you are agreed. I will ask you to continue to strive to achieve a unanimous verdict where all 12 of you are agreed. But at this stage, I wanted to indicate to you that I can accept a majority verdict from you, all right."

11. At 11:51 a.m., the jury returned with a question for the judge, the trial judge outlined the question asked by the jury to counsel in the following terms:

"Now, the jury has asked as follows; "If possible, we would like to seek clarification with regard to the SATU doctor's findings where she states, the findings on general examination were consistent with the alleged events. When the doctor says events, plural, is she referring to all events on the night of the party or just the events that [the appellant] is charged with, i.e. could the alleged event with [S] also have caused the injuries in and around the vagina?"

12. She answered the question in the following way:

"….. Unfortunately, I'm not going to be able to assist you, and I say that in circumstances where I can't elaborate in any way or interpret the evidence provided by [Dr Cochrane] for you. [Dr Cochrane's] evidence is entirely a matter for yourselves to assess and that's what it means when you're told that you're the judges of fact. It's entirely your interpretation of the evidence. So I can't, I'm not permitted to interpret the evidence in any way. It has to be a matter for you, the jury, to interpret and to assess that evidence.

As I told you before, the evidence has concluded and there will be no further evidence in the trial. It's a matter for you then to assess the evidence and decide what weight you attach to the evidence. You have the transcript of [Dr Cochrane's] evidence, both her examination-in-chief and her cross-examination. And that was the evidence in the case in relation to [Dr Cochrane] and that has been made available to you. And I'm afraid, unfortunately I can't assist you beyond that, ladies and gentlemen, I'm not permitted to do that in any way in relation to any part of the evidence in the trial.

…. this is what it means when you're told you are the judges of fact, it's your interpretation. I would not be allowed to interpret the evidence for you and to tell you

what you should -- how you should assess that evidence or how you should interpret that evidence…. All right, so I'm going to ask you to return to continue your deliberations…."

13. At 12:01 p.m. the jury returned to deliberate. The judge proposed sending the jury out for lunch at 13:00 p.m. and asking the jurors to return to deliberate by 13:30 p.m. unless additional time was requested by them. This proposal was accepted by counsel for the respondent; however, Mr Dwyer objected, submitting that the jurors should be given a full hour and that providing a shorter lunch may "add pressure" to the jurors. During the hearing of this appeal, Mr Dwyer advanced in his oral submissions that the jurors may have been placed under 'pressure' during the course of their deliberations by the trial judge. The shorter lunch breaks given to the jurors were central to these submissions. We do not propose to set out the full interaction between the judge and counsel regarding the issue of shorter lunch breaks for the jurors; however, it suffices to state that the decision to permit this commonplace course of action lies within the discretion of the trial judge and there is no reason to think that it was in any way objectionable in the present case.

14. The trial judge heard further submissions from Mr Dwyer regarding his request for the trial judge to instruct the jury about its right to disagree. Again, given the centrality of the submissions made by Mr Dwyer at this point of the trial to the ground of appeal numbered Ground 13 below, we think it is necessary to outline the detail of the submissions made by Mr Dwyer and the response of the trial judge to his application. The exchange occurred as follows:

"JUDGE: Now, do you wish to say anything, Mr Dwyer?

MR DWYER: Yes please, Judge. Again, Judge, and it's just to assist the Court, I do appreciate that the Court perhaps might not like me raising the issue of the disagreement again. But it's just vis-à-vis an exchange that we had earlier, Judge, in submissions, where I thought I heard the Court indicating that the Court felt that it

hadn't ever given that type of direction before. Now, if you didn't -- if you have given that type of direction before to a jury, there is no problem, that is you have the right --

JUDGE: I don't think, I'm trying to --

MR DWYER: Yes.

JUDGE: -- I have presided over an awful lot of trials.

MR DWYER: Yes.

JUDGE: An awful lot of trials in every part of this country, I don't, I don't recall inviting a jury ever to reach a disagreement.

MR DWYER: Very good, yes, Judge.

JUDGE: I have of course received verdicts where it was clear that the jury disagreed.

MR DWYER: Yes, yes, Judge.

JUDGE: I have on numerous occasions.

MR DWYER: Very good.

JUDGE: But I don't recall ever indicating to them that they could disagree.

MR DWYER: Yes, yes, Judge, and just on that particular point, Judge, it does appear to be the case from the authorities and from the Judge's Charge and I'm happy to address this again, Judge, when you've had an opportunity to consider the book. I'm referring just to the section of the book which deals with verdicts, directions. And deals with the issue of disagreements there, it's rather extensive, so I don't want to take up your time by opening up the chapters. But I can refer you to just the relevant pages, Judge, and then if you need further submissions from me, I will --

MS LAWLOR: Does my friend have a copy for the prosecution?

MR DWYER: No, I don't, but I can refer you to the paragraphs.

MS LAWLOR: If we could just get a copy of whatever my friend has, Judge.

MR DWYER: Yes, we'll be doing it in the library, yes. So the verdict directions,

Judge, are dealt with at page 8.50 onwards. And the issue in relation to disagreements is dealt with at paragraph 42-47 onwards. And it runs for just for ten pages.

JUDGE: Thank you.

MR DWYER: But I would respectfully submit, Judge, that it is clear from those authorities as summarised in the book that there may come a time in every trial where a judge ought to consider or ought to direct the jury that they have a right to disagree. And I would be just concerned, Judge, just in the light of—and you may never have come across circumstances where you felt it was appropriate, and obviously the Court hasn't. But I would just be concerned that in any way the Court would have perhaps a policy. And I know that the Court probably does not have a policy, because that would limit your discretion --

JUDGE: I don't have a policy, Mr Dwyer.

MR DWYER: Yes, Judge.

JUDGE: I have taken many disagreements from juries.

MR DWYER: No, but in terms of --

JUDGE: What I have said is I don't recall ever telling a jury that they can disagree.

MR DWYER: That's the point, Judge, yes, that is --

JUDGE: But I don't have a policy as such.

MR DWYER: Well, that's the -- well, the point is --

JUDGE: I've never been asked before --

MR DWYER: Oh I see.

JUDGE: -- to tell a jury that they can also disagree.

MR DWYER: Okay.

JUDGE: I've never been asked that before.

MR DWYER: Well, I think we can --

JUDGE: And I certainly have never been asked just as I've given the majority warning to say, and tell them also they can disagree, I've never been asked that before."

The trial judge subsequently ruled that she would not direct the jury on its right to disagree until she received a question from the jury which might prompt some intervention of that kind by the Court.

15. Later that afternoon, counsel for both parties agreed that it would be best to recall the jury and send its members home for the weekend as they had, at that point, been deliberating for over eight hours. The trial judge recalled the jurors and told them to return on Monday the 29th of May at 11:00 a.m.

Relevant proceedings on the 29th of May

16. On the morning of the 29th of May, the judge informed counsel of an interaction which had occurred between the jury minder and the jurors on the previous Friday 26th of May. The judge told counsel that once the matter was brought to her attention, she had carried out enquiries and prepared a note of what she had been told regarding the incident. The judge described the events of Friday the 26th of May as follows:

> "I was told that the jury minder had approached the jury at 3.45 and had asked the jury if they had reached a majority verdict, to which the foreman had replied no, they were getting there and they would like to come back on Monday to reach a unanimous verdict because the Judge had asked them to reach a unanimous verdict. And one of the jurors then said: Could we stay until 5?
>
> Now, you will recall on Friday when I was asked, I sent the jury away at 4. I felt that the jury had been in a room on a very hot day for long enough and I wanted to get a verbatim account of what the nature of the interaction was. And I felt that of course I

have to bring that to the attention of the prosecution and the defence and that is what I am doing now. I am bringing it to the attention of the prosecution and the defence."

17. Mr Dwyer submitted that this interaction between the jury minder and the members of the jury amounted to the placement of pressure on the jurors, but his only applications to the Court in light of the incident was that the jury be reminded that they had as much time as it needed to reach a verdict and that the jury minder be instructed not to speak to the jury about any matter in connection with the trial. It appears from the transcript that both applications were granted by the trial judge.

18. After the jury had returned to deliberate at 11:16 a.m. Mr Dwyer submitted that the Court should instruct the jury on its right to disagree if it had not returned with a verdict within about an hour. The trial judge informed counsel at that point that it was her intention to call the jury in at 12:00 p.m. (assuming it had not reached a verdict before then) and indicate to the jury that it had the right to disagree. There was some discussion between the trial judge and counsel regarding whether the judge should firstly ask the jurors whether they were making progress before instructing them about the jury's right to disagree. Ultimately, this became something of a moot point because the jury returned with a verdict at 11:41 a.m. that day.

Grounds of Appeal

19. The appellant appealed against his conviction on sixteen grounds of appeal. However, counsel for the appellant relied upon the following four (nominal) grounds of appeal (three in substance) in his written submissions and subsequent hearing: -

1. That the learned trial judge erred in law by allowing the prosecution to re-examine a witness that had been tendered to the defence, on issues that did not arise during the cross-examination by defence counsel.

2. That the learned trial judge erred in law by allowing the prosecution to elicit evidence from a witness regarding his constitutional right to silence in order to discredit their own witness.

12. The learned trial judge erred in law by failing to remind the jury of the legal principles regarding reasonable doubt and benefit of the doubt following the question from the jury.

13. The learned trial judge erred in law by failing to inform the jury of their right to disagree, and in doing so, maintaining a policy not to inform juries of their right to disagree.

20. The appeal is taken, in effect, on three grounds. The first of these effectively pertains to the re-examination of D (Grounds 1 and 2 fall to be considered under this head). The second issue raised (Ground 12) pertains to supposed omissions in the charge by a supposed failure of the judge, at a given stage, to remind the jury of the legal principles about reasonable doubt or the benefit of the doubt. The third ground (Ground 13) pertains to an alleged failure by the judge to inform the jury of their right to disagree and included submissions regarding a supposed fixed policy rule (as ground 13 is framed) against doing so—in truth the latter point is not statable and was not pursued. We deal with each ground sequentially.

Ground 1: "The learned trial judge erred in law by allowing the prosecution to re-examine a witness that had been tendered to the defence, on issues that did not arise during the cross-examination by defence counsel"; and

Ground 2: "That the learned trial judge erred in law by allowing the prosecution to elicit evidence from a witness regarding his constitutional right to silence in order to discredit their own witness."

21. On the 18th of May 2023, at the request of the defence, D was called by the prosecutor—she had not otherwise intended to do so. This witness had made a so-called "pre-prepared" statement to the Gardaí in circumstances where he was under suspicion for committing a sexual offence—the complainant whereof was the complainant in the present case. This is evident at least from the fact that he was detained pursuant to section 4 of the Criminal Justice Act, 1984 (as amended) which permits detention only in circumstances where a person has been arrested for an offence to which that Act applies and where the member in charge of the Garda station to which the arrested person is taken determines that his, or her, detention is necessary for the proper investigation of the offence for which they have been arrested. He had attended the Garda station at which he was so detained with his solicitor (who also happened to be the appellant's solicitor) and, after caution, proffered to gardaí what was characterised as a "pre-prepared" statement—that is to say, a statement which he had made to his solicitor about the matters in issue in these proceedings (speaking broadly). Following the provision of the statement to gardaí he was questioned at some length but answered: "no comment". The prosecution invited the judge to warn the witness of his right not to answer questions which would tend to incriminate him when he was called. His right to silence was not relevant when he was giving evidence and arises in a totally different context.

22. Prior to calling the witness, the prosecutor, no doubt anticipating that what was to be said by the witness would be in accordance with his statement, indicated that in order that the jury might have what was called the "full picture" said:

> "MS LAWLOR: [D], Judge, just that you know -- have will full picture, came to his detention with a prepared statement, he was also represented by Mr Phelim O'Neill, [the appellant's] solicitor, and the same -- not the same issues in respect -- well, obviously the same issues in respect of hearsay apply, but the requirement, as I see it, for the Court to warn him against self-incrimination applies and also it will be traversed by me in the course of re-examination or indeed direct examination, depending on how matters play, with [D], how it is that this statement came to pass."

23. Defence counsel then asked the court to rise. Defence counsel had an opportunity to consider what had been said. The prosecutor, in our view correctly, says that the defence was accordingly put on warning that if, as anticipated, evidence was given in accordance with the statement prepared by the proposed witness she would seek to put in evidence the circumstances in which it was taken—primarily, it seems rational to infer, that the statement was not, so to speak, spontaneously given to the gardaí, but that the witness had produced it to the gardaí and was represented by the same solicitor as the respondent. It seems to us that what was said by the prosecutor in advance is relevant only to the issue of whether or not by taking no objection at that stage as to what the prosecutor indicated she would do defence counsel was barred from objection to what was actually done a short time later—we think it was proper, given the point at which he intervened, for counsel to wait until the prosecutor "crossed the line", so to speak, into what, he contends, was forbidden territory—which is what he did as can be seen from our quotations below.

24. We think that, notwithstanding the length thereof, it is necessary to set out the material parts of the evidence of the witness. The witness was examined in chief by the prosecutor. The part of the examination in chief which we consider to be material is as follows:

"MS LAWLOR: [D], I'm not going to ask you or go into detail about events on the 30th of -- my apologies -- December 2018. But I just want to confirm with you, you were questioned by An Garda Síochána in relation to a party you attended; is that correct?

A. Yes.

Q. And I think you came to An Garda Síochána with a pre-prepared statement; is that correct?

A. Yes.

Q. Which you had prepared with your solicitor; is that correct?

A. Yes."

25. When cross-examining the witness, and, it appears from the context, due to the fact that the witness has said he could not recall exactly what was said by the complainant when she confronted S, the following exchange took place:

"Q. All right. And just to -- I'll just read to you from that statement that you made -

A. Yes. A hundred per cent, yes.

Q. -- to the police. Yes. And you can confirm that 'Sometime later, Nadia came down and went over to Seyi to ask where [S] was'. Okay. [S], yes. This is your statement, yes. 'When she found [S], she went crazy. Hitting him and shouting, "How could you do this to me". And that he was a sicko.' Is that what you recall?

A. Yes.

Q. Yes. And then after that, do you remember [the complainant] come looking for [S]?

A. Yes.

Q. And I think that would've been about 10 minutes later, according to your statement?

A. That was -- yes. That was what I thought, yes.

Q. Right. Now, I think that [the appellant] was present in the house when this was happening; isn't that correct?

A. He was, yes.

Q. Yes. And in relation to [the complainant] coming looking for [S], what did she do? Did she find [S], and can you recall what she did when she found him?

A. She was going to him and pushing him.

Q. Yes. Yes?

A. And --

Q. Okay?

A. Yes.

Q. Will I just read to you from the statement that you made? I know --

A. Yes.

Q. -- it's a good few years ago so, you know -- she said, according to this, 'After this, perhaps 10 minutes later, [the complainant] -- well, you say younger sister. I think she's older actually. Anyway, 'younger sister came looking for [S]. And when she found him, she pushed and tried to slap him, asking how he could do this to her sister. She pushed him to the floor before somebody broke them up'?

A. Yes.

Q. Do you remember that happening, yes?

A. Yes.

Q. And you stayed in the house, I think, for a few hours later. And then you went home a few hours later, in the early morning; isn't that so?

A. Yes. Yes.

Q. And just to read that, you said in your statement, 'After a few hours I went back home to [another] house, with [the appellant] and [another person], ….' Correct?

A. Yes, correct."

26. In re-examination a dispute arose as to the issue of whether or not the prosecutor was asking leading questions, but that point is of no relevance to the matter now in controversy. The first part of the re-examination was as follows:

"Q. Just to check one or two things with you. You've been brought through a statement there that you provided to the gardaí; is that right?

A. Can you repeat that -- please?

Q. Mr Dwyer has brought you through a statement --

A. Yes.

Q. -- that you provided to the gardai?

A. Yes.

Q. And you provided it to them on the 23rd of August of 2019; is that correct?

A. I can't remember the day exactly. But if that's what it is, then --

Q. And do you recall being questioned by the gardaí about the events of that night?

A. I remember being questioned, yes. But not all the questions, like.

MS LAWLOR: I think you were in a two-hour interview.

MR DWYER: Sorry, Judge. On re-examination, leading questions are not permitted. I mean, the prosecution had an opportunity to call this man as a witness.

JUDGE: Well, they -- you don't have to -- they don't have to be leading questions.

MR DWYER: No, but she is -- she is --

MS LAWLOR: I won't ask leading questions.

MR DWYER: All right.

Q. MS LAWLOR: Do you remember how long the interview was?

A. It was long.

Q. It was long?

A. Yes.

MS LAWLOR: Now, your definition of long might be a bit different than mine. Is long more or less than an hour?

MR DWYER: That's a leading question, Judge.

MS LAWLOR: More or less than an hour? Is long --

JUDGE: Well, perhaps --

Q. MS LAWLOR: Tell us what long means?

JUDGE: -- how long do you mean?

A. Just a few hours.

MS LAWLOR: A few hours. Okay. And do you recall being asked questions about what happened that night?

MR DWYER: That's a leading question, Judge.

JUDGE: You're asked not to ask leading questions, Ms Lawlor.

MS LAWLOR: May it please the Court.

JUDGE: That's a yes or no answer, so it's -- please, --

MS LAWLOR: May it please the Court.

JUDGE: -- refrain from leading questions.

MS LAWLOR: All right.

JUDGE: Thank you.

Q. MS LAWLOR: What happened in the interview?

A. He asked questions, and I answered them.

MS LAWLOR: And what did you answer -- what was your answer to the questions?"

At that point, counsel for the appellant intervened and, after hearing submissions in the absence of the jury, the judge permitted counsel to further re-examine in the following terms:

"Q. [D], I'll be very brief with you. You were asked about a statement you provided

to the gardaí on the 23rd of August of 2019?

A. Yes.

Q. And that was a statement you brought with you to the garda station?

A. Yes.

Q. And you gave it to the gardaí in the course of an interview which I think you told us at the start took some time; isn't that right?

A. Yes.

Q. A couple of hours I think you said?

A. Yes.

Q. And I understand, and I have a note of it, you chose to make no comment in respect of all of the other questions that were asked of you in the interview?

A. Yes."

The only additional evidence elicited in re-examination after the judge's ruling was the fact that the witness agreed that he made no comment in respect of the questions asked in the interview (we paraphrase slightly). The witness did not, thereby, go far beyond what he had originally said.

27. It will be seen, accordingly, that that objection was taken only towards the very end of the re-examination. Reference was made, again, to the statement, to the fact that the appellant was questioned by the gardaí about the events of the night upon which the offence occurred, and as to what had occurred. As can be seen above, his answer was: "[h]e asked questions, and I answered them". The objection was to a further enquiry immediately thereafter to this effect: "[a]nd what did you answer – what was your answer to the questions".

28. Objection was taken on the basis that by re-examining the witness in these terms—at least at that stage when she was seeking to lead evidence about the fact that he was represented by the same solicitor as the respondent and his "no comment" responses—counsel had gone beyond what was properly permissible in re-examination, and that what was being done was an attempt by the prosecutor to impeach her own witness. The witness's

evidence might be regarded as unfavourable to the prosecutor because it was to the effect that the complainant had remonstrated with S but had said nothing to similar effect in relation to her conduct vis-à-vis the appellant. The absence of evidence is not itself evidence, so D's testimony could not be used to build any proposition which undermined the credibility of the complainant's evidence, since D stated that the complainant had remonstrated with S but said nothing in relation to her conduct vis-à-vis the appellant.

29. The rule of law in relation to re-examination hardly needs re-statement. One may only re-examine a witness on matters which have been raised in cross-examination—one may not introduce new matter save with the permission of the trial judge. One may not ask leading questions. The rule is stated in a number of the books, and it is put as follows in McGrath, *Evidence* (3rd edn, Thompson Round Hall, 2020):

> **"Re-examination**
>
> **3-172**
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> A witness who has been cross-examined may be re-examined by the party who called him or her with a view to eliciting further evidence that is favourable to that party and to rehabilitate the credibility of the witness and the veracity, reliability and accuracy of the evidence given by him or her if this has been impugned on cross-examination. The principal rule governing re-examination is that it must be confined to matters that were dealt with on cross-examination and a witness may only be questioned in relation to new matters with the leave of the trial judge.
>
> **3-173**
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> While a witness cannot generally be invited on re-examination to change his or her evidence in relation to a matter, a witness may be asked to clarify an answer given on cross-examination if an ambiguity arises as to the evidence given.
>
> **3-174**

It should be noted that evidence which was not admissible on examination-in-chief may become admissible as a result of the nature of the cross-examination. For example, a witness may be re-examined in relation to a previous consistent statement if an allegation of recent fabrication is made upon cross-examination."

30. The matter is put thus in Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 1999):

"There is a right, in re-examination, to ask all questions which may be proper to draw forth and an explanation of the sense and meaning of the expressions used by the witness in cross-examination, if they be in themselves doubtful and, also, of the motive by which the witness was induced to use these expressions; but there is no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness: *Queen Caroline's Case* [(1820) 2 B&B 284]. Questions falling outside these limitations require the leave of the judge."

31. We think that it may be of assistance if we quote here from Phipson, *Evidence* (15th edn, Sweet & Maxwell, 1999) where the authors, having expressed the general rule, thus stated:

"upon a charge of rape on a child, defending counsel having elicited in cross-examination that the act had not caused her any pain, the prosecution was allowed to ask, in explanation, whether the defendant had done the same to her on former occasions" and also gives the example of a case in which "an accomplice admitted in cross-examination that he had committed two other robberies on the night in question. The prosecution were not permitted to ask in re-examination in whose company he was (in order to incriminate the defendant) on the ground that the question did not arise out of cross-examination."

We think that these examples are useful as indicating the type of question which may not be asked in, or the outer limits of, re-examination.

32. We have been furnished with a copy of an old case viz: *Prince v. Samo* [1838] 7 A&E 627. Reference was made there to *Queen Caroline's C*ase (1820) 2 B&B 284—the proceedings in the House of Lords on a Bill of Pains and Penalties, *inter alia*, divorcing her from George IV. On that authority, Lord Denman C.J., in *Prince v. Sammo*, said:

> "… That the witness might be asked as to everything said by the plaintiff when he appeared on the trial of the indictment that could in any way qualify or explain the statement as to which he had been cross-examined by that he had to right to add any independent history of transactions wholly unconnected with it."

Lord Denman C.J. further said that:

> "Upon the whole, we think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorise proof by the party calling that witness of <u>all</u> [our emphasis] that he had said at the same time, but only of so much as can be in some way connected with the statement proved."

33. It was pointed out that in *Prince v. Samo* the statement put was not that of a witness, but rather a party to the suit and that the original articulation of the rule, by Lord Tenterden C.J. (giving the advice of the judges to the House of Lords) in *Queen Caroline's* case, was confined to statements of a witness (by which we understand to mean a witness other than a party).

34. The matter has been dealt with by this Court in *The People (DPP) v. Griffin* [2018] IECA 91. One of the issues which arose in that appeal against a conviction for manslaughter pertained to the re-examination of witnesses. There, the passage which we have quoted above from *McGrath* was cited with approval. We think it would be of assistance if we set out the portions of this Court's judgment dealing with the issue (since the facts are relevant

to making a judgment as to whether or not what was sought to be done in this case was permissible). In *Griffin* Birmingham J. (as he then was) considered the issue of re-examination of witnesses in the following terms:

> "31. It is submitted that the judge erred in law and in fact in permitting the prosecution to re-examine Ms Linda Prentice regarding her prior statement made in September, 2001. The relevance of this was that Ms Prentice had given evidence that when she was going out to meet her boyfriend on the night in question, she saw the appellant ignite "a white thing" and throw it into the den causing a fire. Ms Prentice in her evidence-in-chief told the Court she had a heroin problem around the time of the offence. Ms Prentice was cross-examined by counsel at length. The cross examination took some four days. Part of the cross-examination included probing in great detail into the history of her drug habit and her attempts at rehabilitation. In re-examination, prosecution counsel asked the following:
>
> > *"I just want to confirm that in your original statement on 27th September, 2001 you told the Gardaí 'I am presently on a methadone course in CARP in Killinarden Centre in Tallaght'*
> >
> > *A. Yes."*
>
> 32. It was understandable that counsel for the prosecution would wish to re-examine on the issue of the witness' attempt at rehabilitation. The issue was raised by the defence in attempt to undermine her credibility, and her cross-examination omitted questioning her about attending a methadone course in CARP at the time of her making her statement in 2001. The re-examination was designed to provide a more complete picture. There was nothing improper in what occurred and, accordingly, this ground fails.
>
> *Mr James Farrelly* [otherwise known as James Shields]

33. The evidence of Mr Farrelly was to the effect that he met the appellant on the night of the fire. He was cross-examined in relation to his drug habit, and of having committed crimes of dishonesty. The suggestion was introduced in cross examination that he may have mistaken the encounter with the appellant on the night of the fire with another night. The following was stated on re-examination:

> *"Q. MS GEARTY: Now, Mr Farrelly, just the last few questions you were asked by Mr Condon, he concluded by asking you was it even the same night, and bearing in mind the alcohol and drink, you said it was possible, but unlikely. Now, why do you say it's unlikely that you're confused about the night?*
>
> *A. Oh yes. I know deep down in my heart, I know for a fact that on that night he approached me and told me if I opened my mouth, he'd kill me. I know for a fact deep down, regardless of what he says. He wasn't there, so he doesn't know. I know for a fact that he grabbed me that night and said that to me. I know deep down.*
>
> *Q. And just in terms of the night it was?*
>
> *A. Yes.*
>
> *Q. I see?*
>
> *A. Yes, definitely."*

34. Counsel for the DPP cites the parameters of re-examination as set out by McGrath, Evidence (Thompson Round Hall, 2005), p. 92, para. 3-77. as follows*:*

> *"A witness who has been cross-examined may be re-examined by the party who called him or her with a view to eliciting further evidence which is favourable to that party and to rehabilitate the credibility and the veracity, reliability and accuracy of the evidence given by him or her if this has been*

> *impugned on cross-examination. The principal rule governing re-examination is that it must be confined to matters that were dealt with on cross-examination and a witness may only be questioned in relation to new matters with the leave [of] the trial judge." In the Court's view the re-examination was a proper one, nothing improper occurred and this ground of appeal fails."*

35. *Griffin* is a clear example of matters raised in re-examination which fall within the rule. What can arise, and arises in this case, is whether or not the line has been crossed, so to speak, from what is permissible to that which is not. Here the matter raised did not pertain to the statement but rather to subsequent events in the course of what can be regarded for the present purpose as a conversation namely the appellant's responses to questions by the Gardaí. The statement could be readily understood and was not qualified or explained by the answers. In principle, on the facts, the re-examination was not permissible because it added nothing to what he had said in the statement. This is to say nothing about the fact that the evidence in question was irrelevant and hence inadmissible and could have been excluded on that basis alone.

36. The question arises then as to whether or not the ground of appeal in question should succeed. We cannot see how this evidence, even though inadmissible, could have had any realistic bearing upon the jury's adjudication or the outcome of the case—it was no more than what one might describe as a part of the 'give and take of a trial' where, because trials are generally not perfect, some advantage is sometimes gained by one party by the pursuit of a course which is not strictly permissible, to be followed by the conferral of an advantage upon the opposing party in another situation in the same trial. The importance of this issue is virtually nil—certainly its significance has been magnified out of all proportion.

37. We think that any procedural decisions of the present kind are particularly within the discretion of the trial judge; the law of procedure is not a straitjacket but is, rather, of its nature, flexible to serve the end of the search for truth. Hence, when the evidence in a given case is otherwise admissible a judge will have a wide discretion, subject to the orderly conduct of a trial, to permit, *inter alia*, further examination whether in-chief, by way of cross-examination, or re-examination—even if to do so introduces new matter.

38. We, accordingly, in respect of this ground of appeal, think that it is a proper case to apply the provisions of section 3 of the Criminal Procedure Act, 1993. That provision is as follows:

> "— (1) On the hearing of an appeal against conviction of an offence the Court may—
>
> *(a)* affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred) …"

39. One hardly needs to quote authority to elaborate the circumstances in which we may apply the so-called "proviso". We hold that there is no reality to the idea that this issue casts any doubt over the appellant's guilt and there has been nothing in the nature of a fundamental, indeed any, injustice.

40. We, therefore, reject these grounds of appeal.

Ground 12: "The learned trial judge erred in law by failing to remind the jury of the legal principles regarding reasonable doubt and benefit of the doubt following the question from the jury."

41. This ground arises because the judge refused an application by counsel for the appellant to recharge the jury on the legal principles regarding reasonable doubt following

the question from the jury outlined above because she was of the view that she had already clearly, and carefully, outlined those principles in her charge.

42. Counsel for the appellant placed considerable emphasis on the following passage from Coonan and Foley, *The Judge's Charge* (Round Hall, 2008), at para. 5-55:

> "The trial judge should recharge the jury in the clearest possible terms where it gives some indication that it has misunderstood the directions on either the burden or standard. In *R. v Gibson* the members of the jury came back into the court after deliberating for two hours and said that they were having difficulties making a decision due to a lack of evidence. Although the court of Appeal, per Watkin L.J., said that generally it is "wholly unnecessary" to recharge on the burden or standard, there are exceptions to this rule and the instant case was one such exception. In reaching this decision the Court relied on the decision in *R v Rafique* and *R v Bell*. In *Rafique* the members of the jury had come back from deliberating for some time and had informed the trail judge that very few of them were decided on the evidence of the police. When pressed about their difficulty, the foreman said "it is the evidence they haven't given we are concerned about". The obvious implication of that comment was that the jury had failed to take into account the burden of proof and, as a result, the trial judge should have recharged them on this issue. Similarly, in *Gibson* it was held that "a very clear restatement of the burden and standard was required from the recorder in response to the foreman's statement."

43. Counsel submitted that the question posed by the jury indicated that the jury identified, what he considered to be, a "gap in the evidence" which he said was analogous to the facts in *R v. Rafique* [1973] Crim L.R. 777 cited in *The Judge's Charge*, where the jury demonstrated concern regarding evidence it had not heard. It was further submitted that it was clear from the question that, at least some of, the jury members were "having difficulty" with the rules regarding the burden and standard of proof in criminal trials, and

that, by refusing to recharge the jury, the trial judge failed to appropriately address the jury's question. The jury didn't have any difficulty here.

44. In response, counsel for the respondent submitted that the transcript of the trial judge's charge to the jury contained, what she described as, "an emphatic explanation of the standard of proof and a pellucid demonstration of the concept of reasonable doubt". She further submitted that the trial judge correctly, and directly, responded to the jury's question.

45. In *Rafique,* it was conceived that a question by the foreman of the jury, "[i]f there is insufficient evidence to give a verdict, is that the verdict, or have we to give a verdict?" indicated that the foreman, at least, was clearly confused and that the trial judge's response that the jury must give a verdict was unsatisfactory. *R v. Bell* was a case of larceny where the defendant offered his wife as an alibi in his defence at the preliminary inquiry; however, the wife was unable to attend the trial to provide evidence. Although the jury was found to have been correctly directed regarding the burden of proof, the jury twice returned with questions about the wife's evidence which suggested that the jurors might have forgotten the previous direction. In those circumstances it was held that the jury ought to have been redirected regarding the burden of proof.

46. In *Gibson*, the accused was charged with an offence of wounding for allegedly stabbing the injured party with a knife. However, no weapon was ever recovered, nor had the victim and another witness seen one at the scene of the alleged stabbing. During its deliberations, the jury returned with a written question wherein it was stated: "due to a lack of evidence we are finding it difficult to come to a decision". In response, the trial judge reminded the jurors of aspects of the evidence which suggested that there was sufficient evidence upon which to convict but did not remind them of the burden and standard of proof. On appeal, it was held that, in the circumstances, the trial judge ought to have re-directed the jury on the burden and standard of proof.

47. The examples given bear no relation to what occurred here. In any event, we are not to be taken as approving any statement of principle in those decisions as being part of Irish law. The approach to be taken by a judge is particularly within his, or her, discretion and, accordingly, this Court must be slow to intervene where an issue of this type arises.

48. We also reject this ground of appeal.

Ground 13: "The learned trial judge erred in law by failing to inform the jury of their right to disagree, and in doing so, maintaining a policy not to inform juries of their right to disagree."

49. This ground of appeal arises because the trial judge declined to instruct the jury on its right to disagree, despite numerous applications from counsel for the appellant for the judge to so instruct the jury.

50. In his written submissions, counsel for the appellant advanced the proposition that the trial judge erred in law by failing to inform the jury of its right to disagree in this case, and, in doing so, maintained what he considered to be a "policy" of not informing juries of the right to disagree which he contended amounted to an unlawful fettering of discretion in carrying out a public function on the part of the trial judge. In his submissions, counsel referred to each application for the judge to instruct the jury on its right to disagree in sequential order. We think it useful to summarise the chronology of these applications (which we now do), although each application is referred to within the section describing the relevant events at trial above.

51. Counsel for the appellant's first application for the jury to be informed of its right to disagree occurred after the trial judge gave the majority warning to the jury. Following the application from counsel, the trial judge indicated that she was not going to inform the jury of its right to disagree at that stage and remarked that she could not recall ever expressly

instructing a jury on that subject. The written submissions also refer to the fact that the express wording of the majority instruction omitted the possibility of the jury disagreeing.

52. The next application came when the jury returned with the question regarding the evidence of Dr Cochrane, the detail of which need not concern us. After the trial judge had responded to the jury's question, there was a discussion between the judge and counsel regarding the time allowed for the jury's lunch—during which counsel for the appellant submitted that providing the jurors with less than an hour for lunch could place 'pressure' on the jury to reach a verdict. At that point, counsel for the appellant then applied for the jury to be instructed on the right to disagree. When declining this application, the trial judge rejected a suggestion, put to her by counsel for the appellant, that she had a policy of refusing to instruct juries regarding the right to disagree, and explained that she simply could not recall having received an application to so instruct the jury in previous trials. On consideration of the transcript she had no such policy on any view of what was said by her and we need not say more about this untenable proposition.

53. The final application occurred during the hearing on Monday the 29th of May 2023. Following the application from counsel the trial judge indicated that she would indicate to the jury that it had the right to disagree at 12 o'clock if the jury had not returned with a verdict before then; however, this never occurred because the jury returned with a majority verdict before that time.

54. Counsel for the appellant also cited the length of time spent by the jury after the majority instruction and the express wording of the majority warning itself as factors which supported his contention that the trial judge ought to have informed the jury of its right to disagree. Regarding the latter factor, counsel's written submissions suggested that the trial judge's omission of an explicit reference to right to disagree in the express words of her majority warning "excluded any possibility of a disagreement", and, thus, may have led to

a belief that the jury had no option other than to select one of the three possible verdicts highlighted by the judge. Counsel further submitted that the refusal of the trial judge to inform the jury of its right to disagree itself amounted to placing pressure on the jury to come to a decision.

55. In the latter context, counsel for the appellant referred to the *People (DPP) v. Cahill* [2001] 3 I.R. 494 and *People (DPP) v. Byrne* (Unreported, Court of Criminal Appeal, 24 February 2003). In *Cahill*, where it was said the jury should have been told of its right to disagree, the Court of Criminal Appeal, in rejecting that contention, dealt with the matter in the manner stated in the words of Keane C.J. at page 511:

> "While a trial judge may properly take the view, depending on the particular circumstances of the case, that the time has arrived when the foreman of the jury can be asked whether there is any prospect of their arriving at a majority verdict within a reasonable time, there is no obligation whatever on the judge to direct the jury that, as an alternative to bringing in a verdict of guilty or innocent, they may simply record a disagreement. To give a direction in those terms might stimulate a belief in juries that there was, in effect, a third verdict standing somewhere between innocence and guilt. This court would strongly deprecate the use of language by trial judges which would encourage such a view."

In *Byrne*, the rule was said to be this:

> "Disagreement, it has to be said, is not a verdict. It simply means that a trial has proved abortive, and that is a conclusion which no sensible person wants in a criminal trial and it is certainly no function of the trial judges to be stressing to juries that they have, after all, the right to disagree, as it is sometimes unfortunately put."

In both cases the appeal was dismissed.

56. Although somewhat different from the above cases, it is also appropriate to refer to *The People (DPP) v. Kelly* (Unreported, Court of Criminal Appeal, 9 February 1994), and *The People (DPP) v. John James Kelly* [2006] 4 I.R. 273. The principles were re-stated but, on the facts, the appeal in *Kelly*, was allowed. In that case, the jury deliberated until 3 a.m. and it was held that:

> "[W]hatever about the propriety or wisdom of keeping a jury cooped up until this hour at the end of a lengthy trial, this court has no doubt, having regard to the requests made to him and the patent difficulties which the jury were having, that the learned trial judge should have informed them of their right to disagree."

In *The People (DPP) v. John James Kelly,* again on the facts, there was no basis for any finding that the jury had any difficulties or were under any pressure. Delivering the judgment of the court, Kearns J stated that:

> "To place undue emphasis on the right to disagree can be appreciated by an experienced criminal trial judge as inviting too readily such an option by a jury. To have done so at an early stage in circumstances where there had already been one trial in this case and in circumstances also where no indication of deadlock or intractable differences had been notified by the jury to the judge would have been imprudent to say the least."

57. The thrust of the authorities is clear: to put the matter no further, disagreements are not to be encouraged and each case will depend on its own facts. There is no basis for suggesting that the jury had any difficulty reaching a verdict and this ground must fail on the present facts—the judge dealt with the matter appropriately.

58. In our experience, judges rarely tell juries in their charges of their capacity or right to disagree and, rightly, do so only after lengthy deliberations. They may possibly broach the issue with the jury if they consider there is a real possibility they may be deadlocked. If

the jury indicate difficulty, the judge would also engage with the issue and seek to establish the reality of continued deliberations: this may extend to inviting a jury to continue deliberating for a period. It is perfectly right for a judge to afford a jury further time for deliberation after such enquiries (in circumstances where it has been given a majority instruction). All will depend on the circumstances, and we stress that there is a wide margin of discretion vested in trial judges as to how to deal with the issue. There was no basis here for suggesting the jurors were under some sort of pressure or that the judge erroneously exercised her discretion in refusing to tell them of the jury's entitlement to disagree. The jury deliberated at length—a typical example of how careful and conscientious juries are generally—and the very last thing that is to be inferred from that is that the jurors felt pressured either as a body or severally. Again, this Court will not lightly interfere with that discretion.

59. Counsel for the respondent also submitted that there was no error in the majority instruction. Counsel drew an analogy between the basis upon which juries are not informed of the statutory possibility of a majority verdict at the outset of their deliberations, and the manner in which the trial judge opted to explain the majority direction to the jury in this case, in support of that submission. Again, we think this submission is correct.

60. We, therefore, reject this ground of appeal also.

61. The appeal is dismissed.