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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

v

QP

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Before: McCloskey LJ and Colton J

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Mr Charles MacCreanor QC and Ms Kate McKay BL (instructed by the Public Prosecution Service) for the Crown
Mr Gavan Duffy QC and Mr Michael Ward BL (instructed by MacElhatton Solicitors) for the Appellant

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COLTON J (*delivering the judgment of the court*)

Reporting Restrictions

The complainant and injured party is entitled to automatic lifetime anonymity by virtue of section 1 of the Sexual Offences (Amendment) Act 1992, as amended. As a result neither this judgment nor any other form of communication or publication should disclose her identity or any information from which she might be identified.

Introduction

[1] On 2 October 2020 at Laganside Crown Court, Belfast the appellant was convicted by a majority jury verdict of 10/2 of a single count of raping his mother. The jury was unable to reach a verdict on a further count to the same effect. In his carefully considered decision Huddleston J, the single judge, noted that in *R v Creaney* [2015] NICA 43 this court, adopting what Lord Halsham had stated in *R v Lawrence* [1982] AC 510 at 519h, identified the following principles relating to directing the jury:

(i) The judge must identify the defence case.

(ii) The judge must strike a fair balance between the prosecution case and the defence case.

(iii) The judge must not be so critical as effectively to withdraw the issue of guilt or innocence from the jury.

In granting leave to appeal Huddleston J stated at para [20]:

> "*… leave is granted on the appeal against conviction on the grounds that it is arguable that* [the trial judge] *may have overreached on some of the issues in light of the principles set out in* ***R v Creaney***."

[2] The appellant was punished by the imposition of an extended custodial sentence of ten years imprisonment augmented by an extended licence period of five years. Huddleston J also granted leave to appeal against sentence.

Grounds of Appeal

[3] Considering that the grounds of appeal lacked clarity and particularity, this court directed the provision of amended grounds. These are in the following terms:

Ground 1

The conviction of the appellant was unsafe as a result of an unfairness in the trial process, namely:

(i) The failure of the trial judge to place the defendant's case fairly and properly before the jury; and

(ii) By including in her charge comments and instructions to the jury which amounted in effect to a direction to disregard the most significant aspect of the defence case.

Ground 2

The conviction of the appellant was unsafe as a result of an unfairness in the trial process, namely:

(i) The learned trial judge misrepresented the significant [sic] and relevance of the defence forensic expert as to the DNA findings; and

(ii) (The learned trial judge) failed to properly place before the jury the potential value of this evidence to the defence case.

Factual Background

[4] On the evening of 2 February 2018, the complainant who was 54 years of age at the time, had been at her sister's house drinking, something she did regularly on Friday and Saturday evenings. She had last eaten at about 4.00pm and began consuming alcohol at approximately 7.00pm. Over the course of the evening, she consumed most of a 10 glass bottle of vodka. She left her sister's house after 3.00am and was walked to her home by her brother-in-law, G. Importantly, from the appellant's viewpoint, the evidence at trial was that G walked the complainant to within 30 yards of her home, but did not go any closer than that and specifically did not enter the home.

[5] When the complainant entered her home she went upstairs and found her son, the appellant, in his bedroom playing a PlayStation device. He was a 33 year old man. He had previously been married with 4 children but had been separated from his partner for 2 years and was living for most of that time in his mother's home. The complainant's evidence was that she had a brief friendly discussion with her son. In her ABE interview, which was adopted as her evidence-in-chief at the trial, she says:

> "… then [the appellant's] to see if he was in or not and he was sitting playing his PlayStation and then it's just banter, just like laughing about, I was going to turn it off while I'm speaking to you, turn it off I was annoying him, I was annoying him. Ahm and I just right night night son I love you and he went love you too mummy and give me a wee kiss and I closed the door and went on into the bedroom, got into bed ahm I probably had a wee smoke first and then got into bed and literally conked out."

[6] After falling asleep she describes what happened, again in her ABE interview in the following way:

> "… I woke up with somebody having sex with me from the back, ahm I think it happened before but I wasn't too sure. So when this was going on it was like a split second I went I am not dreaming this, this is really happening. So dived out of bed to turn the light on and when I looked he wasn't in the bed he had jumped and he was down on his hunkers down the far side of the bed and I started shouting at him telling him you know what you've done you just bloody raped me, calling him everything. He jumped up and went no I haven't what are you saying. He says he was only looking for a cigarette, my cigarettes, anybody knows me they are always right at the door where my wee dressing table is, so if he wanted one he's

> done it more times than enough came in and took one off, off me when I have been sleeping like. Ahm so I rather than to get into a big row or hit him or anything I just told him to get out, pack his stuff and get out. He denied it he said he didn't do nothing."

[7] The "he" referred to in this evidence is the appellant. The reference to her thinking it happened before ultimately formed the basis of the second count, in respect of which the jury was unable to reach a verdict and which is not therefore the subject matter of an appeal.

[8] The complainant's evidence was the central plank relied on by the prosecution in respect of count 1.

[9] The prosecution also led evidence from a medical witness, Dr C, who examined the complainant, approximately 18 hours after the alleged rape. On her examination she found a 0.7cm laceration and an area of abrasion which were in keeping with penetrative blunt force trauma.

[10] Finally, in terms of the evidence the prosecution also called three witnesses namely the complainant's daughter C, a family friend who was a police officer, E and another witness, the complainant's sister, L, who gave evidence to the effect that the complainant had complained to them about the rape in the following days.

[11] The appellant's case was that sometime after his mother had come into his room (there is a dispute as to whether this was 5 minutes as the appellant stated or as much as 40 minutes as the Crown suggested) he came into her bedroom with a view to borrowing a cigarette. It was common case that the complainant was in the habit of leaving cigarettes along with a lighter on her bedside table next to the door. The appellant's case was that having entered the room he picked up the box of cigarettes and had accidently dropped the lighter. It had fallen to the floor, bounced towards the bottom of the bed and he had gone onto the floor in order to find this. Some moments later, his mother got out of the bed, turned on the light and accused him of having sex with her. There followed a heated exchange whereupon he packed a number of items into a bag and left the house at approximately 4.30am.

[12] The appellant gave evidence at the trial in support of his account of what happened.

[13] In relation to the evidence from Dr C concerning her medical examination of the complainant it was suggested in cross-examination that the injuries disclosed may have been caused whilst using one or other of two sex toys which were found in the drawer next to her bed. She agreed that such objects could have caused the injuries which were found but that she had not been asked to and had not considered the matter.

[14] To complete the evidential picture, as part of the police investigation sample swabs were obtained from the genital area of the appellant and from the vagina, perineal and buttocks of the complainant.

[15] In addition the police seized and examined a pair of boxer shorts seized from the bedroom of the appellant's room which were black with an orange band – the complainant's evidence being that the appellant was wearing orange underwear at the time of the alleged offence. The appellant claimed that he had been wearing his pyjamas.

[16] The prosecution did not lead any evidence in relation to this forensic evidence. Secondary disclosure revealed that no traces of any of the appellant's DNA were found on the samples taken from the complainant. Equally, there was an absence of any of the complaint's DNA on the samples taken from the appellant.

[17] The police forensic examination of the boxer shorts did not reveal any DNA from the complainant.

[18] The appellant called a Dr Bader, Forensic Scientist to comment on the results of these forensic tests. He gave evidence to the effect that he would not have expected to find anything on the vaginal swabs from the complainant but if the allegations were true he would have expected traces of the complainant's DNA on the appellant's samples. His opinion was that:

> "In my opinion, the results from the complainant's intimate swabs do not assist with supporting the allegations or not. However, the results from [the appellant] may support the proposition that he did not engage in the alleged activity, although it is not possible to calculate reliably the level of support in my opinion."

[19] In relation to the boxer shorts seized and examined it was Dr Bader's opinion that if the appellant was wearing these particular boxers and wore them even for a very short time after having sex with the complainant one would expect to see her DNA recovered from them.

The Relevant Legal Principles

[20] Before examining each of the grounds of appeal it is useful to set out the legal principles to be applied by the court in carrying out that examination.

[21] The basic principles to be applied by this court in exercising its appellate jurisdiction under section 2 of the Criminal Appeal Act (Northern Ireland) 1980 have been set out by Kerr LCJ in R v Pollock [2004] NICA 34. At para 32 of his judgment he set out the applicable principles established by the authorities:

> "[32] The following principles may be distilled from these materials:
>
> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[22] It is noted that the focus in Pollock is on an analysis of the evidence rather than the judge's charge – but it remains the principal test to be applied by this court.

[23] The obligations on trial judges are well established. Blackstone's Criminal Practice 2022 at D18.21 provides a comprehensive discussion of the proper approach for a trial judge. The section deals with preliminary and general matters, correcting errors, written directions, standard directions, directions as to the function of judge and jury, directions on the burden and standard of proof, directions on separate consideration of counts and defendants, directions on the ingredients of offences, directions on specific defences and other standard directions. When dealing with the way in which the judge should approach summarising the facts to the jury the following appears at D18.38:

> "**Summarising the defence case**
>
> Crucially in Curtin [1996] Crim LR 831, the Court of Appeal stated that it was part of the judge's duty to identify the defence. The way in which this is done will depend on the circumstances of the case, however the following propositions apply:

(a) When the accused is giving evidence it will be desirable to summarise that evidence

…

Moreover, it is desirable for the judge to give an overview of the defendant's case, in addition to weaving the defence case into the chronology of the prosecution evidence …

Judicious Judicial Comment

It is the judge's duty to state matters `clearly, impartially and logically', and not to indulge in inappropriate sarcasm or extravagant comment (Berrada [1989] 91 Cr App R 131). Similarly in Marr [1989] 90 Cr App R 154, the Court of Appeal stressed that observance of the accused's right to have the case presented fairly is never more important than when `the cards seem to be stacked more heavily against the defendant' (p156). Lord Lane CJ added:

> 'However distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have the case fairly presented to the jury both by counsel and by the judge.' (p156)

However, provided it is emphasised to the jury that they are entitled to ignore opinions, the judge may comment on the evidence in a way which indicates his or her own views. Robust comments to the detriment of the defence case are permitted (eg O'Donnell [1917] 12 Cr App R 219, in which the judge described the accused's story as a 'remarkable' one) providing the judge is not so critical as effectively to withdraw the issue of guilt or innocence from the jury (Canny [1945] 30 Cr App R 143 in which the judge repeatedly told the jury that the defence case was absurd; see also Green [2017] EUCA Crim 1 774, [2018] 1 Cr App R 14 (218) and Marchant [2018] EUCA Crim 2606 [2019] 4 WLR 20)."

[24] In *R v Creaney* [2015] NICA 43 the Court of Appeal took the opportunity to review the extent to which a trial judge is required to review the elements of the evidence in a case which involved multiple counts of indecent assaults and gross indecency.

[25] Having set out the factual background in his judgment Morgan LCJ dealt with the charge to the jury at paras [33] and [34] as follows:

> "[33] Lord Hailsham gave a general description of the content of a judge's direction to the jury in R v Lawrence [1982] AC 510 at 519, HL: 9 "…. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."
>
> [34] Further helpful discussion of the content of the judge's charge can be found in Archbold 2015 beginning at paragraph 4-438 and Blackstone 2015 beginning at paragraph D18.21. From those sources the following general points can be drawn:
>
> (i) The judge must identify the defence case. Where the accused has given evidence it is desirable to summarise that evidence and where he has given evidence and answered questions at interview it may be appropriate to draw attention to consistencies and inconsistencies between the two. It is also desirable for the judge to give an overview of the defence case in addition to weaving the defence case into the chronology of the prosecution evidence (see Curtin [1996] Crim LR 831 and Pomfrett [2010] 2 AER 481).
>
> (ii) The longer the trial the greater the likelihood that the jury will need assistance in relation to the evidence. In a trial lasting several days it will generally be of assistance if the judge summarises those matters not in dispute and succinctly identifies those pieces of evidence in conflict. Brevity is a virtue. The jury will invariably have the assistance of speeches from counsel dealing with the issues of controversy in the case as a result of which the Court of Appeal is unlikely to be persuaded by appeals based merely on the

failure of the judge to refer to a particular piece of evidence or a particular argument (see Farr 163 JP CA)

(iii) The judge must, however, strike a fair balance between the prosecution case and the defence case. Particularly where the defence case is weak the trial judge must be scrupulous to ensure that the defence case is presented to the jury in an even-handed and impartial manner. It follows that the judge must not engage in inappropriate sarcasm or extravagant comment (see Bentley (deceased) [2001] 1 Cr App R 21 CA, Marr (1989) 90 Cr App R 154 and Berrada (1989) 91 Cr App R 131). 10

(iv) Provided that the judge emphasises to the jury that they are entitled to ignore his views he may comment on the evidence. The judge may do so robustly where for example the defence case is riddled with implausibilities, inconsistencies and illogicalities but the judge must not be so critical as effectively to withdraw the issue of guilt or innocence from the jury (see Nelson [1997] Crim LR 234 CA, Canny (1945) 30 Cr App R 143).

(v) The judge is not confined to the arguments advanced by the prosecution or defence. He is entitled to make uncontroversial comments as to the way the evidence is to be approached particularly where there is a danger of the jury coming to an unjustified conclusion without an appropriate warning. Such remarks may be particularly appropriate in complaints of sexual abuse where feelings of shame, embarrassment or vulnerability may need to be taken into account in considering the explanation for any delay in reporting the matter (see *R v Evans* (DJ) 91 Cr App R 173 CA, R v D [2009] Crim LR 591 CA and R v Miller [2011] Crim LR 79 CA)."

[26] The grounds of appeal focus exclusively on comments made by the trial judge to the jury, after the defence closing and in her charge to the jury.

[27] Although sub-paragraph 4 of para [32] of Pollock focussed on the evidence at a trial conspicuous unfairness or a material misdirection by a trial judge to a jury can, depending on the circumstances lead an appellate court to conclude that a

verdict is unsafe in accordance with the Pollock principles. For example in *R v ZK* [2018] NICA 46 the court considered a direction from the trial judge to the jury concerning an assertion by a complainant in a rape case that she was a virgin at the relevant time. At para [60] the court concluded:

> "[60] We have given careful consideration as to whether the misdirection renders the verdict of the jury unsafe. The sole statutory test for the Court of Appeal is one of safety of the convictions; see section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 and *R v Pollock* [2004] NICA 34. There is no fixed rule or principle that a failure to give a direction or misdirection is necessarily or usually fatal. It must depend on the facts of the individual case; see *R v AB* [2015] NICA 70 at paragraph [22] and *R v Hunter* [2015] EWCA Crim 631; [2016] 2 All ER 1021 at paragraphs [89] to [92]. In this case we are satisfied that the judge's direction was prejudicial to the appellant in relation to the central issue of consent which is to be seen in the context that there was an issue as to the reliability of AB for the reasons which we have given in paragraph [17]. We consider that the credibility and reliability of AB was of central and critical importance and by this significant degree of unfairness the judge endorsed AB's evidence in relation to this issue elevating it to the status of not being challenged and not being contradicted. Applying the principles set out *R v Pollock* at paragraph [32] we consider that the direction to the jury that the evidence of AB that she was a virgin, that this evidence had not been challenged or contradicted gives rise to concerns about the safety of the conviction and accordingly we quash the conviction."

[28] In similar vein the Court of Appeal subsequently in the case of *R v WC* [2016] NICA 61 observed:

> "[35] As is noted in *R v McDade* [1989] 8 NIJB 1:
>
> > 'An accused charged with serious criminal offences is entitled to have his defence put adequately and fairly before the jury.'
>
> [36] A judge should not therefore make comments in his summing up which are so weighted against the defendant as to leave the jury little real choice other than to comply with the judge's views. A trial judge is, however, entitled to express an opinion and to comment

> upon the evidence and to do so, where appropriate in strong terms."

Analysis of the grounds of appeal

[29] Having set out the legal principles the court now turns to the specific grounds of appeal.

First ground of appeal

[30] At trial the appellant made the case that the complainant's evidence in relation to the alleged rape was unreliable.

[31] The central arguments advanced to the jury on his behalf in respect of the count on which he was convicted were that:

(i) There had, in fact, been no sexual contact between him and the complainant, and

(ii) That the complainant, at the relevant time had memory problems related to Fibromyalgia, had taken prescription medication, was heavily under the influence of alcohol and was therefore a highly unreliable witness with respect to her perception and belief that the appellant had been having sex with her as she woke from her sleep.

[32] The most significant evidence in support of this argument derived from the evidence of the complainant as to an event which she asserted had occurred a short time before the alleged offence. The complainant was able to recall, when prompted in her ABE interview and in evidence at trial, that her brother-in-law, having walked her home, entered her home and conversed with her in her kitchen for a period of five minutes. There was no dispute at trial that this event had, in fact, not occurred. The agreed evidence of the brother-in-law was that whilst he walked the complainant to her home, he did not enter the property, let alone have a conversation in the kitchen of the complainant's home.

[33] The appellant focused on this evidence as a key element of his case. Before this court Mr Duffy described it as the cornerstone of the appellant's case. In his closing to the jury he highlighted this issue.

[34] The relevant section of his closing is as follows:

> "Now, there are three major problems with this part of her account, which highlights something very significant.
>
> It would be understandable enough if there were some things that a complainant could not recall – that would be

> understandable if there were things she could not remember. That would be expected, given all of the matters that I have mentioned to you about her Fibromyalgia and her drink, and possibly her medication as well. But – the witness actually denies, she denies there is a problem with her – with her recollection as a consequence of her alcohol consumption, or on this night generally.
>
> She says that she now has a positive memory of G walking her into the house and coming in and sitting for five minutes. She was very specific about that, confirmed it with the police, oh god, I says "Oh, god that's right" – convinced. And then adds "Right, I locked the door after G left."
>
> Her account is completely wrong. And if your verdict was, based on the question of whether G was in the house or not, and if you relied upon the complainant, and if you – if you listened to the urgings of the prosecution about relying upon the complainant and – having accepted her evidence, you may well have been convinced by her account of G being in the house. And maybe you would be convinced. But you would also be completely and utterly wrong. And ladies and gentlemen this highlights one of the difficulties of trying to assess the reliability of a witness like this in circumstances such as this, particularly when you do, do not have access to what the witness was like at the time of the complaint."

[35] After the conclusion of counsel's closing the trial judge made some brief comments to the jury, before she commenced her formal charge the following day. She began by complimenting "two excellent speeches" on behalf of the prosecution and the defence. She correctly pointed out that such speeches do not constitute evidence and reminded the jury that it was for them to determine the facts of the case. She told them that she would be giving them directions in relation to the law and their functions the following day.

[36] Crucially, for the purposes of this appeal she went on to say:

> "Now, another thing I want to say to you is that Mr Duffy said to you there if you were trying the – the case of did G come into the complainant's home – well, you are not trying that case. Equally, if - if Mr MacCreanor had said 'are you trying, did E come into the home' you are not trying that case. You are trying the case of whether or not

> (the appellant) raped (the complainant) at the beginning of February 2019 … that's the case you are trying and that is the only case which you are trying."

She goes on to point out that there are two main witnesses in the case, namely the complainant and the appellant who have given very different accounts of what occurred to the jury and that "they cannot both be telling the truth."

[37] On the following day in the course of her charge the trial judge dealt with this evidence in the following way:

> "Now, you are entitled to examine all of that evidence, ladies and gentlemen, because it is for you and only for you, it is not for me, it not for Mr MacCreanor, it's not for Mr Duffy, it's for you to determine the reliability or otherwise of (the complainant's) evidence. And you might want to consider, when dealing with those parts of the evidence that were tested, like did G come in, did you – what did you have – did you have a toastie or did you have a burger, or why did you not remember when the earlier incident – you might think to yourselves are these particular memories of that part of the day before or the evening in question, are they as important in the grand scheme of things as the allegation that she says she wakened up to find her son penetrating her vagina with his penis. Now, it is entirely a matter for you, but you might think to yourselves, 'well, would I remember if I had a toastie or a burger at 4 o'clock the previous day, but I might remember if one of my family members penetrated my vagina.' It is up to you to assess whether or not you think those loops or gaps or – or vacancies in the memory are important to you in the grand scheme of the entirety or the body of the evidence that I talked to you about earlier when discussing the burden of standard of proof.
>
> Now, what I would say to you as well about human memory, ladies and gentleman, that it is just purely a matter of common sense, is that the human memory is obviously subject to frailty at the best of times, and, I suppose, as we get older, and some of you – there is quite a collection of age groups amongst you, but as we get older, the memory does tend to fade and we might not remember with great clarity matters which are of little importance to us. But when it comes to very important things we might remember those things very clearly.

> That is a question for you ladies and gentlemen, to determine did (the complainant) remain consistent in terms of the allegations of what happened to her in the bedroom so that you can be satisfied on the body of evidence that the (the appellant) did rape his mother, or do you think that a recall of surrounding events such that you cannot be satisfied of her reliability. Those are the issues for your determination and only your determination.
>
> Now, before I leave that recall and recollection of memory issue, there is one other thing I need to – I feel that I ought to mention to you and that is when Mr Duffy was exploring with (the complainant) the issue of remembering things incorrectly. And what I would say to you at this stage is that that works equally for the prosecution as it does for the defendant. You recall, ladies and gentlemen, that when the defendant in his police interview, told the police that he remembered his mother coming in and she was talking to someone with a squeaking voice, who he identified as E, and he was asked, well, - how – who was it or who did you hear and his answer was and I quote 'near enough 110 million per cent sure it was E.' He then went even further and described hearing the closing and the locking of the gate after E left. Now, Mr Duffy said to you yesterday that if the question for your determination was did G enter the house you could not rely upon (the complainant's) evidence. Similarly, I put it to you that if the question was did E enter the house, you could not rely on the defendant's earlier account. What I said to you yesterday was, 'That is purely speculative questions. Those questions are not the questions for your determination. The questions for your determination are did the defendant rape his mother in February 2019 …"

[38] The trial judge commenced her charge at 10:34 on 14 October 2020 and she sent the jury out for a break at 11:42. In the course of the break Mr Duffy made a number of requisitions to the trial judge and raised the issue which forms the basis of Ground 1 of this appeal. However, Mr Duffy commenced his requisitions by submitting that the differences in the purported mistaken memories of the complainant and the appellant were "distinct and distinctive." Before being able to develop the theme the trial judge interjected as follows:

"My problem with that is, Mr Duffy, that you put that to the jury in a scenario where if this was the question … that you were examining … and I felt that was unfair."

The exchange continues as follows:

"Mr Duffy: Well, can I – can I say – can I explain to Your Honour, why, why it is perfectly fair? The jury had been asked – one of the questions you are being asked here is as to the reliability of the complainant – is she reliable?

Judge: Yeah.

Mr Duffy: Is her memory reliable?

Judge: Yeah.

Mr Duffy: And the - the thing that is striking about her account of G coming into the house is that she does appear to have convinced herself or satisfied herself …

Judge: Yeah.

Mr Duffy: … that that did happen.

Judge: Yeah.

Mr Duffy: Whereas in actual fact, in the Crown case, there is no dispute about this – that definitely didn't happen. But that is not a failure of hearing or a failure of – of – of eyesight, that is actually not just a failure of recall but a failure of recall which has been remedied with a false recall. That's a very, very – and we say that's – that's a very significant thing in a case like this where we are saying 'this is someone who has satisfied herself that the – the defendant has had sex with her.' And we are saying in fact that even though she has satisfied herself that that has happened, it actually hasn't happened. So there – it's a very very – it's

coincidental in time to the allegation – I mean this is in – within a matter of …

Judge: Uh-huh.

Mr Duffy: … an hour of the allegation so her condition and her perception at the time are – are clearly relevant. What is also – it's also the kind - exactly the kind of failure the defence are saying lies at the heart of what we say is an incorrect allegation. Whereas, the defendant's failure, where he is sitting playing at a PlayStation, he gets his headphones on. He absolutely – Your honour is absolutely correct, he completely and he accepts he has completely made a mistake about this - notwithstanding the fact that he says he is 110 million per cent sure …

Judge: Uh huh.

Mr Duffy: That it's E that he hears and so on and so forth, that is a failure of hearing and perception. It is quite a different thing from – from – from – from what the defence are highlighting with the – the complainant.

Judge. Uh huh.

Mr Duffy: And to kind of almost set the two in juxta position to each other and then to say 'well look this one cancels out the other.' Really that's

Judge: No I didn't put both of them to and I said those are not the questions for you …

Mr Duffy: No.

Judge: These are the questions for you.

Mr Duffy: No, no well they are not – they are not the ultimate questions for the jury, it is important for a jury to – to - the jury should

not dismiss this false recollection that the complainant has.

Judge: Yeah.

Mr Duffy: From a defence point of view we say it's very, if not, possibly the most important point in the case because it is – it is an accepted fact that G did not come into the house, clearly it is beyond any dispute that if (the complainant) says that she has a memory of that, that memory is completely wrong and that – it it – it gives the jury some kind of a barometer by which they can assess – well, she is completely wrong about that, you know, what does that say about her reliability?

Judge: Yeah.

Mr Duffy: Which is really the central point of the entire case.

Judge: Yeah.

Mr Duffy: So from saying that it's a point which isn't – you know the reason why it was – it was put in that way – I wasn't for a minute suggesting the jury should – should ignore the verdicts which they should concentrate on and some other question, but really was - it was illustrative of whether or not they could place faith in her recall, and indeed, is there risk that her recall might be recalling things that in actual fact have not occurred. So that was really – the second thing."

Mr Duffy then went on to deal with other matters.

[39] Having considered the transcript in full, it is not clear that the trial judge made any determination on the issues actually raised in the requisitions. Towards the end of the exchange she said the following:

> "Yes, I will try and deal with it at that stage. The – the matters that you put forward Mr Duffy are all factual really, and there is no requisition as far as I know on any

> legal aspect of the case at this stage. I will see what I do with – with your submissions as I go through the rest without actually isolating anything."

[40] The judge recommenced her charge to the jury at 12:11 and at 12:39 the jury retired to consider its verdict.

[41] In the course of the remainder of her charge the trial judge reminded the jury of the statement of G to the effect that he stopped at a distance of approximately 30 feet from where he saw (the complainant) enter her home at which stage he returned to his own home without at any stage entering the premises. She then says:

> "Now, you will remember, of course, that originally (the complainant) says she didn't remember him coming in but then she did remember coming in because somebody had told her that he came in, and she was able to say that they had a chat – well he wasn't in the house, clearly from his statement."

She made no further comment on this issue.

[42] This ground of appeal concerns what Mr Duffy QC described as the appellant's "primary case" at the trial. Unsurprisingly, therefore, Mr Duffy confirmed in response to the court's question that this ground represents the main plank of the appeal. Elaborating, he described the appellant's "primary case" as a frontal challenge to the reliability of the complainant's account of the alleged offending. He submitted, in substance, that the judge had failed to adequately and fairly convey this case to the jury in her directions and, in particular, encouraged the jury not to grapple with the key aspects of the evidence bearing thereon. No adequate counter balance, Mr Duffy argued, was to be found in other parts of the judge's charge. It was submitted that the judge had critically undermined the centre piece of the defence case by an adverse and negative intervention immediately following completion of defence counsel's closing submission to the jury. This, it was submitted, was compounded by the judge, in later charging the jury, (a) diminishing the importance of the key evidence bearing on the issue of the complainant's unreliability and (b) making an unfair comparison with a distinct and peripheral evidential failure on the part of the appellant, namely his apparently erroneous belief that he had heard a woman (whom he identified) in the house upon his mother's return that night (see para [37] infra).

[43] Mr MacCreanor argues robustly that there is no merit in the appellant's submission.

[44] He says firstly that there was nothing improper or unfair in what the trial judge said immediately after the defence closing speech. Rather, he says the intervention was entirely correct and appropriate. By reminding the jury of the

verdict which they are actually being asked to consider she was not inviting them to disregard the evidence in respect of G. To the contrary, he suggests, that what the trial judge did say was necessary to ensure the fairness of the trial.

[45] He points to the repeated reminders by the trial judge in the course of her closing to the effect that it was for the jury and the jury alone to determine issues of fact. She said that the determination of the reliability of the complainant was purely a matter for them. She told them that they were perfectly entitled to take on board any slant on any fact relied upon by the defence or the prosecution, or indeed, herself, but they were not bound to do so. By way of example at the outset of her charge she repeats to the jury that "you are the sole decision makers and arbitrators in respect of the facts of this. The facts of the case are for you, and you only, to determine." Shortly thereafter she says "so, when I come to deal with an overview of the facts of the case, ladies and gentlemen, even if you think, 'well, the judge was kind of putting that in such a way that it is clear that the judge – if you think the judge thinks this or that, and you don't accept the slant that I would put on these facts, you just reject it.'"

[46] Mr MacCreanor highlights that the judge expressly praised the closing speech for the appellant and submits that on any fair reading of the charge the defence case was fairly and properly before the jury. It would have been clear to them that the appellant was contending that the complainant was unreliable and a factor relied upon was the complainant's error in her recollection about whether G had been in the house prior to the alleged rape.

[47] In assessing this matter as a general starting point the court takes the view that an appellate court should be very slow to interfere with the verdict of a jury. We note that in this case the jury had the benefit of hearing evidence from the complainant which was fully and properly tested in cross-examination. Similar considerations apply to the appellant who also gave evidence. The jury was obviously alive to issues raised by the appellant. They acquitted him on one of the charges and ultimately there was a majority conviction in relation to the count under appeal.

[48] There can be no doubt that the judge's closing charge to a jury is a fundamental element of a criminal trial. As the authorities make clear, in the course of a charge, the trial judge must identify the defence case and ensure a fair balance between that case and the prosecution case.

[49] In this case it is clear that the learned trial judge was at pains to point out that the assessment of the evidence was a matter for the jury. She made this point repeatedly in the course of her charge. The issue for this court is whether, if indeed, it accepts the appellant's criticisms of her charge those comments provide a sufficient counter balance to the alleged unfairness.

[50] The court has significant concerns about the way in which the judge addressed the jury on this issue. We elaborate on these in the following paragraphs.

[51] The trial judge's initial comments to the jury, immediately after the closing of the appellant's case, can only be interpreted as being critical of the central argument put forward on behalf of the appellant. This intervention was provoked by Mr Duffy's suggestion that if the jury were to determine whether G had in fact visited the complainant's home immediately before the rape and they accepted the complainant's account they would have come to the wrong decision. It is clear from the exchanges between the trial judge and counsel in the course of subsequent requisitions that the trial judge regarded this as "unfair." Whilst she was, of course, correct to point out to the jury that this was not what they were being asked to decide, it seems to us that it could reasonably be argued that this was a mischaracterisation of what Mr Duffy was actually saying. He was not saying that they had to determine the issue as to whether or not G was in the house but was making the point that if the complainant was unreliable on this issue she might also be unreliable on the central issue.

[52] By highlighting and isolating this issue in the way that she did the court considers that it may well have had the effect of undermining a key aspect of the appellant's case.

[53] The court, however, does not consider that this intervention alone would be fatal or determinative of this appeal. The trial judge had ample opportunity in the course of her charge to deal with the evidence on this point and explain its significance from the appellant's point of view to the jury in accordance with her obligation to identify the defence case and strike a fair balance between that case and the prosecution case.

[54] Having considered the contents of the charge we regrettably come to the conclusion that she failed to do so. It is correct that the judge indicates that the appellant argued that the complainant was an unreliable witness. In dealing with the evidence upon which the appellant relied to establish this unreliability she refers to the complainant "not remembering G coming into the house after he had walked her home but that he or somebody else had told her that he had walked her home and then she remembered that." She then goes on to compare this to a failure by the complainant to remember whether she had eaten a toastie or a burger at 4 o'clock the previous day.

[55] Whilst there is no doubt that the trial judge was entitled to comment on whether this mistake was significant in her view, what is absent from her charge is an explanation to the jury of the significance that the appellant attached to this issue. Indeed, this absence is compounded by the fact that she juxtaposes this with something which the complainant got wrong about the evening in question, namely whether he heard E come into the house and close the gate after she left. Mr Duffy was at pains to point out in his requisition that these two issues could not be

equated. At no stage does the trial judge grapple with this issue. Indeed, after hearing the requisitions, the way in which she deals with the two "mistakes or mistaken memories" can be contrasted. She indicates as a matter of fact that G clearly was not in the house at the relevant time and leaves it at that.

[56] When she comes to the memory of the appellant, having described the error, she goes on to remind the jury of the significance the prosecution attach to this. Thus, she says:

> "Initially, he said that the first thing that you are charged for the rape of your mother and you have crafted this story – crafted or created – call it what you will. Mr McCreanor then concentrated on the story given and the detail given, and he concentrated on how the details have changed in an effort, Mr McCreanor, was putting to the defendant, to make the story more convincing. And the changes, indeed, that Mr McCreanor put were, firstly, in relation to E and the squeaky voice, and then he put to the defendant that you gave – you gave this account at interview that you heard E and you knew it was E because of the squeaky voice, but in this courtroom you heard G's statement of evidence read to you and you changed your story to cover that.
>
> Secondly, it was put to him that he had described in great detail the opening and the closing of the gate, in his evidence. This was when he was telling the police that E had been in and had gone out and about the gate opening and closing and the bar going across the gate and the – the noise that it would have made. Whereas, Mr MacCreanor was putting to him that now he had heard G's statement having been read, he knew that he couldn't be right so he changed that story and said that it was the wind – it must have been the wind that he heard blowing the gate open and closed."

[57] There is absolutely nothing improper about these comments, and indeed, they are exemplar of how such an issue should be dealt with. However, what concerns the court is that there is an absence of this approach when dealing with the mistaken memory of the complainant, which was expressly described as the most important element of the appellant's case.

[58] We have therefore come to the conclusion that the trial judge failed to properly identify the appellant's case and did not strike a fair balance between the prosecution case and the defence case in her summing up. This was compounded by the fact that she characterised the submission made on behalf of the appellant as a

purely speculative question which was not one for their determination. By doing so there was a clear risk that this effectively withdrew an essential element of the appellant's case from consideration by the jury. In so doing, she encouraged the jury not to grapple with key aspects of the evidence bearing on the issue of the complainant's reliability.

[59] It follows that the first ground of appeal succeeds. This is sufficient for us to conclude that the verdict is unsafe.

Second Ground of Appeal

[60] This ground entails a twofold challenge to discrete aspects of the judge's charge to the jury. The first complaint is that the judge misrepresented the significance and relevance of the evidence of the appellant's forensic expert relating to DNA findings. The second complaint is that the judge failed to properly place before the jury the potential value of this evidence to the defence case. This may be conveniently described as the "boxer shorts" ground of appeal. It unfolds in the following way.

[61] In her ABE interview the complainant initially provided a composite account of the alleged offending. This contained no mention of the appellant's attire. Further probing by the interviewing officer followed. Her first view of the appellant during the alleged events was on the bedroom floor, adjacent to the bottom of the bed where he was "crouched down on all fours." At a later stage of the interview the complainant responded to an invitation to relay the alleged events again. In doing so she provided essentially the same account. This included some elaboration of the position allegedly occupied by the appellant, namely "… crouched down on all fours … his bum was up in the air." Asked to describe the appellant's state of attire, the complainant responded:

> "Just his boxers on … they were orange."

[62] Next, the complainant was asked whether the appellant had changed his underwear in the aftermath of the alleged offending. She replied:

> "I don't think so, I think he kept the same ones on …
>
> (Those orange ones?)
>
> Hm … mm …."

The complainant further provided a description of the clothing donned by the appellant at this stage, namely a light pair of jeans and a t-shirt.

[63] What is set forth in this paragraph and the next is common case. Two items in particular were seized by the police in the aftermath of the alleged offending for

forensic examination. One was a set of gent's checked pyjamas which the appellant claims to have been wearing at the material time. The second was a pair of gent's boxers. This court has received the enlarged photograph of this latter item provided to the appellant's legal representatives at the trial. This depicts a pair of gent's boxers predominantly dark grey/light black in colour, with a noticeable orange waist band below which, in one place, there is a small, curved orange line. At the time of his arrest the appellant was wearing green boxers. These, together with a bag of clothes, were seized by the police. The appellant's arrest occurred at the home of his former partner, where he had sought refuge after the complainant had ordered him out of the house immediately following the alleged offending. The agreed statement of the former partner was that the appellant had not changed his clothes while in her house. Furthermore, there was no evidence that either the appellant or the complainant had washed prior to the seizures for forensic purposes.

[64] At this juncture it is necessary to record the complainant's allegation that upon awakening she could feel a penis inside her from behind and had a feeling of skin on skin. Intimate samples were taken from the complainant. Scientific examination disclosed no indications of the appellant's DNA. Intimate samples were also taken from the appellant. Similar testing revealed no indication of the complainant's DNA. Testing of the aforementioned orange/grey boxer shorts disclosed no trace of the complainant's DNA.

[65] Pausing, the upshot of all the aforementioned scientific testing was that the prosecution case contained no element of DNA evidence. The relevant reports were, however, properly provided to the defence on secondary disclosure.

[66] At the trial a forensic expert witness (Dr Bader) gave evidence on behalf of the appellant. The witness testified as follows:

(i) One would not expect to find the appellant's DNA in the vaginal samples taken from the complainant. However, there would be a "good chance … depending on circumstances" of finding the appellant's DNA in the swabs taken from the complainant's buttocks.

(ii) With regard to the intimate swabs taken from the appellant, the expert testified, in general terms, that on the premise that there had been penetration one particular area of the male penis is a "particularly good area to look for DNA from the female …" In cross-examination, the witness was reminded of the following passage in his report:

> "… the results from [the appellant] may support the proposition that he did not engage in the alleged activity, although it is not possible to calculate reliably the level of support in my opinion."

He testified under oath:

> "On the assumption of intercourse, if the allegation was true, then I would have expected to find DNA from the complainant on [the appellant's] penis …
>
> But it's not possible to give a calculated measurement to compare the two alternative positions."

(iii) Addressing specifically the outcome of the testing of the aforementioned boxer shorts, he testified that if these had been the shorts worn by the appellant in the immediate aftermath of the alleged offending:

> ".. then I would have expected to find DNA from the complainant on the – on the – at least the inside, if not other surfaces of those shorts … as a result of transfer from her to his penis and then from his penis onto the shorts."

Dr Bader repeated this in cross-examination and his evidence on this issue was not challenged.

[67] To summarise, there was no incriminating DNA evidence against the appellant. This, inevitably, featured in senior counsel's closing address to the jury. He suggested that this was a "significant problem" for the prosecution. Counsel reminded the jury of the expert's evidence that in the absence of ejaculation he would not expect to find the appellant's DNA in the complainant's vaginal swabs. Counsel continued:

> "But equally, of course, the absence of semen is also what you would expect if there had been no intercourse. If there had been no ejaculation, yes, you would expect not to find anything, but equally, about [sic] there was no intercourse, you would expect not to find anything."

Next, the jury was reminded of the absence of the appellant's DNA in any of the other, external, swabs taken from the complainant.

[68] Senior counsel then addressed the jury on the discrete issue of the boxer shorts. He reminded them of the finding of the appellant's full DNA profile in this item of clothing. This, counsel suggested, was "... consistent with him being the wearer of those shorts …" – albeit he had earlier reminded the jury of the appellant's evidence that he had been wearing checked pyjama bottom, which could square with another item of clothing removed from the complainant's home by the police. Counsel's submission continued: if the complainant was correct in her assertion that

the appellant had been wearing boxers and if these were the same boxers forensically tested with negative results as regards the complainant's DNA "... then the findings create a massive problem for the prosecution." Counsel then summarised the expert evidence:

> "… if these pants were pulled up on the defendant, shortly after having had sexual intercourse with her, and even if he only had them on for as little as five minutes and then discarded them, you would expect to see the complainant's DNA on them."

[69] Both counsel addressed the trial judge before she began charging the jury. One of the specific issues raised by Mr MacCreanor was the way in which Mr Duffy had dealt with the issue of the boxer shorts. The submission made, properly analysed, was of notably narrow dimensions: there was no evidence that the police either believed or assumed that the boxer shorts seized and then subjected to scientific examination coincided with those described by the complainant ie formed part of the appellant's attire following the alleged offending. In response the judge expressed her intention to "… fairly deal with that particular issue in a fairly neutral sense."

[70] Sequentially, the next event in this discrete chapter was the judge's closing to the jury. She dealt with the evidence of the defence expert in the following way:

> "… it's entirely a matter for you to make – draw your own conclusions …
>
> But what I would suggest to you … you might consider that Dr Bader's evidence is neutral at best. His conclusions were there is no DNA matching [the appellant] on the intimate swabs from the complainant, nor matching the complainant on the intimate swabs taken from [the appellant] or the samples from the boxer shorts."

The judge then read to the jury the following passage in Dr Bader's report:

> "In my opinion, the results from the complainant's intimate swabs do not assist with supporting the allegations or not. However, the results from [the appellant] may support the proposition that he did not engage in the alleged activity, although it is not possible to calculate reliably the level of support in my opinion."

The judge then reminded the jury of the following: the complainant's evidence that the appellant had been wearing orange boxer shorts; the appellant's evidence that he

had not been wearing any boxer shorts; the evidence that the only boxer shorts seized from the complainant's house were "black boxers with an orange band"; and the fact that these did not match the complainant's description. The judge then stated:

> "So I would suggest to you, when you break that all down, it's a fairly neutral finding in terms of Dr Bader."

[71] In the outworkings of the amended grounds of appeal, the case made by the appellant is formulated in these terms:

> "The manner of the charge dealt with this important evidence in a most unsatisfactory way and failed to properly and fairly place before the jury expert evidence which was of assistance to the defence. As a consequence, the learned trial judge again failed in her obligations to fairly place the defence case before the jury and therefore created an unfairness which contributed to an unsafe verdict."

[72] This court's assessment of this ground of appeal is the following. In our view, the evidence of Dr Bader could not accurately be described as "fairly neutral." The analysis that it was positively supportive of the appellant's case and, correspondingly, detrimental to the prosecution case seems to us unassailable. In our judgement, Dr Bader's evidence relating to the boxer shorts satisfied the test of relevance as it addressed a possible scenario which the jury should properly have considered. The ingredients of this scenario were: the complainant was accurate in her description of the appellant wearing boxer shorts in the immediate aftermath of the alleged offending; she was inaccurate in her description of their colour; the appellant's claim that he was wearing checked pyjama bottoms was inaccurate or unreliable; and the gent's boxer shorts seized by the police and forensically examined subsequently were worn by the appellant at the material time. In our view these were all plausible possibilities. Furthermore, there was no suggestion at the trial that the evidence relating to these matters failed to satisfy the overarching test of relevance. In particular, this suggestion did not form part of prosecuting counsel's closing address or the judge's charge to the jury.

[73] From the foregoing analysis the conclusion must be made that the judge failed to accurately and fairly portray this aspect of the appellant's case in her charge to the jury. In consequence, there is clear potential for a finding by this court that the conviction was unsafe. We next pose the question of whether there is any material before this court, in particular any other aspects of the charge to the jury, which provides an appropriate remedy or counter balance. We consider that there is none. Furthermore, we decline to speculate that the jury might possibly have reached its verdict on the basis of an acceptance of the defence closing submission on this issue

and a related rejection of the relevant part of the judge's charge. Stated succinctly, it is inappropriate for this court to engage in pure conjecture of this kind.

[74] For the reasons given, the second ground of appeal is made out.

Omnibus Conclusion

[75] Both grounds of appeal succeed. The court will consider the parties' submissions regarding ordering a retrial.