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IN THE CROWN COURT SITTING AT BELFAST

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R

-v-

PATRICK JACKSON AND STUART OLDING

(APPLICATIONS FOR COSTS)

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Her Honour Judge Smyth

Introduction

[1] These are defence applications for costs orders against the Public Prosecution Service following the defendants' unanimous acquittals by a jury on counts of rape. Mr Jackson seeks the recovery of all costs incurred as a consequence of the trial. Mr Olding seeks the costs incurred up to 19th February 2018 when he was granted legal aid.

[2] The applications are brought pursuant to section 3 of the Costs in Criminal Cases Act (Northern Ireland) 1968. Section 3 provides:

> *"Costs of defence in cases of acquittal, dismissal or discharge.*
>
> 3. - (1) Subject to the provisions of this section and of section 6, any court before which a person is prosecuted or tried (including a magistrates' court conducting the preliminary investigation of an indictable offence), if -
>
> (a) the accused is acquitted; or
>
> (b) the charge is dismissed, withdrawn or struck out; or
>
> (c) in the case of a magistrates' court conducting the preliminary investigation of an indictable offence or a judge of the Crown Court

conducting a preparatory hearing under the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988, the accused is discharged;

may-

(i) in the case of proceedings to which section 1(1) applies, order the Director of Public Prosecutions; and

(ii) in any other case, order the prosecutor;

to pay to the accused the whole or any part of the costs of the defence.

(2)…

(2A) ….

(3) The costs of the defence mentioned in subsection (1) shall, subject to subsection (4) and to rules pursuant to section 7, be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by him. in carrying on the defence (including, in the case of a trial, any proceedings preliminary or incidental to such trial) and to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in, or incidental to, his attendance to give evidence.

(4)…..

(5)…..

(6)…..

(7)…..”

[3] The core issue is in regard to the factors that should weigh upon the exercise of the court's discretion to award defence costs and its exercise in this particular case. Section 3 provides no guidance on this issue, nor is there any reported case law in Northern Ireland. Section 2 of the Act also gives the court a discretion to award prosecution costs on conviction but Valentine (*Criminal Procedure in Northern Ireland, second edition*) states that the normal practice in Northern Ireland is that in police prosecutions, no costs are awarded to either party on conviction or acquittal.

[4] Valentine summarises the relevant considerations at paragraph 21.07 as follows:

“The ECHR does not guarantee a defendant who has been acquitted the right to his costs, but for a court to refuse

> *costs on the ground that the defendant is guilty and lucky to get off is a breach of the presumption of innocence in ECHR article 6 (2.) …. Costs do not normally follow the event. In practice, a court is more likely to award costs to or against a private prosecutor than the Crown, police or government department, since the proceedings are closer in their nature to civil proceedings. On indictment, costs can be awarded even though the prosecution was justified. The normal practice in Northern Ireland is that in police cases, no costs are awarded to either party on conviction or acquittal. In England costs of an acquitted defendant are paid out of "central funds", whereas in Northern Ireland they would be ordered to be paid by the prosecuting authority. English case law indicates that an order for costs would only be made <u>against the prosecutor</u> if there is a particular reason for doing so, in that the prosecutor has acted spitefully or instituted or continued proceedings without reasonable cause. In summary trials, the court should decide that the prosecution should never have been brought before he considers whether to award costs. In deciding whether to award defence costs, the court takes into account on the one hand, that under ECHR it is generally unfair that a person found innocent should be encumbered with the expense of defending himself, and on the other hand the public interest that prosecutions should be brought without fear of a penalty in costs if the prosecution is unsuccessful. Section 3 the 1968 Act says "may" not "shall". Also, if the 1968 Act were interpreted to make it obligatory to award costs to an acquitted defendant then section 2 of the Act would be interpreted to require a convicted defendant to pay prosecution costs automatically….."* (emphasis added)

[5] Both prosecution and defence accept that recent case law on the award of defence costs in the Republic of Ireland is of assistance to the court. That case law is derived from the principles established in England and Wales under a similar historic statutory framework. The current statutory framework in England and Wales bears no relation to section 3 and is of little or no assistance to the court.

[6] In order to determine the relevant factors that I should take into account in this case, it is helpful to set out the relevant statutory provisions and lines of judicial authority in both England and Wales and the Republic of Ireland.

The historic and current position in England and Wales

[7] In England and Wales, the power to award defence costs was originally governed by section 11 B of the Costs in Criminal Cases Act 1952. It provided that the court "*may, if the accused was acquitted, order the payment out of local funds of the costs of the defence*", but provided no guidance as to how the discretion should be exercised.

[8] In 1959, Lord Parker, C.J. issued a practice direction ([1959] All ER 471) which stated:

> *"The court desires to make a statement on costs in criminal cases. The court's attention has been drawn to the difficult question as to the lines in which the discretion to award costs to acquitted persons should be exercised. This discretion, in so far as courts of Assize and Quarter Sessions are concerned, is now given by section 11B of the Costs in Criminal Cases Act 1952, under which the court may, if the accused is acquitted, order the payment out of local funds the cost of the defence. The discretion is in terms, completely unfettered, and there is no presumption, one way or the other, as to the manner of its exercise. In a statement issued on 24th March 1952, this court, while emphasising that every case should be looked at on its merits, said that it was only in exceptional cases that costs should be awarded. That statement referred to a circular issued by the Lord Chief Justice after consultation with the judges of the Queens Bench Division, approving a Home Office circular issued in connection with section 44 of the Criminal Justice Act 1948, now replaced by the section above, referred to. While no attempt was there made to catalogue exceptional cases in which costs might be awarded, such illustrations as were given were cases where the prosecution might be said to be in some way at fault. On the other hand the suggestion has been canvassed that the mere fact of an acquittal should carry with it the expectation that the discretion would be exercised in favour of an acquitted person. Were either of these views correct the effect would be to impose a fetter on the exercise of the absolute discretion conferred by the statute. As we have said there is no presumption, one way or there other as to its exercise, each case must be considered on its own facts as a whole and costs should be awarded where the court thinks it is right to do so. It is impossible to catalogue all the factors that should be weighed, clearly however matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings or their continuation on himself are among the matters to be taken in to consideration. On the other hand the court desires to make it plain that they entirely disassociate themselves from the view that the judge is entitled to base his refusal to award costs on the ground that he thinks the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more ground for refusal to*

award costs to the acquitted person than the mere fact of his acquittal is ground for awarding them."

[9] The significance of the Practice Direction became clear when two days after it was issued, Devlin J delivered judgment in R v Sansbury [1959] 3 All ER 472, . He said:

> *'The recent pronouncement by the Lord Chief Justice in the Court of Criminal Appeal on this subject has not, I think, laid down any new law, but it has, perhaps, made it clear that a judge's discretion to award costs is rather wider than has hitherto been thought, and in particular, I think, it has now been made clear that the notion that was very generally entertained that the awarding of costs against the prosecution necessarily involved some reflection on the conduct of the prosecution, or on the propriety of it being brought is quite wrong'*

[10] In Sansbury, Devlin J concluded that no fault could be attributed to the prosecution or the police and that the prosecution was properly brought. He acknowledged that the police would be put in an impossible position if it were said to be their duty to act as arbiters or quasi-judges, in deciding whether to prosecute or not. Nevertheless, he made an order for defence costs out of local funds because, in addition to being not guilty of the offences charged, the defendant did not give just cause for the belief that he was guilty, however it may have appeared to police at the beginning of proceedings. In those circumstances, he considered that it "*would be an undeserved hardship if he had to pay a heavy bill of costs, and one in which the statute is designed in a proper case to give relief* ". He noted that the defendant's conduct had not contributed in any way to the prosecution and that the prosecution had apologised for some aspects of the case presentation, although he emphasised that the award of costs was not intended to punish the prosecution or the police.

[11] Subsequently, in Berry v British Transport Commission [1961], Devon L.J. as he then was, provided further guidance on the nature of the discretionary power to award costs, and the distinction between its exercise in civil cases as opposed to criminal cases. He said:

> *"It is the intent of every statute that confers a discretionary power that the power should be used justly. It does not follow that a principle on which it is just to make an award of civil costs will be equally just when applied to an award of criminal costs, and that is how the distinction arises. I do not propose to examine all the relevant differences that may be made for this purpose, between a civil action and a criminal proceeding, but in relation to an award of costs against the party who initiated proceedings, there is one difference that is obvious. A plaintiff brings an action for his own end, and to benefit himself. It is therefore just that if he loses he should pay the costs. A prosecutor brings*

proceedings in the public interest and should be treated more tenderly…"

[12] In 1985, new provisions empowering courts to make an order for defence costs were enacted in the Prosecution of Offenders Act 1985 (POA 1985). Although the statute gives no guidance on when and how the power should be exercised, guidance was provided in a Practice Direction issued in 2004 ([2004] 2 All ER 1070). It stated that "*such an order [for defence costs] should normally be made, unless there are positive reasons for not doing so.*" An example of such a situation is "*where the defendant's own conduct has brought suspicion on himself, and has misled the prosecution into thinking that the case against him was stronger than it was. In such a case, the defendant can be left to pay his own costs*". Although the decision whether to make an order remains a matter for the discretion of the court in the light of the circumstances of each particular case, the effect of the guidance was to create a rebuttable presumption that an acquitted defendant should recover his costs from central funds. (Section 16).

[13] In addition to the power to make an order for defence costs from central funds, section 19 provided for regulations to be made by virtue of which a party to criminal proceedings may be ordered to pay costs thrown away as a result of his "*unnecessary or improper act or omission*". Thus, for the first time it was envisaged that an order for costs could be made against the Director of Public Prosecutions. At paragraphs D 33.33-36 Blackstone 2018th edition explains the limited circumstances in which such an order may be made: There must be a causal relationship between the unnecessary or improper act, and the incurring of the costs to be paid under the order. An act is defined as unnecessary or improper if events would not have occurred if the party had conducted itself properly (DPP v Denning [1991] 2 QB 532.) A mere mistake without repetition can be grounds for a costs order and if additional costs arise from the prosecution not conducting the case properly, it is not an answer to be unsure whether the fault lies with the CPS or the police as the prosecution's responsibility is indivisible. However, section 19 contains a discretion not a duty and, where there is a satisfactory explanation, no order should be made. (R (Singh) v Ealing Magistrates Court [2014] 178 JP 253.

[14] Although the regulations made pursuant to section 19 of POA 1985 remain in force, the award of defence costs out of central funds in England and Wales is now governed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012), the Criminal Legal Aid (Contribution Orders) Regulations 2013 and the Costs in Criminal Cases (Legal Costs)(Exceptions) Regulations 2014. This complex legislation provides that an acquitted defendant can apply for costs from central funds, but only if he has previously sought a Representation Order and been deemed to be financially ineligible, or has been granted an order subject to financial contribution. Normally, an acquitted defendant will have his costs or his contributions refunded but that is limited to normal legal aid rates and representation (i.e. usually junior counsel rather than silk, or exceptionally, silk alone).

The position in the Republic of Ireland

[15] In the Republic of Ireland, like Northern Ireland, there have never been central funds from which an award of defence costs may be made. In The People (at the suit of the Attorney General) v Nuala Bell and others [1969] IR 24, the central issue was whether legislation pre-and post the Anglo-Irish Treaty conferred a power to award costs against the Attorney-General (the equivalent of the Director of Public Prosecutions) arising out of criminal trials. Kenny J held that he did have power and the decision was upheld by a majority in the Supreme Court. Since the only issue in the appeal was the jurisdiction to make the order, no consideration was given to the factors that should bear upon the exercise of that discretion.

[16] The application for costs in Bell was brought by five defendants, all of whom had been acquitted. On their behalf it was submitted that the length of the trial made the case unique so that costs should be awarded to all of them. It was also submitted that the case would ordinarily have been dealt with in the District Court had a more serious charge not been added in error. It was submitted that the error was apparent from the decision ultimately not to proceed with that charge. Furthermore, it was submitted on behalf of one of the accused that she had been successful in an earlier civil action arising out of the same incident and despite knowing of that outcome, the Attorney General had proceeded with the prosecution.

[17] In the absence of any Irish authority indicating how his discretion should be exercised, Kenny J relied on the England and Wales 1959 Practice Direction and the judgment of Devlin J, as he then was, in R v Sansbury (referred to at paragraphs 6 and 7 above).

[18] He awarded a portion of one defendant's costs, who had been acquitted on his direction, but refused to award costs in respect of the others acquitted by the jury. The prosecution was based on statements made by the defendants which the defence alleged were involuntary. All of the statements were found to be voluntary and were admitted in evidence apart from one and in light of its exclusion, the prosecution accepted that there was no further evidence against that defendant, whereupon the judge had directed her acquittal.

[19] In line with the English guidance, Kenny J specifically rejected the suggestion that an order for costs against the Attorney-General was a reflection of the propriety of either bringing or pursuing the prosecution. He said:

> *"It was strenuously contended that I should not award any costs because to do so would be a reflection on the Attorney General. Devlin J, as he then was, rejected this argument in R v Sansbury and I too reject it, but lest it may be thought that the award of costs to Miss Brady is a reflection on the decision of the Attorney General to go on with the prosecution, or on the conduct of the prosecution, or counsel retained by him, I wish to say that the decision of the Attorney General to go on with the prosecution after*

the jury had, in a civil case, awarded damages to Miss Dillon, was a proper one, and that the prosecution was conducted with moderation and fairness."

[20] The question of how the judicial discretion to award costs should be exercised was considered further by Charlton J in The People (at the suit of the Director of Public Prosecutions), Respondent v Anthony Kelly, Applicant [2008] 3 IR 202. He referred to O 99, r1 of the Rules of the Superior Courts 1986, which provides:

> *'Subject to the provisions of the Acts, and any other statutes relating to costs, and except as otherwise provided by these rules:*
>
> *1. The costs of, and incidental to every proceeding in the Superior Courts shall be in the discretion of these courts respectively*
>
> *2. No party shall be entitled to recover any costs of, or incidental to, any proceeding from any other party to such proceedings, except under an order, or as provided by these Rules.*
>
> *3. The costs of every action, question, or issue tried by a jury shall follow the event, unless the court, for special cause, to be mentioned in the order, shall otherwise direct.*
>
> *4. The costs of every issue of fact, or law, raised upon a claim, or counter-claim, shall, unless otherwise ordered, follow the event.'*

[21] Charlton J referred to the judgment of Kenny J in Hewthorn Co. v Heathcott [1905] 39 ILTR, in which he stated:

> *'It is well settled law, as is shown by the authorities cited to me, that when costs are in the discretion of a judge, he must exercise that discretion upon the special facts and circumstances of the case before him, and not be content to apply some hard and fast rule.'*

[22] In considering the discretion as to costs, having taken into account the authorities, and without attempting to lay out a definitive list, he suggested that the trial judge might usefully ask the following questions:

1. Was the prosecution justified in taking the case through it being founded on apparently credible evidence?

2. Did anything within the investigation by the Gardai give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused? I use this test in distinction to a matter that might raise a reasonable doubt because, firstly, the trial judge must distance himself, or herself from the evidence and, secondly, it is for the jury to judge whether there is any reasonable doubt about the guilt of the accused.

3. Was there any indication that the case had been taken against the accused through being based on an abuse of his rights through oppressive questioning, which contributed to a confession that was unreliable in law?

4. Whether the accused was acquitted by direction of the trial judge or acquitted upon consideration by the jury? Then one might go on to consider the reason for such acquittal by the trial judge, whether as to a failure in technical proofs or if it was one of the rare cases of inherent weakness in evidence that had actually been offered

5. If there had been an acquittal by direction of the trial judge, was this one based on a decision that required the exclusion of evidence, and if so, whether that exclusion was based upon a serious, as opposed to a mistaken, abuse of the accused rights? This is not a circumstance to apply the rule as to the exclusion of evidence based on a mistake that accidentally infringes some constitutional right of the accused. What might be considered here is deliberate abuse by the servants of the State.

6. What answer had the accused given to the charge when presented with an opportunity to answer it? The purpose of a Garda investigation is not to provide an opportunity to an accused person to state what his defence is: McCormack v Judge of the Circuit Court [2007] IEHC 123 (unreported, High Court, Charlton J, 17th April 2007). The purpose of any fair investigation, however, is to seek out the truth, sometimes according with an initial police view as to who is guilty, and often times contradicting it. A fair interview upon arrest would naturally bring an accused person to the point that he or she is expected to deal with the preliminary outline of the case, inculpating the suspect, and allow him or her an opportunity, if he or she wishes, the chance to say what the answer to it is, or might be, in a case based on circumstantial evidence.

7. What was the conduct of the accused, in the context of the charge that was brought, specifically in terms of who he was associating with, and on what ostensible basis? Sometimes, an accused can be partly responsible for attracting suspicion by dealing with, and having close relations with those who are closely linked to criminal activity. Such a relationship may be explained in evidence in an apparently reasonable way, but at other times, the course of dealings may be left untreated, in any reasonable way in the evidence. Suspicion can arise against the accused in other ways, such as by running away or apparently destroying what might be relevant evidence.

8. What was the conduct of the accused in meeting the case at trial?

9. Whether any positive case was made by an accused, such as might reasonably be consistent with innocence, and whether any right was exercised to testify as to that case, or whether an opportunity was used under the Prosecution of Offences Act 1974 to communicate with the Director of Public Prosecutions as to the nature of that defence?

10. Has the prosecution made any serious error of law or fact, whereby the case became presented on a wrong premise? The same question is applicable to the defence.

[23] Having considered those factors, Charlton J refused to award costs. He analysed the prosecution case and that of the defence in detail concluding that there was no misconduct by the prosecution in the conduct of the trial. He noted in particular, that there had been no failure in terms of disclosure and pointed out that in looking at the issue of costs the court is concerned with the whole of

the case. Furthermore, he concluded that the defendant had drawn suspicion onto himself by the company he kept.

[24] In Sean Foley, Applicant v Her Honour Judge Yvonne Murphy and the Director of Public Prosecutions, Respondent [2008] 1 IR 619, the applicant had been acquitted by the direction of the judge of charges involving child pornography but his application for costs had been refused. He sought an order of certiorari on the grounds that insufficient reasons had been given for the refusal of costs by the trial judge, and that the refusal was irrational or unreasonable in the circumstances. The court granted the relief sought, and remitted the case to the trial judge to further explain her reasons. The judge explained her ruling in some detail, referring to the criteria set out by Charlton J in Kelly and stating that the exercise of her discretion not to award costs had been based on her view that the prosecution was properly brought, that it was based in part upon the defendant's own admission to accessing child pornography on a different date and her rejection of the defendant's assertion that he had put the prosecution on notice of the flaw in the case that had led to the direction.

[25] At the ensuing substantive hearing, Hedigan J refused the applicant the relief sought in relation to costs. At paragraph 48 he said:

> *"… With regard to the three reasons identified by the first respondent in refusing the applicant his costs, I am satisfied that these are factors which properly arose for consideration in the exercise of her discretion… nor can her conclusion be said to be unreasonable in light of these three factors. She was entitled to take into account the previous admissions of the accused, the nature of the acquittal, evidence which had been ruled inadmissible, and her finding that the prosecution had been properly brought and maintained. In exercising her discretion, the first respondent had a considerable advantage of having been the trial judge in the proceedings, and was best placed to determine the application for costs. Her finding that the direction given by her in the trial was given on technical grounds is parsed far too closely by the applicant in these proceedings. Whether she characterised the nature of the direction as technical, or due to an inherent flaw in the technical evidence or indeed as a mixture of both is again something that I consider within her jurisdiction. Nobody could be better placed than the trial judge to make such an assessment."*

[26] In The People (at the suit of The Director of Public Prosecutions), Applicant v Bourke Waste Removal Ltd and others [2013] 2 IR 94, the Court of Criminal Appeal considered the discretionary nature of an award of defence costs. The trial judge had awarded costs against the Attorney-General following the defendants' acquittal by a jury of offences contrary to the Competition Act 2002. He accepted a number of criticisms with regard to the thoroughness of the

investigation and took into account the previous good character of the defendants and the fact that they had not been associating with persons in relation to whom any inference of guilt might have been justified. Although applications of no case had been refused, the trial had continued on a much narrower basis than when the case was initially advanced. The appeal was dismissed on the basis that the court would not interfere with the exercise of a discretionary judgement of a trial judge in relation to costs unless it was satisfied that such exercise was substantially flawed, or was such that in the interests of justice ought to be set aside.

[27] The court confirmed that in exercising the trial judge's costs jurisdiction, that discretion is *not* coupled with any specific presumption that costs should follow the event. Although Charlton J had held in Kelly that the discretion in Order 99 r 1 of the rules of the Superior Courts meant that costs should normally follow the event in criminal cases, the court clarified that sub-rules 3 and 4 (see paragraph 18 above) are not applicable to criminal proceedings. In essence, the court followed the historic English approach set out in Parker C.J.'s Practice Direction of 1959, and that remains the position in the Republic of Ireland.

[28] The court also made it clear that the actual result of the prosecution was more than a purely neutral factor and although the actual result (i.e. the acquittal) is not determinative of orders for costs following the event, it is the starting point of the court's consideration on costs and is to be considered in conjunction with other relevant circumstances.

[29] In noting that the relevant factors for consideration may vary depending on the nature of the alleged criminal offences, the court suggested four abridged questions which may merit consideration and applications following acquittals in trials involving competition offences. The court made it clear that the guidance was in no sense definitive, and that it did "*not seek to do violence to the more detailed criteria of Charlton J*" in Kelly. The abridged questions are as follows:

(a) *Was the prosecution warranted, both in regard to the matters set forth in the book of evidence, what actually transpired at the trial, and what responses were made by or on behalf of the defendants prior to the trial?*

(b) *Had the prosecution conducted themselves unfairly or improperly in relation to the defendants, by oppressive questioning or otherwise, and had the prosecution been pursued with reasonable diligence and expedition?*

(c) *What was the outcome of the prosecution? If an acquittal, was this on foot of the direction granted by the trial judge, and if so, on what basis?*

(d) *How had the defendants met the proceedings, both prior to and at trial, and had they associated themselves with undesirable elements or otherwise contributed to drawing suspicion on themselves?*

Discussion

[30] I am determining two separate applications for costs and am mindful that the relevant factors or the weight that should be attached to those factors may

not be the same in each case. In so far as there are differences, I refer expressly to the applicant concerned.

[31] In considering how the discretion in section 3 to award defence costs should be exercised, I am applying the following principles:

- I have an unfettered discretion which must be exercised upon the special facts and circumstances of the case before me, and no hard and fast rules should be applied.
- The acquittal of the defendants is more than a purely neutral factor and is the starting point for consideration.
- There is no presumption that an award of costs should or should not be made.
- In order to make an order for costs it is not necessary that there should be fault or impropriety on the part of the Director of Public Prosecutions either in initiating or continuing the prosecution.
- Whether or not the judge agrees with the jury's verdict is irrelevant to the exercise of the discretion.

[32] Counsel for Mr Jackson and Mr Olding are in agreement that the factors which should primarily weigh upon the exercise of my discretion are largely set out in the judgment of Kelly and both prosecution and defence have addressed me in relation to those factors, in so far as they appear relevant. In so far as the abridged factors in Bourke were referred to, I have addressed them also in the course of the discussion.

[33] In addition to those factors, it is submitted on behalf of the applicants that I should take into account the personal and financial consequences of the trial upon each of them. That extends to the damage to their reputations, the termination of each of their contracts by IRFU, the fact that each of them have been obliged to accept offers of employment overseas far from family and friends and the fact that they have lost the opportunity to play rugby for Ulster or Ireland. It also extends to the financial impact on family members who assisted with legal costs.

[34] It is important to make clear that the power to award defence costs contained in section 3 does not include the power to award compensation for loss of reputation or other damage consequent on the trial. Valentine states at paragraph 21.09 that "*the costs of the defence are, subject to rules under section 7, reasonable compensation for expenses properly incurred by the defendant in carrying on the defence (and in the case of a trial proceedings incidental or preliminary to it) and for the expenses, loss of time or trouble of defence witnesses (but not of a character witness unless otherwise directed*".

[35] However, I accept that there may be exceptional situations where although a defendant is ineligible for legal aid, his financial situation after acquittal is so irrevocably changed as a consequence of the prosecution that it

would be unjust not to take that factor into account. I have therefore considered whether this is a relevant factor in the case of either Mr Jackson or Mr Olding.

[36] I was provided with affidavits dated May 2018 from Mr Jackson and his father Peter Jackson setting out the sums of money expended in legal costs and their source, along with vouching financial documentation. Mr Jackson states that before he made any payments for legal fees he had paid off his mortgage and has set out the amount of savings he had in the bank at that time. He sets out the payments made to his solicitor between 22 January 2017 and 16 March 2018. In order to make a payment on 15 November 2017 he drew down on the mortgage that had already been paid off. On 28 February 2018, a significant sum of money was transferred from his father into his bank account to meet a further payment. On 16 March 2018, a further significant sum was transferred from his father and that sum, along with additional money was paid to his solicitor on that date. Mr Jackson confirmed that there are outstanding fees for work undertaken during the last two weeks of the trial. Additionally, there are fees outstanding in respect of other legal proceedings.

[37] Mr Peter Jackson confirms that the payments he transferred to his son's bank account to meet legal fees came from retirement money he received in January 2018. He explains that the reason he contributed to the legal costs was because it was uncertain whether his son would be able to obtain credit due to his prosecution.

[38] On Mr Jackson's behalf, Mr Kelly Q.C. said that he "*is without employment, [he] is without offer of employment. It is not for me to criticise those who have seen to that that's the position we are in. He has paid an enormous price for the events of that evening, despite what we would say is a resounding acquittal in this case. And he did everything that he was supposed to during the Crown court process and we would argue that he did nothing at all to bring it on.*"

[39] Before both applications were concluded, the applicants were in employment. For that reason, the court invited them both to provide evidence of their current financial situation and the terms of their new contracts of employment along with information regarding any financial terms associated with the termination of their contracts by IRFU. They were invited in particular to provide confirmation of the reasons given for the termination because Mr Kelly Q.C. had told the court on 18 May 2018 that Mr Jackson's contract had been terminated on the basis of text messages (see pages 13 and 14 of the transcript), whereas Mr O'Donoghue Q.C. did not accept that this was the reason, the implication being that the contracts were terminated as a consequence of the prosecution.

[40] Mr O'Donoghue Q.C. explained that there may be issues of confidentiality which would have to be considered before such information could be disclosed and the court may have to hear evidence in closed court. The court indicated that if necessary, such an application would be granted. When the hearing resumed, no application was made and no evidence relating to the matters raised was provided. Mr O'Donoghue indicated that he intended to rely only on the affidavit submitted in February 2018 in support of Mr Olding's application for

legal aid. On behalf of Mr Jackson, it was indicated that he wished to rely only on the affidavits lodged in May 2018. Evidently, those affidavits did not deal with the terms upon which the contracts of employment were subsequently terminated or the current financial situations of either applicant.

[41] In those circumstances, there is simply no evidence upon which this court could conclude that the financial circumstances of either Mr Jackson or Mr Olding have been irrevocably changed as a consequence of the prosecution for rape and that this is a relevant factor to take into account in determining the applications.

[42] Furthermore, Mr Olding made an application for legal aid on the basis that his available funds were such that legal aid ought to be granted in the interests of justice. That application was granted. If Mr Jackson had found himself in similar circumstances he also could have made a legal aid application. Whilst the willingness of family or friends to assist with legal costs is relevant to such an application, Mr Jackson's father was not required to contribute his retirement monies which, no doubt, were much needed for future living expenses. Indeed, Mr Peter Jackson explains in his affidavit that he provided those funds because it was unclear whether his son would be able to raise the money rather than because attempts to do so had been unsuccessful. In any event, Mr Jackson has declined the opportunity to provide evidence regarding his current financial situation including the extent to which he has repaid the debt to his father.

[43] On behalf of the prosecution, Mr Hedworth QC submitted that in addition to the factors set out in Kelly and Bourke, I should also take into account the fact that the Public Prosecution Service has never been resourced to pay awards of costs to an acquitted defendant. Consequently an order for costs would affect the Service's ability to properly discharge its functions which would not be in the public interest. It was also submitted that the fear of an order for costs would deter prosecutors from bringing prosecutions in cases involving wealthy individuals.

[44] I am unpersuaded that either of these factors should weigh upon the exercise of the court's discretion. In choosing to enact section 3, Parliament has expressly decided that if an acquitted person should be paid his costs, it is the Director of Public Prosecutions who should pay. Since it would clearly not be in the public interest that the Public Prosecution Service should be unable to properly discharge its responsibilities because of the impact of an award of costs, particularly where there has been no impropriety on its part, those who hold the public purse strings would be required to make the necessary budgetary adjustments. With regard to the second factor, the public is entitled to expect that the Public Prosecution Service will make decisions about prosecutions based on the prosecution test without having regard to irrelevant considerations such as the possibility of an award of costs. I do not accept that a decision whether to award defence costs should in any way be influenced by the risk that a public body might act improperly in future.

[45] I turn now to those factors in Kelly and Bourke which I consider are relevant to the exercise of my discretion in addition to the fact that both defendants were acquitted. It should be clearly understood that this exercise is quite separate from the task entrusted to the jury, which was to decide whether the prosecution had proved beyond reasonable doubt that the defendants were guilty, and nothing should be inferred as undermining the decisions of the jury in this case.

Was the prosecution justified in taking the case through it being founded on apparently credible evidence?

[46] This involves a consideration of whether the prosecution acted reasonably in commencing or continuing the proceedings. The court's focus is on the reasonableness of the investigation and the decisions made in light of the evidence available at that time.

[47] On behalf of Mr Jackson, Mr Kelly QC submitted that this was a highly unusual case in which a *Makanjuola* warning was given to the jury in the course of the summing up. This is a warning to be cautious before relying on the evidence of a witness if he or she has been shown to be unreliable or in a more extreme case, if the witness is shown to have lied or there is some other reason to urge caution. It is submitted that because I gave such a warning in respect of the complainant's evidence that supports the submission that a proper investigation would have revealed the complainant's unreliability.

[48] However, this submission fails to take account of the context in which the warning was given. Unlike many cases, the jury was not told to exercise caution before accepting the complainant's evidence. The jury was told that they should consider inconsistencies in her accounts and *possible reasons* and if they concluded that the *reason* for the inconsistencies was that she had or may have told lies, then certain consequences would follow.

[49] In particular, it was explained to the jury in careful terms that a person who has been raped will have suffered trauma and that trauma may affect that person's ability to take in, register and recall the event. Afterwards, some people may go over and over it in their mind with the result that their memory may become clearer, whilst other people may try to avoid thinking about it and consequently while the incident did occur they may have difficulty in recalling it accurately.

[50] It was also explained that they should consider the possibility that a person who has made a false complaint may also have difficulty being consistent and that the inconsistencies may expose the possibility that the details do not represent a true recall of events but are part of a manufactured account which is difficult to remember consistently. For that reason, inconsistent accounts may be an indicator that the account as a whole is untrue. (26 March 2018 pp 80-81)

[51] The jury was expressly told that the purpose of suggesting a number of possible explanations for inconsistencies was so that they could think about it

and that I was not expressing any opinion because it was for them to decide whether or not the complainant's evidence was true. (p83)

[52] I returned to the issue of inconsistencies and the conclusions that the jury may choose to draw on 27 March 2018 in the context of the complainant's account to Dr Lavery. I said this:

> "*If you decide, members of the jury, that there are inconsistencies between two accounts then you have to consider why that may be so. Now, the prosecution has suggested that the cause of the inconsistencies is trauma and it is common case between the prosecution and defence that trauma is a reason often advanced to explain inconsistencies. If you are satisfied from all of the evidence that trauma is the reason for the inconsistencies, then the fact that there are inconsistencies between the two accounts might not be a matter of particular importance for you. However if, having heard all of the evidence, you are of the view that [the complainant] may have lied or may have deliberately made a false allegation against any of the defendants when giving her account to Dr Lavery, then consequences flow from that about which I am obliged to caution you.*

[53] The *Makanjuola* warning is then explained in the following terms:

> *"If you believe that the complainant may have lied or may have deliberately made a false allegation, you need to exercise very considerable caution as to how you approach her evidence and in particular whether you feel that you can safely rely on her account given at the ABE interview. If you consider that not only may she have, but that she has actually lied or deliberately made a false allegation against any of the accused to Dr Lavery, then I am directing you not to rely on any of her complaints against any of the first three defendants unless you find that there is other independent evidence that supports what she has said."*

[54] In those circumstances, I do not accept the submission on behalf of Mr Jackson that the terms of the *Makanjuola* warning is a significant factor in assessing whether the prosecution was justified in taking the case through it being founded on apparently credible evidence. It was entirely for the jury to decide the significance, if at all, of any inconsistencies in the complainant's evidence.

[55] Mr Kelly QC also criticised the investigation and submitted that the decision not to adduce the complainant's evidence in chief by way of ABE and the decision not to provide a statement of evidence led to unnecessary complication and delay. He made this point in the context of the first of the four abridged questions in Bourke which asks:

> *"Was the prosecution warranted both in regard to the matters set forth in the book of evidence, what actually transpired at the trial, and what responses were made by or on behalf of the defendant's prior to the trial?"*

[56] I do not accept that submission. Notwithstanding the fact that the complainant did not rely on her ABE interviews and gave her evidence in chief orally, as she was entitled to do, the lengthy recordings were played to the jury by the defence in their entirety. Whilst I accept that the defence was properly entitled to bring to the jury's attention any inconsistencies in the two accounts, whether it was necessary to play the entire ABE interviews to achieve this purpose is not entirely clear.

[57] Mr Kelly QC criticised the delay of 13 months before a decision to charge the applicants was taken and suggested that the delay " *is yet another feature of why he had to incur costs to the level at which he did in this particular case*". He went on to submit that " *the next time round, serious case, ignore the profile; you have to make a decision as to whether or not you are going to charge the defendant in a particular case*". On the other hand, Mr O'Donoghue QC criticised the prosecution for taking what he described as a "*premature*" decision to charge Mr Olding. He submitted that it was premature for a number of reasons. Although one of those reasons was apparently incomplete forensic evidence to which I will turn in a moment, he also submitted that because of Mr Olding's public profile, greater care should have been taken before deciding whether to prosecute which he described as "*a huge judgement call*".

[58] On behalf of the prosecution, Ms Walsh submitted that the decision to prosecute in this case was no greater or smaller than any other decision to prosecute for rape and rejected any suggestion that a different or higher standard ought to have been applied by the PPS in view of the applicants' public profile. I too reject any such suggestion. The law applies to every citizen equally and there is not a different set of rules for the rich and famous.

[59] There is no evidence to suggest that the prosecution was either dilatory or premature in making decisions in this case or that the public profile of any of the applicants influenced the decision-making process. This was a complex investigation involving, amongst other things, the examination of a number of electronic devices and the need to obtain expert reports. Nor was any explanation given by Mr Kelly QC as to why the period of time that elapsed before charge was a factor that increased Mr Jackson's costs.

[60] Mr Kelly QC also submitted that the decision to try all four defendants on the same indictment added to the length and complexity of the case and suggested that this course may not have been necessary. There is no doubt that the number of defendants, coupled with the fact that they were not jointly charged and faced different offences added to the complexity of the trial and elongated it.

[61] The court was required to give some consideration to this issue when an application was made on behalf of Mr Jackson to sever Mr McIlroy from the

indictment. The application was opposed on behalf of Mr McIlroy. Applying the relevant legal principles, I concluded that the counts were properly joined on the indictment. Although Mr Kelly QC suggests that the fourth defendant (who is not an applicant) need not have been tried on that indictment no such application was made in the course of the trial, nor were any submissions made on behalf of any other defendant that the indictment should be severed. In any event, there is no doubt that the cases were so intertwined that they could not properly be tried separately.

[62] Finally, Mr Kelly QC relied on issues that arose in the course of the trial which were not the fault of either the prosecution or the defence, but which impacted on the length of the trial. In particular, he relied on the inappropriate behaviour of some members of the public on social media and on Twitter in particular, the unexpected illness of jurors and also incidents that occurred which required specific case management in order to ensure a fair trial.

[63] Whilst these cannot be laid at the door of the prosecution, I accept that the effect of all of those matters has been an increased financial burden on the part of Mr Jackson in particular. However, issues such as juror illness and other unexpected issues often arise in a serious criminal trial.

[64] Although Mr Kelly QC stopped short of alleging fault on the part of the prosecution, preferring to characterise the issues raised in terms of what might have been done better, Mr O'Donoghue QC made no bones about his submission that the prosecution was at fault in the bringing of the prosecution against Mr Olding. He levelled a number of criticisms at the investigation carried out by the police. He submitted that the police ought to have carried out a third ABE interview with the complainant to clarify her evidence in light of answers given by Mr Olding to the police, inconsistencies in her accounts and the evidence of Dara Florence in particular. Whilst it is correct that the police are required to investigate all reasonable lines of enquiry including those matters which point away from guilt, and specifically the reason for inconsistencies, such a course may be problematic in sexual offence cases. The officer who conducted the interview explained that the purpose of an ABE is quite different from an ordinary interview in that its purpose is to record the complainant's account in as complete a manner as possible. It is not her function to challenge the account. It is also the experience of this court that drawing a complainant's attention to inconsistencies in her account as a result of further investigations may give rise to accusations of coaching. Furthermore, the unique considerations that arise in sexual offence cases because of the impact of trauma on memory mean that a further ABE may not assist the investigation.

[65] Mr O'Donoghue QC submitted that the decision to prosecute was taken without securing any objective expert evidence that could have explained any medical reason for the inconsistent accounts given by the complainant and why the final account was to be preferred. This submission fails to recognise the clear authority of R v Chanson [2012] EWCA Crim 1478 which is followed in this jurisdiction, to the effect that the prosecution may not call expert evidence which

tends to convey to the jury the expert's opinion of the truth or otherwise of the complaint. I therefore find no merit in this submission.

[66] Mr O'Donoghue QC submitted that the decision to prosecute Mr Olding for vaginal rape was based on incomplete forensic evidence, and this was one of the reasons the decision was premature. He submitted that Mr Olding had always denied having vaginal intercourse with the complainant and had always insisted that he had consensual oral sex only. He had told police that he ejaculated onto his stomach after the oral sex and Mr O'Donoghue QC submitted that forensic tests carried out at a late stage which indicated semen on the complainant's top and pants supported his account that only oral sex had occurred. He described the failure to send the complainant's top and pants for forensic testing at an earlier stage as a "*glaring and obvious omission*".

[67] On behalf of the prosecution, Ms Walsh submitted that the charge of vaginal rape against Mr Olding was based on forensic tests which indicated his semen on the crotch of the complainant's trousers. The complainant had never positively asserted that Mr Olding had penetrated her vagina. Her evidence was that there were times when she did not know who was behind her. On the other hand, she had always stated that Mr Olding had penetrated her mouth and that she had not consented. She said that she had put her trousers on immediately after sexual activity with Mr Olding and that she had her pants in her hand. The decision not to continue the prosecution in relation to vaginal rape therefore was based entirely on additional forensic evidence and had no bearing on the complainant's credibility.

[68] Ms Walsh also explained the rationale for submitting only certain items for evidential analysis in any investigation. Primarily, consideration is given to the accounts that are put forward by both the complainant and a suspect. Because the complainant made no reference to her top in her ABE, and because she said that she did not know whether or not Mr Olding had ejaculated, the top was not considered to be relevant. Furthermore, Mr Olding had said that he ejaculated onto his stomach, got up from the bed and wiped his stomach with toilet roll.

[69] In dismissing the suggestion that the failure to test the complainant's top and pants initially was a "*glaring and obvious deficiency*", Ms Walsh pointed out that if this had been the case, the deficiency would have been identified at an earlier stage by the expert and conscientious defence team. She reminded the court that it must consider the evidence available at the time decisions were taken, not with hindsight. Whilst in hindsight, all of the complainant's clothes ought to have been forensically examined, there was a clear rationale based on the evidence for the decision taken and when the matter was raised, the prosecution responded promptly and made prosecutorial decisions expeditiously.

[70] Mr O'Donoghue QC's next submission concerned the impact of the decision not to pursue the vaginal rape charge on the remaining oral rape charge. He submitted that the prosecution ought to have carried out a full review of the

decision to prosecute Mr Olding in respect of any offence, and that if it had done so, it would have concluded that there was no reasonable prospect of conviction.

[71] The prosecution submits that if there was any merit in that argument, Mr Olding would have made an application of no case to answer at the conclusion of the prosecution case. Neither Mr Olding nor indeed did Mr Jackson do so. Blackstone 2018 edition discusses the principles of an application of no case to answer from paragraph D 1654 onwards. The leading authority is Galbraith [1981] 2 All ER 1060. In the course of his judgment in that case, Lord Lane, CJ said (at p 1042B-D):

> "*how then should the judge approaches submission of 'no case'?*
>
> *(1) if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*
>
> *(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
>
> *(a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
>
> *(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury….*
>
> *There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."*

[72] Mr O'Donoghue's submission appears to be that notwithstanding the implicit defence assessment at the conclusion of the prosecution case that "*the prosecution evidence [was] such that its strength or weakness [depended] on the view to be taken of a witnesses reliability, or other matters which are generally speaking within the province of the jury and [that] on one possible view of the facts there [was] evidence upon which a jury could properly come to the conclusion that the defendant is guilty,*" fuller review of the evidence before the trial started should have resulted in that charge being withdrawn. There was a dispute between the parties as to whether

the evidential test for prosecution (reasonable prospect of conviction) is different from the Galbraith test. Regardless of the difference in wording, I am unable to accept the logic of the submission that there may be sufficient evidence upon which a jury could convict and yet the test for prosecution, based on the same evidence, was not met. In any event, a consideration of all of the evidence in this case clearly justified the prosecution in this case.

[73] I turn now to the submission that the decision to prosecute Mr Olding was based on a flawed understanding of the facts of the case. Mr O'Donoghue QC relied on one issue - that the prosecution opening statement to the jury relating the circumstances in which Mr Olding entered the bedroom was inconsistent with the complainant's oral evidence. Mr O' Donohue accepted that the details in the opening were based on a portion of the ABE but pointed out that this was inconsistent with another portion. Whilst this is correct, it is apparent from the ABE interviews that the complainant was extremely distressed and that her evidence was difficult to follow. In the context of a complex, multi–faceted investigation, there is no merit in the submission that the decision to prosecute was "*based on a flawed understanding of the facts of the case* ".

[74] Having considered all of the submissions I am satisfied that the prosecution was justified in taking the case through it being founded on apparently credible evidence. Matters such as inconsistencies were wholly for the jury's consideration in the context of what is now generally understood regarding the impact of trauma on memory. In addition, the prosecution had to consider a number of strands of evidence including the independent evidence of the taxi driver of the complainant's highly distressed state, medical evidence which confirmed intimate injury, the contents of messages sent the following day and the different conclusions that a jury may have drawn from all of the evidence, including that of Dara Florence, to which I will turn in a moment.

Did anything within the investigation by the police give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused?

[75] This factor overlaps with the previous factor to a degree. On behalf of the prosecution, Ms Walsh succinctly summarised the evidential picture available to the prosecution in a "speaking note" where she set out:

> "*…. This was a situation where those investigating were presented with a young woman who had contemporaneously reported that she had been the subject of serious sexual assaults. Medical examination demonstrated that there was a tear to the vaginal wall that was bleeding some 24 hours later. Their investigations led them to the taxi driver who described the complainant-from the moment he first saw her in the street after she had left the house-as being very upset and crying. He stated that she was being comforted by the fourth defendant who messaged his friends and co-accused the next day that "it wasn't going to end well". They had two defendants Mr Jackson and Mr Olding who denied any form of penile*

> *penetration on the part of Mr Jackson and yet they had a witness (Dara Florence) who walked in and said that she was 100% certain that sexual intercourse was taking place and so on.."*

[76] In addition, the prosecution points out that messages sent the following day were a key part of the prosecution case. Mr Olding had described himself as "*a top shagger*", although he denied that sexual intercourse had in fact occurred, as well as making reference to "*spit roasting*" and adding that "*it was like a merry-go-round at the carnival"*. Mr Jackson had responded to the text relating to "*spit roast",* and the meaning of that term was submitted by the prosecution to support the complainant's account. Whilst the meaning of the term was disputed, a report was available to the prosecution and served (although not ultimately relied upon) supporting the slang meaning suggested by the prosecution.

[77] On behalf of both Mr Jackson and Mr Olding, it was submitted that notwithstanding this evidence, the prosecution also had to consider Dara Florence's assessment of the consensual nature of the event she had witnessed and that her evidence "*created a serious inherent doubt as to the guilt of the accused."*

[78] Mr Kelly QC posed the question "*how could the issue of the witness who came into the room create anything other than lies or real or serious doubt".* In making that submission, he said that if Mr Jackson was not engaged in consensual activity with the complainant, why would he have invited that witness to join in? If the witness had accepted the offer, the complainant (on the prosecution account) would have been a victim of rape while the other would have been a willing participant. That submission fails to take account of the fact that consent and reasonable belief in consent are two entirely different concepts. If the jury was sure that intercourse had occurred, it would have been open to them to conclude that the complainant did not consent but that Mr Jackson reasonably believed that she was consenting. Since we do not know the basis of the jury's verdict, it is impossible to draw any conclusion regarding their view of the evidence.

[79] Mr Kelly criticised the manner in which Ms Florence's evidence was investigated by the police submitting that it was defective and that the effect of her evidence was misunderstood:

> "*The way in which this aspect of the investigation was marshalled was at best poor; it didn't find its way into notebook for four days. When it did, actions, directions and otherwise were given. It was 2 ½ to 3 weeks before another ABE was embarked upon and it wasn't until the end of the summer when the witness was approached for a second time to understand a little more detail as to what she had or had not seen".*

[80] Mr O'Donoghue QC also relied on the evidence of Dara Florence in his submission that the police investigation gave rise of itself to the existence of a

serious inherent doubt as to the guilt of the accused. He submitted that her evidence was the "*single most compelling piece of evidence in the case*".

[81] He pointed out that Mr Olding's account of how the oral sex occurred in terms of the body positions and the position of his hands was corroborated by Dara Florence and also supported his account that the sex was consensual.

[82] The question of whether Dara Florence's evidence gave rise, of itself, to the existence of a serious inherent doubt as to the guilt of Mr Olding requires careful consideration. The issue for the jury was whether the prosecution had proved beyond reasonable doubt that the complainant did not consent to oral sex and that Mr Olding did not reasonably believe that she was consenting.

[83] Ms Florence observed the scene for a very short time and whilst she did not think she was witnessing a rape, she did not see anything which positively indicated consent either. This gives rise to a consideration of the myths and assumptions that arise in cases involving sexual offences. Dr Hall told the jury that there is overwhelming evidence that victims of rape do not fight back and the jury was directed that people subjected to sexual offences react in different ways; there is no classic response. Some people freeze, some people resist and some people do not resist because of the circumstances.

[84] The complainant said that she did not fight back, that she froze and allowed sex to happen, but that she did not consent. The defence pointed out to the jury that the complainant must have interrupted the oral sex on a number of occasions, such as when she was removing her top at the request of Mr Olding, and that these interruptions and recommencing of oral sex were inconsistent with someone who was frozen. The jury was carefully directed about the legal meaning of consent and in particular, the difference between submission and consent. It was for the jury to decide the question of consent not the prosecution, and in assessing Dara Florence's evidence, the prosecution was required to bear in mind the same myths and assumptions regarding consent as the jury. Furthermore, in considering whether the investigation of itself gave rise to an inherent doubt regarding the guilt of Mr Jackson, it has to be remembered that Dara Florence said that she was "*100%*" certain that she saw Mr Jackson penetrating the complainant, which he consistently denied.

[85] Taking account of the complexities of Dara Florence's evidence in particular, I am not satisfied that there was anything within the investigation which give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused.

Was there any indication that the case had been taken against the accused through being based on an abuse of his rights through oppressive questioning, which contributed to a confession that was unreliable in law?

[86] It is not suggested by either party that this is a relevant consideration in this case.

Whether the accused was acquitted by direction of the trial judge or acquitted upon consideration by the jury?

[87] The applicants were acquitted by a jury and as already indicated, no application was made at the end of the prosecution case that the evidence should not go before the jury. On behalf of Mr Jackson, Mr Kelly QC did touch on whether the length of jury deliberations may be a relevant factor on the basis that some reference was made in Bourke about an acquittal in 55 minutes in a complex fraud case. This issue was raised in the context of the relevance of an acquittal by direction as opposed to a jury. It was not considered to bear much weight in Bourke and since the basis of the jury verdict is unknown, little weight if any can be attached to the length of the jury deliberations in this case. In light of the fact that the acquittal was by a jury, it is not necessary to consider the fifth question posed in Kelly.

What answer had the accused given to the charge when presented with an opportunity to answer it?

[88] In relation to question 6, it is relevant to consider what answer the accused gave to the charge when presented with an opportunity to answer it. It is helpful to set out Charlton J's explanation of this factor. He states that the purpose of a police investigation is not to provide an opportunity to an accused person to state what his defence is. The "*purpose of any fair investigation, however, is to seek out the truth, sometimes according with an initial police view as to who is guilty, and oftentimes contradicting it. A fair interview upon arrest would naturally bring an accused person to the point that he or she is expected to deal with the preliminary outline of the case, inculpating the suspect and allowing him or her an opportunity, if he or she wishes, the chance to say what the answer to it is, or might be, in a case based on circumstantial evidence.*"

[89] On behalf of Mr Jackson, Mr Kelly QC submitted that his response to the police was absolute and immediate. Although this was his first time in a police station, or interviewed under caution, and although the contents of the complainant's first ABE were not disclosed or the results of forensic testing completed, he nevertheless gave a full account. Subsequently, he completed a detailed defence statement and gave consistent oral evidence. Although Mr Kelly QC accepted that Mr Jackson did not answer police questions in later interviews he submitted that since the jury was told not to draw adverse inferences, this was not a relevant consideration.

[90] In response, the prosecution submitted that Dara Florence's evidence that she was sure that Mr Jackson was having sexual intercourse with the complainant, thus confirming the complainant's evidence, was an important subject of police questioning. In those circumstances, it was submitted that his failure to answer questions about this matter in later interviews is relevant to an application for costs.

[91] On behalf of Mr Olding, Mr O'Donoghue QC submitted that he gave a full account when he was first interviewed on 30 June 2016, submitted to forensic

testing in the police station and gave a consistent account throughout the duration of the investigation and the trial.

[92] In response, the prosecution submitted that whilst it is accepted that Mr Olding gave a "*relatively*" detailed account in his first interviews on 30 June 2016 and answered all questions, his failure to answer questions in later interviews arising out of Dara Florence's account and what she had seen Mr Jackson doing, as well as specific questions about the WhatsApp messages he had sent and whether his semen could have ended up on the complainant's face hair or clothing is a relevant consideration for the costs application .

[93] There is an important distinction in the task entrusted to the jury, and my task in determining these applications for costs. It was for the jury to decide whether the prosecution had proved the guilt of the defendants beyond reasonable doubt. The question whether inferences of guilt should be drawn from a defendant's failure to answer questions during interview is relevant only to the conclusions the jury was entitled to reach , based on their assessment of the evidence. It has no bearing on my task , which is to distance myself from the evidence and assess whether the prosecution was warranted in terms of the available evidence , including what actually transpired at the trial and what responses were made by or on behalf of the applicants prior to the trial. (see Bourke referred to at paragraph 29 above).

[94] A person who attends a police station is not compelled to answer questions or to cooperate in any way. However, where he chooses not to fully cooperate, and where that may have a bearing on the police assessment of the evidence, that will be a relevant factor in an application for defence costs. It is apparent from the authorities that on the rare occasions that defence costs have been ordered, the conduct of the applicant has been beyond reproach. Whilst it is correct that both applicants answered a large number of police questions, agreed voluntarily to provide samples and maintained their innocence throughout, the evidence of Dara Florence was key to both prosecution and defence and in fact was described by Mr O'Donoghue QC as "*the single most compelling piece of evidence*". Whilst the refusal to answer such questions in later interviews was based on legal advice, it was unhelpful in the context of this complex police investigation and is a relevant consideration in these applications.

What was the conduct of the accused in the context of the charge that was brought, specifically in terms of who was he associating with, and on what ostensible basis?

[95] It is submitted on behalf of both Mr Jackson and Mr Olding that whilst the text messages were distasteful, particularly in relation to the "*spit roast*", they were not the only persons to engage in such behaviour and it should not be concluded that anything in these messages brought suspicion on either defendant. In particular, it is submitted that they had no bearing on the question whether either applicant had engaged in non–consensual sex. However, the prosecution submitted that the messages that were exchanged the following day were a key part of the prosecution case and were highly relevant to the events that had taken place.

[96] In my view, Mr Olding's description of himself the following day as a "*top shagger*", as well as the description of events as being like a "*merry-go-round at a carnival"* and the reference to "*spit roasting*", particularly in the absence of an explanation to the police, tended to draw suspicion upon him, albeit he apologised in court for his immature talk and was ultimately found not guilty of rape. Similarly, whilst Mr Jackson also expressed remorse for the content of the messages, particularly, his response to the "*spit roast*" text, and was found not guilty of rape, his failure to explain his conduct to the police or to answer questions about Dara Florence's evidence tended to draw suspicion upon him.

What was the conduct of the accused in meeting the case at trial? Was a positive case made by the accused such as might reasonably be consistent with innocence, and whether any right was exercised to testify as to that case, or whether an opportunity was used under the Prosecution of Offences Act 1974 to communicate with the Director of Public Prosecutions as to the nature of that defence?

[97] Questions 8 and 9 may be considered together. In terms of the conduct of the trial, it is not suggested that either defendant did anything to disrupt the running of the trial or breached their bail conditions. This was a complex trial which required careful consideration of voluminous material by all those involved in either bringing or defending the charges and the length of the trial reflected that complexity. In respect of both applicants, a positive case of innocence was put throughout the process, and they exercised their right to testify, maintaining the account they had given to the police.

Has the prosecution or defence made any serious error of law or fact, whereby the case became presented on a wrong premise?

[98] No further submissions were made on behalf of either applicant or the prosecution other than those already referred to above.

Conclusion

[99] It is apparent from the authorities that an individual discretion is vested in every trial judge to order defence costs of an acquitted defendant where it is just to do so, taking into account the special facts and circumstances of every case.

[100] This was a highly complex police investigation and the prosecution was warranted albeit the jury did not consider that the charges had been proved beyond reasonable doubt. The evidence bore the characteristics of a Rubik cube, capable of bearing myriad conclusions, depending on the jury's view of the evidence. But those were conclusions for the jury to reach, not for the prosecution.

[101] Having considered all of the relevant factors, I am satisfied that there is no basis for exercising my discretion in the applicants favour.

[102] The applications are therefore dismissed.