AN CHÚIRT UACHTARACH
THE SUPREME COURT

[2023] IESC 8

Supreme Court Record No. S:AP:IE:2022:000026
Court of Appeal Record No. 11/2019
Central Criminal Court Record No. CCDP0078/2017

Dunne J.
Charleton J.
O'Malley J.
Baker J.
Woulfe J.

Between/

THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

-AND-

S.Q.

Appellant

JUDGMENT of Ms. Justice Baker delivered on the 31st day of March, 2023

Introduction

1. This is the appeal of S.Q. ("the appellant") against the judgment of the Court of Appeal (Edwards, McCarthy and Keane JJ.) delivered by McCarthy J., which dismissed the appeal against his conviction in the Central Criminal Court on the offence of rape: [2021] IECA 347.

2. At the trial in the Central Criminal Court, the appellant's defence was that any sexual activity between himself and the complainant was consensual. The complainant gave evidence that she had not consented. The evidence was heard over two days, the jury was charged on the third day and on the fourth day returned with a guilty verdict. The evidence amounted to the testimony of the complainant, forensic evidence from the sexual assault treatment unit, interviews with the accused, and evidence of Gardaí, as well as text messages sent by the appellant to the complainant very shortly after the incident, including one in which he described himself as a "stupid man" and asked for her forgiveness.

3. Leave to appeal from the judgment of the Court of Appeal was granted by Determination of this Court ([2022] IESCDET 88) on the following point:

> "[…] whether, on the facts of the case and the applicable law, the trial of the applicant should be found to have been unfair by reason of the failure of the Gardaí to take statements or contact details from, and the further failure to disclose the existence of, the two persons who could potentially have given evidence as to the complaint."

4. This point concerns the circumstances in which the complainant made her initial statement to the Gardaí. The evidence given during the trial was that the complainant had presented at a Garda Station the evening after the incident which gave rise to the charge. It was not until the complainant gave a victim impact statement for the purpose of the sentencing hearing that it became apparent that before she attended the Garda Station and reported the

incident, she had, some 20 or 22 hours after the incident, contacted by phone, and then met with, a male work colleague "R" (whom she identified by name), and his girlfriend. They accompanied her to the station and R's girlfriend remained in attendance while the complainant made her statement to the Gardaí. None of this had been disclosed to the defence before the delivery to the defence solicitor of the victim impact statement, and prosecution counsel and solicitor were also unaware of the facts surrounding the attendance of the complainant at the Garda Station or of the identity of the two persons. Statements were not taken from R or R's girlfriend at the time of the original complaint or in the process of preparation for trial, nor were they interviewed by the Gardaí during this period. The Gardaí had not taken any details of their names, addresses or contact information.

5. The appellant's new solicitor, who was instructed for the purpose of an appeal, raised a concern in correspondence that commenced on 10 June 2019. A further six letters were sent. This Court noted the following in its Determination at paragraphs 7-8:

> "apart from acknowledgements and one inaccurate letter to the effect that the relevant information had been included in the statement of a garda, the inquiry was not properly answered until October 2020. It was then confirmed that the complainant had been accompanied to the garda station by her work colleague and his girlfriend, and that the girlfriend had sat with the complainant while she made her statement. They both left when the complainant was taken for medical examination. No statement was taken from either of the two individuals in question.
>
> Further, it also appears clear that their names and contact details were not requested on the occasion of their attendance at the garda station, and that the complainant was not

asked about her engagement with them at any stage either during the investigation or after the conviction."

6. At a case management conference on 4 October 2022, counsel for the respondent requested an adjournment and indicated she might seek to bring an application to adduce further evidence on the appeal should evidence be available from the two persons. On 27 October 2022, the case management judge was sent the affidavit of Anne Catherine Ralph, Assistant Principal Legal Executive, Solicitor's Division, Office of the Director of Public Prosecutions, sworn on the 27 October 2022, which contained two exhibits: the statement of R, taken on 14 September 2022, and the statement of Detective Garda Marie Connelly, the Garda who took R's witness statement, dated 28 September 2022.

7. A subsequent case management conference was held on 1 November 2022, where counsel for both the appellant and the respondent confirmed that no application would be brought to seek to introduce at the hearing of the appeal the affidavit relating to new evidence, or to seek liberty to adduce new evidence at the appeal.

8. The argument on this appeal ran on the basis that the evidence of R and his girlfriend was now unavailable.

The Judgment of the Court of Appeal

9. The judgment of the Court of Appeal concluded that a significant issue had been raised and that evidence from R and/or R's girlfriend might have been admissible as evidence of recent complaint (at paragraph 9). However, McCarthy J.'s view was that it was a matter of speculation whether anything they might have said would have assisted one side or the other.

10. At paragraph 18, the Court of Appeal considered the applicable principles were those arising from the case law relating to so-called "lost evidence". The Court accepted a submission made on behalf of the prosecution that the fact that potentially relevant evidence or information was not known or was unavailable did not necessarily mean that unfairness or potential unfairness arose. It regarded it as essential that an accused person engage with the facts and identify how that evidence might have assisted the defence. The conclusion was that there had been no such engagement by the appellant and no attempt by him to obtain or seek that the Gardaí procure evidence, or any suggestion as to what it might contain, and how it might have impacted upon the verdict.

11. In paragraph 20, the Court noted that the complainant had not mentioned to the Gardaí that she had told those who accompanied her to the station anything about what had occurred, which, the Court commented, meant that: "[i]n strictness, accordingly, the Gardaí had no reason to suppose that she had done so."

12. The Court of Appeal ultimately determined that the Gardaí should have sought out evidence, approached the individuals and ascertained whether they had had any engagement with the complainant about what had occurred, and, if so, invited them to make statements, and that there was a departure from that duty in this case.

13. The Court of Appeal then addressed the question whether the trial was unfair. It concluded that the argument of unfairness was entirely speculative, in that it was not possible to know what the persons might have said. No effort had been made by the accused to obtain any information about them and there had been no real engagement with the prosecution about either their absence or their identity. The Court of Appeal accepted that the appellant had been

deprived of the opportunity to make enquiries that might or might not have yielded fruit, but it was speculative to say that this impacted the fairness of his trial.

14. Dismissing the appeal, the Court rejected the argument that the absence of the information regarding the attendance of R and R's girlfriend with the complainant or speculation as to what they might have said, could give rise to any risk of unfairness or render the trial unsatisfactory. It was highlighted that the determination of such issues is a matter of judgment on a case-by-case basis on the particular facts (para. 23).

Grounds of appeal

15. The grounds of appeal are short and precise:

(a) That the Court of Appeal erred in finding there was no engagement by the defence with the prosecution about the absence or identity of the missing witnesses in circumstances where the defence on appeal initiated the enquiry into the actual presence or absence of such witnesses and where the prosecution in conceding the presence of the witnesses had been omitted from the investigation in error failed to rectify such error by obtaining the identity of and statements from such witnesses.

(b) That the Court of Appeal erred in finding that the burden of proof and the onus of establishing what in fact the missing witnesses would have said rested on the defence on appeal

16. It is the second point that was most relied on at the oral hearing. There can be no doubt that the defence did seek details of the missing witnesses over a period of 20 months and the failure to respond or to take steps to resolve the issue during this period was entirely that of the

prosecution. The defence did "engage" with the prosecution and the unavailable and unknown evidence in that sense.

17. In summary, this appeal concerns one issue, whether the trial was unfair by reason of the failure of the Gardaí to seek out, preserve and disclose the evidence. It is admitted there was a failure by the investigating Gardaí, but the appeal turns on the consequence of such failure for the safety of the conviction.

The Right to a Fair Trial

18. As the role of an appellate court is to make a determination as to whether a trial was fair, it is convenient, before considering the arguments of the parties on the issues presenting, to situate this appeal within the constitutional right to a fair trial. This sets the framework for the discussion.

19. The right to a fair trial is protected by Article 38.1 of the Constitution and separately by Article 6 of the European Convention on Human Rights. One element of the constitutional right to a fair trial is the obligation on the prosecution to disclose evidence. The presumption of innocence, fundamental to the fairness of the trial process, means that the prosecution must prove its case, and the defendant has no burden to establish innocence. The prosecution must fairly present that case and an accused person has the right to test the evidence, including but not limited to cross-examination: *O'Callaghan v. Mahon* [2005] IESC 9, [2006] 2 I.R. 32. Further, it is now recognised that the presumption of innocence and the right to a fair trial imports the principle of equality of arms: *State (Healy) v. Donoghue* [1976] I.R. 325, *JF v. DPP* [2005] IESC 24, [2005] 2 I.R. 174, and the right on the part of the accused person to present evidence: *People (DPP) v. Tuite* [1983] 2 Frewen 175.

20. The prosecuting authorities, and especially the Gardaí, have available to them the powers of interview, arrest, search and forensic analysis, and the imbalance in resources presents a particular discordance in considerations of equality of arms. This has been addressed in the authorities as importing an obligation on prosecution authorities to seek out, preserve and disclose evidence, even evidence not thought to be useful to advance the prosecution case or argument, and even that which is capable of being helpful to an accused person, as that person's personal rights to liberty may be impacted by a trial at which that evidence is adduced.

21. Heffernan, *Evidence in Criminal Trials,* Bloomsbury 2nd ed., notes at para. 14.04 that:

> "[T]he imbalance in the resources available to the prosecution and the defence is tangible at the coalface of the practice of disclosure. The prosecution has at its disposal the fruits of the evidence-gathering endeavours of the Gardaí, Forensic Science Ireland, other state agencies and, in some instances, foreign agencies. On foot of investigations by the Gardaí, the prosecution has access to witnesses and witness statements. The defence, in contrast, is very much dependent on the prosecution's lead and moreover is constrained in its ability to gather independent evidence by the limits of legal aid and the accused's personal financial resources."

22. The duty to investigate crime has as its correlative the duty to seek out and preserve evidence, and to disclose it to a defendant. Thus, the duty of the prosecution authorities, in practice one that rests on the Gardaí, to seek out and disclose evidence is central to, and supports, fair trial rights and goes some way to redressing the imbalance between prosecution and defence in the light of the powers of the Gardaí to investigate and collect evidence.

23. The leading case in this area is still *Braddish v. DPP* [2001] IESC 45, [2001] 3 I.R. 127 where this Court, hearing an appeal from a judicial review, prohibited the trial of the appellant

for the offence of robbery because the Gardaí had failed to seek out and preserve CCTV evidence. That evidence was direct, real evidence of the crime, which had a clear potential to exculpate in circumstances where an allegation that the appellant had made a confession was hotly disputed. Hardiman J. set out the important investigative role that the Gardaí play:

> "It is the duty of the gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not." (at p. 133)

24. Keane C.J. in *McKevitt v. DPP* (Unreported, Supreme Court, 18 March 2003) stated at p.7-8 that:

> "The prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material which is in their possession they are under a constitutional duty to make that available to the defence."

25. The following appears in the 5th edition of the DPP's *Guidelines for Prosecutors*:

> "The extent of the duty to disclose is determined by concepts of constitutional justice, natural justice, fair procedures and due process of law as well as by statutory principles. The limits of this duty are not precisely delineated and depend upon the circumstances of each case. Further, the duty to disclose is an ongoing one and turns upon matters which are in issue at any time." (Para. 9.3 of the Revised Guidelines 2019)

See also *Report on the Criminal Jurisdiction of the Courts* 2003 para. 740 referred to at para. 14.39, fn 173 of Heffernan, *op. cit*.)

26. The obligation on the prosecution to disclose evidence is a continuing obligation and finds statutory reflection in section 4C of the Criminal Procedure Act 1967 which places an obligation on the prosecution to disclose additional documents and evidence that come to light at any time after service of the Book of Evidence.

27. A court is entitled to scrutinise the prosecutorial choice to not disclose certain evidence: see for example *Traynor v Judge Delahunt* [2008] IEHC 272, [2009] 1 I.R. 605 where McMahon J. noted that the fact that the DPP gave an assurance that the prosecution did not propose to rely on the material which was not disclosed was not a "adequate excuse" for the failure to disclose (at p. 611).

28. The duty to seek out and preserve evidence, and to disclose it to a defendant is not unqualified, and its exercise does not require disproportionate commitment of investigative resources. As Lynch J. stated in *Murphy v DPP* [1989] I.L.R.M. 71 at 76, "The authorities established that evidence relevant to guilt or innocence must so far as is necessary and practicable be kept until the conclusion of the trial.", quoted with approval by Hardiman J. in *Braddish* at page 132.

29. Two interrelated duties may be distilled from the case law. First, the prosecution authorities have a duty to take reasonable and proportionate steps to search out and preserve evidence. Second, relevant material must be disclosed by the prosecution to the accused as a matter of constitutional fairness. The defence must have available to it all material that may strengthen its case or damage that of the prosecution, and it is not for the prosecution to determine which particular material is to be disclosed.

30. The present appeal does not require me to have recourse to ECtHR jurisprudence in the light of the clear statements in domestic law of the constitutional importance of the obligation to disclose. However, there are numerous examples of judgments where the European Court of Human Rights has identified the right of disclosure as fundamental to facilitation of the preparation of defence under Article 6(3)(b): for example, *Edwards v. United Kingdom* (1992) 15 E.H.R.R. 417. Article 6(1) of the ECHR provides that an accused has a right to a fair and public hearing by an independent and impartial tribunal and that the rights to a fair trial include that an accused person have "adequate time and facilities for the preparation of his defence".

Failure of duty in the present case?

31. At paragraph 20, the Court of Appeal thought it was "debateable" whether there had been a breach of the obligation to seek out evidence, but ultimately concluded that there had been a departure from duty in that the Gardaí ought to have approached R and his girlfriend and thereafter sought statements from them.

32. In the light of the principles just now stated, I have no hesitation in concluding that there was a clear failure by the Gardaí to seek out and preserve evidence to properly protect, respect, and support the fair trial rights of the accused person, and that this duty is not one predicated on the possible usefulness of the evidence not gathered.

33. I should say at this juncture that I disagree with the comment of the Court of Appeal (at para. 20), and in my view no blame rests on the complainant in respect of the failure of the Gardaí to obtain information about, or disclose the involvement of, R and his girlfriend. The undisputed fact is that the complainant openly attended at the Garda Station with two people, and one of them, R's girlfriend, had accompanied her to the interview room and had been present when she was giving her statement to the interviewing Garda. The Garda did know of,

and should have recorded, the presence of these two persons, and should, in addition, have asked the complainant whether she had spoken of the incident to anyone before presenting to make her complaint.

34. In the light of the importance of recent or first complaint evidence in the presentation of a prosecution case for sexual assault and rape, such evidence was of potential significance to the prosecution as well as the defence. The gathering and disclosure of the evidence and identity of the persons to whom complaints had been made, or who had accompanied the complaint, is so basic and fundamental to the process of investigation and prosecution of such crimes that the omission is inexplicable.

35. The evidence was within the procurement of the Gardaí at the time of the interviews of the complainant, and during the course of the preparation for trial. Indeed, it would appear that once the issue was raised in the course of case management that the DPP sought out and located the two persons, albeit their memories have now been materially impacted by the passage of time and their evidence is not likely to be of assistance, or perhaps even reliable, in the circumstances.

Consequence of failure

36. The respondent accepts that the Gardaí failed in its duty to collect the evidence of R and his girlfriend, and that it would have been "preferable", to use the language adopted by the Court of Appeal, had statements from them been procured in an expeditious manner in light of the unique role that recent complaint evidence can play in rape and serious sexual offences. The question for this Court is what consequence should flow from that failure.

37. The fact that a failure has been found does not inexorably lead to a conclusion that the trial was unfair for the reasons that will now be explored.

38. The question on appeal is whether the trial was unfair such that there was a lost chance of acquittal, and this sometimes involves the question whether evidence that could have afforded a route to acquittal was not procured or disclosed.

39. Section 3 of the Criminal Procedure Act 1993, the current statutory "proviso" which identifies the role of an appellate court when considering *inter alia* the effect of an error argued to amount to a miscarriage of justice, provides:

> "3(1) On the hearing of an appeal against conviction of an offence the Court may-
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred)'.

40. O'Donnell J. (as he then was) in *People (DPP) v Fitzpatrick and McConnell* [2012] IECCA 74, [2013] 3 I.R. 656 at 681 set out the standard of review on appeal:

> "The proviso has been part of Irish law since the creation of the Court of Criminal Appeal. It does not, however, invite a court of appeal to make its own value judgment as to the guilt or innocence of the first appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial the first appellant would have been convicted. If a departure from the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed."

41. The test is whether there has been a lost chance of acquittal in the light of the course of the trial and the evidence as a whole. The ECtHR too looks to the totality of the circumstances of the trial: *Edwards v. United Kingdom* and *Jespers v. Belgium* (1983) 5 E.H.R.R. 305. There is no jurisprudence from that Court which suggests that it takes the view that a conclusion that there has been a breach of fair trial rights inexorably leads to the quashing of a conviction.

42. From the perspective of the appellant, the argument is that because R and his girlfriend were the only potential witnesses as to the state of mind of the complainant following the alleged attack and before she went to the Garda Station, absent the opportunity to cross-examine such witnesses, the accused was deprived of the real possibility of an obviously useful line of defence as to the credibility and consistency of the complainant in circumstances where, other than his denial of forced sexual intercourse, he had little else to offer in his own defence.

Recent or first complaint evidence: the evidence not gathered or disclosed

43. It is important in this context to consider the nature of the evidence said to have been unavailable at trial by reason of the failure of the Gardaí to gather, preserve, and disclose that evidence. Taken at its height and from the context of the victim impact statement, the evidence would have been that the complainant sought assistance of R who agreed to immediately meet her and attended at her home with his girlfriend to discuss an incident in "peace and quiet". It is unclear whether she disclosed the fact of, or the details of, the alleged assault.

44. Irrespective of what the complainant might have told her friends regarding the incident, they would or could have offered evidence of her demeanour during their initial conversation and on the journey from her home to the Garda Station. Conversely, it might have become clear that she had given them a different account to that given to the gardaí. Whether that evidence

could have offered a real basis of defence, or whether the evidence was of a type likely to avail the prosecution, but was less likely to avail the defence, will be examined below.

45. It is worth considering first what role that the evidence might or could have played at trial, as the unavailable testimony was "recent complaint evidence" and not evidence of fact.

The evidential value of recent complaint evidence

46. Recent complaint evidence is admissible as an exception to the rule against self-corroboration, sometimes called the rule against narrative, and to an extent as an exception to the hearsay rule in trials of sexual crimes and is limited to that extent. It is admissible not as corroboration of the testimony of a complainant but as indicative of the consistency of that evidence.

47. The common-law evolved a principle that recent complaint evidence could be adduced in rape and sexual assault prosecutions as a way of protecting the victims of these crimes from the risk of not being believed if they did not complain or call for help, or raise a "hue and cry" immediately, to alert those around them to the crime. The Canadian Supreme Court in *Kribs v. R* [1960] SCR 400, 405 usefully re-stated the reasoning for the doctrine as follows:

> "The principle is one of necessity. It is founded on factual presumptions, which in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential thereto, is that if she fails to do so, her silence may naturally be taken as virtual self-contradiction of her story."

48. This view that a prompt complaint suggested the trustworthiness of the victim and that initial silence was indicative of a baseless allegation.

49. K. M. Stanchi, in 'The Paradox of the Fresh Complaint Rule' (1996) 37 BCL Rev 441, explores the history of the paradox, and suggests that the rule, initially meant to help sexual assault victims by supporting the credibility of the evidence of a complainant, has in some way become more harmful than helpful, in that by giving juries this evidence promptness again seems to support veracity, the "timing myth" is indirectly reinforced. The author does not however advocate the abolition of the rule.

50. Contemporary academic discussion supports the view that the strict application of a requirement that a victim make a complaint at a first reasonable opportunity fails to recognise recent advances in the understanding of why some victims of such crimes are slow to report, and do so in many cases years later, and often because of a "triggering event". See Heffernan, *Evidence in Criminal Trials,* 2nd edn, Bloomsbury 2020, where it is noted at [7.35] that:

> "These doctrinal premises rest on biased perceptions about female adult complainants and outmoded attitudes to sexual offending. For example, research in relation to rape trauma has dispelled the myth that promptness in the reporting of offences is likely or, in some cases, even possible."

51. Immediate complaints are not always possible, and delayed complaints are not necessarily indicative of unreliability or fabrication. This could be owing to the age of the victim, the fact that the perpetrator was in a position of trust or authority, because the victim often thinks he or she will not be believed, or does not have the language to voice the elements of the assault: see Ní Raifeartaigh, then Reid Professor of Criminal law at TCD, and now judge

of the Court of Appeal, “The Doctrine of Fresh Complaint in Sexual Cases”, Irish Law Times (1994) Vol. 2 pp 160-162.

52. The Court of Criminal Appeal considered the doctrine in *DPP v. Brophy* [1992] I.L.R.M. 709 where an appeal was allowed against conviction on account of the failure of the trial judge to discharge the jury following the giving of inadmissible evidence of a complaint and where O’Flaherty J. used the opportunity to explain the principles applicable to the admissibility of recent complaint evidence as follows:

> “(a) Complaints may only be proved in criminal prosecutions for a sexual offence.
>
> (b) The complaint must have been made as speedily as could reasonably be expected and in a voluntary fashion, not as a result of any inducements or exhortations. Once evidence of the making of a complaint is admissible then particulars of the complaint may also be proved.
>
> (c) It should always be made clear to the jury that such evidence is not evidence of the facts on which the complaint is based but to show that the victim's conduct in so complaining was consistent with her testimony.
>
> (d) While there is mention in one of the older cases, *R. v Osborne* (1905) 1 KB 551 of a complaint being "corroborative of the complainant's credibility" *this does not mean that such a complaint amounts to corroboration of her testimony in the legal sense of that term but as pointing to the consistency of her testimony. Corroboration in the strict sense involves independent evidence, that is evidence other than the complainant's evidence*

(e) The law on complaints should not be confused with what takes place once the police institute their inquiries. That is a separate matter. A complaint made to the police may, as such, be admissible or not under the guidelines set out above but just because a complaint is not made at the first opportunity to the police does not, of course, inhibit their inquiries. Indeed, a complaint to the police may be made by someone other than the injured party." (p. 18-19) (My emphasis)

53. Of importance to the present appeal is that recent complaint evidence is not to be treated as independent evidence of the truth of a complainant's account of an event, but of what he or she said to the person to whom the story was first told. Such evidence is admissible in limited circumstances as evidence that a complainant's own testimony, which forms the basis of the evidence at trial, is consistent with that first account. The admission of such evidence assists the prosecution of sexual crimes which of their nature are not usually or often witnessed.

54. The third limb in *Brophy* means that the evidence is mostly in practice of benefit to the prosecutor, as explained in the New Zealand case of *R. v. Nazif* [1987] 2 NZLR 122 (Wellington Court of Appeal) at p. 8:

"Evidence of recent complaint is not evidence of its truth or of any fact other than that it was made. In particular it is not evidence of a want of consent by the complainant…. The evidence is admitted only as tending to show consistency between the complainant's conduct at the time and her evidence given at the trial thereby supporting the credibility of her testimony"

55. McGrath, *Evidence* (3rd ed., Round Hall, 2020) at paragraph 3-207 explains the narrow basis on which such evidence can be of use to the defence: If what was said in a first or recent

complaint is positively inconsistent with the complainant's evidence, the defence is entitled to cross-examine in relation to inconsistencies.

56. In paragraph 19 of the judgment, the Court of Appeal explained how the accused person might have sought to benefit from the evidence:

> "It would undoubtedly have been open to the appellant to cause the complainant's friends to be sought out and potentially either ascertain what their evidence might be or, say, seek to depose them if he knew of their existence. It might further have been the case that the defence would have sought to cross-examine the complainant perhaps in some detail as to what she might have said to such persons, the course of events on the day after the offence before she went to the Garda Station at around 9pm (if they had an evidential basis for doing so) and test any evidence of such persons if they were called to give evidence showing consistency; in the event that the complainant denied prior inconsistent statements to them they could have been called to prove them."

57. The respondents argue that it is not rationally conceivable that anything imparted to R and his girlfriend would have been capable of undermining the injured party's contention that she had been raped by the accused, and that the complainant's state of mind is evidenced from the exchange of text messages with the accused, her behaviour in seeking the advice of a friend and her haste in attending the Garda Station. There is little ambiguity about her state of mind and no obvious inconsistency in her complaint. The short timeline within which she made the formal complaint to Gardaí is argued by the respondent to reinforce this inference.

58. It is worth pausing to observe the unusual situation presenting in this case. There was evidence that was not available due to the Gardai's failure to fully perform its investigative obligations. However, the evidence not available at trial was likely to have been mostly of

benefit to the prosecution. It would have been open to the prosecution to call those witnesses to support her account, only insofar as it did so support that account. The evidence would therefore have been inadmissible, save at the instance of the prosecution in a narrow and constrained circumstance, and the defence could not have compelled the DPP to call R and his girlfriend.

59. The evidence by its nature is of limited evidential value: it is not evidence of the fact of the alleged offence, rather was a second-hand account of what the complainant may have said in the aftermath of the rape that may have been used to undermine her credibility. If it did not establish the consistency of the evidence of the complainant, R and his girlfriend might have been called by the defence, but only if their version had been put in cross examination to the complainant and she denied it.

60. The trial judge could have directed that the evidence of R or his girlfriend be obtained, but again the question presents as to whether that option would reasonably have benefited the accused person, having regard to the special nature and limited evidential value of recent complaint evidence. It is unlikely that the defendant would have achieved anything to support a defence by calling these witnesses, having them called, or cross-examining them.

61. The strict and narrow basis on which the evidence of R and his girlfriend might have been admissible must therefore be a key to the consideration of whether the trial was unfair, and whether there was in truth prejudice to the accused by the absence of these witnesses, or by reason of the fact that their existence was not even disclosed before or during the course of the trial.

Discussion on test proposed by Court of Appeal

62. The conclusion of the Court of Appeal was that it was "entirely speculative" to say the trial was unfair, because it was not possible at this juncture to know what R and his girlfriend might have said and the mere reliance on the bald fact that these witnesses might have been available but were not, did not amount to a real "engagement" by the appellant with the prosecution concerning the identity of, or absence of these witnesses. It was the absence of engagement and the fact that the appellate court was left with speculation regarding entirely unknown and then unknowable evidence that led the Court to dismiss the appeal.

63. The Court of Appeal thought it essential that an accused person not merely "sit back" and must engage with the facts. It linked the test to that established from "lost evidence" cases such as *S. Ó C v. DPP* [2014] IEHC 65, *per* O'Malley J. where she said that to make an order prohibiting a trial required an applicant to establish a "real possibility" that evidence did exist that could have been helpful but is no longer available. An applicant seeking prohibition has to show not merely that certain evidence was irretrievably lost or not available for the purposes of mounting a defence, but that the evidence was likely to have been material to the issues in the case and might have assisted the accused person in a challenge to prosecution evidence. The test is often described as requiring an applicant for prohibition to "engage" with the lost or unavailable evidence and show a "real risk" that the trial would be irredeemably unfair if allowed to proceed. However, the context is crucial. That test evolved through mostly a series of applications for judicial review for the prohibition of a trial. See Denham C.J. in *Wall v. The Director of Public Prosecutions* [2013] IESC 56, [2013] 4 I.R. 309 and *Savage v. Director of Public Prosecutions* [2008] IESC 39, [2009] 1 I.R. 185. Finlay C.J. in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476

64. A test thus formulated cannot properly vindicate the rights of the accused person in the circumstances applicable to the present appeal. First, and to an extent obviously, the answer to most applications seeking prohibition of a trial on the grounds that certain evidence has been irretrievably lost which might assist an accused person applies a test derived from the first principle that the decider of facts and the trial court is best placed to judge the materiality of the unavailable evidence. The courts have in those circumstances imposed a very high bar on an applicant who seeks to prevent a trial before it has commenced, leaving for the most part the achieving of a fair trial to the trial judge and to argument in the course of the trial where the relevance and weight likely to be afforded to such evidence can best be understood.

65. The difficulty that arises in the present appeal is quite different from that considered in the recent judgment of this Court, *DPP v. J.D.* [2022] IESC 39 where MacMenamin J., addressed the fact-sensitive nature of "lost evidence" cases, and that it is not enough to merely assert the fact of missing material at para. 83:

> "Rather, it must be shown that, as a matter of likelihood, what was lost was material to the real issues in the case, such as the reliability of some aspect of the prosecution evidence. An accused person must, therefore, be able to show that the nature of the missing evidence is such that in its absence, due to the elapse of time or other reasons, a trial in due course of law cannot take place."

66. What was in issue in that case was an alleged denial of fair trial rights by reason of the fact that the accused person had lost an opportunity to adduce material by giving a statement to the Gardaí which might have been admissible in evidence in the course of trial, and which could be adduced without the accused person himself going into evidence. As MacMenamin J. noted (at para. 84) the appellant could be criticised for not engaging with the evidence, as it

was he who was solely in a position to say precisely what he would have said had he been afforded the opportunity to be interviewed by the Gardaí, the absence of such opportunity being the basis on which the application to stop the trial had been canvassed.

67. However, at the trial under consideration here, neither the lawyers nor the trial judge were aware of the material facts, and a test that required the appellant to "engage" and show how the evidence might have been useful in a real way for the defence of the charge could never be satisfied: the accused person cannot now say what was "lost", and the evidence was not, and could not have been, within the procurement of the accused person as he had no way of knowing about the two persons before the trial had concluded, and the appellant could never have satisfied the test of establishing that the evidence of R and his girlfriend might have been useful or material in the conduct of the defence. What R and his girlfriend might have said is now not possible to ascertain, it is not and never was within the procurement of the accused person and cannot be deployed now to enable the appellant to establish its likely materiality.

68. It would for this reason it seems to me be unfair to the appellant to impose a test of "engagement" when the test could not have been satisfied, and such a test would not meet any test derived from fair trial rights, or fairness in the appeal process. I propose to now formulate a more appropriate test.

Correct approach

69. Although I consider that there was a breach of duty by the Gardaí in its performance of the prosecutorial role, the question for this Court is whether the trial was thereby rendered unfair. I do not consider that the test as enunciated by the Court of Appeal affords a sufficient degree of fairness to the accused insofar as the Court of Appeal considered that the appellant

had to show an engagement with or take active steps to identify the likely evidence of the two potential witnesses, or to show in what way they might have been useful at trial.

70. The test is not whether the appellant has engaged with the evidence and identified in what way it would have been of real benefit because a test thus formulated could not have been satisfied by this accused in the circumstances that occurred. The onus does not lie on the appellant to show how, specifically, the evidence might have availed him in his defence. Rather the question for an appellate court looking at the course of the trial and the evidence as a whole is whether the trial was rendered unfair. There will be cases where the fact that evidence was not sought out, preserved, or disclosed, could lead to the quashing of a conviction on appeal. There will be cases where the failure to seek out or preserve evidence has resulted in a disadvantage to the accused, leading to the absence of evidence at trial. There the defence might have lost some basis for a rational argument or ground of challenge in the course of a trial and might therefore render the trial unfair.

71. It is difficult and somewhat unhelpful to identify examples, but obvious examples include where the Gardaí failed to take DNA samples, failed to disclose the fact that the DNA evidence disclosed two possibly relevant persons at the scene of an incident, or where no effort was made to seek out a video recording or closed-circuit television recording of the scene when it was known that one could have been available.

72. These are examples of evidence of fact which would in the normal course be admissible. Crucially, the evidence which was not available at the trial in the present case was in principle inadmissible and was not evidence of the material facts grounding the conviction.

73. Whilst the facts of the present appeal are unusual and there is no authority directly on point, my view is that the correct approach to the fairness of the trial is that enunciated by

Finnegan J. in *DPP v. Farrelly* [2012] IECCA 49, *viz.* whether the evidence "would be of any possible assistance to the defence" (at p. 5), and whether the evidence could have had any relevance to the evidence at trial, and whether it bore any relationship to the offence with which the appellant was charged. That test is not one which puts the onus on the accused person in the way the "lost evidence" cases do, but which has as its aim the ascertainment by the appellate court of whether there could, not would, have been an avenue of defence which was foreclosed.

74. The task for the appellate court is to assess the fairness of the trial as a whole, what role the absent evidence *could* have played, and whether there was a lost chance of acquittal.

Conclusion on the present case

75. The question here presenting concerns evidence that was, because of its legal nature, of limited evidential value, and in the normal course would not have been admissible. The evidence that was not available was not irrelevant in the strict sense, but rather it could have been called at the instance of the prosecution only insofar as it supported the evidence of the complainant and assisted in the presentation of the complaint to the jury, and in those circumstances could have formed the basis of a challenge to a complainant's evidence.

76. Having regard to the limited evidential value of this evidence and the strength of the other evidence, my view is that, despite a failure by the Gardaí in its investigative role, the trial was not unfair. Even had the Gardaí identified the two witnesses and taken statements from them, their evidence was not admissible in the usual course and therefore it is not necessarily the case that the prosecution could have called those witnesses in the course of the trial.

77. First, their evidence would have been admissible in limited circumstances, and only to show consistency with the testimony of the complainant.

78. Second, their evidence would not have been admissible if there had been significant difference between the evidence of the complainant and the terms of the complaint.

79. Third, the defence could have called one or both of the two persons, only if the complainant denied in her testimony that she had given them an account as recorded in their statements.

80. Fourth , if their statements had been included in the Book of Evidence the defence could have made an application to the trial judge to have those witnesses called or at least made available for cross-examination: see the discussion in *People (DPP) v. Lacy* [2005] IECCA 70, [2005] 2 I.R. 241 at 248 that "if a witness included in the Book of Evidence is not called or tendered, then there should be good reasons why such a course is adopted". As noted above, it is improbable that their evidence could have furthered the defence.

81. Fifth, regarding the argument made by counsel that the evidence of R and his girlfriend might have been put to the complainant to test her account of the incident, it must be recalled that they were not witnesses to the incident. They could have been witnesses as to the demeanour of the complainant prior to her attendance with them at the Garda Station when she may have recounted the incident to them, although it is not clear that she did. At its height the defence lost the possible chance to challenge the complainant if the two witnesses had offered a different account. The appellant's contention that the lack of this evidence caused this trial to be materially unfair rests on the contention that he lacked the opportunity to challenge the consistency of the complainant's testimony and say that the right to confront an accuser is enshrined in both the Constitution and in Convention law. See for example: *In Re the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 at 154 where O'Higgins C.J. summarised the position by saying that a person charged with a criminal offence has at a minimum the right:

> "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

82. The appellant submits that the importance of the right to cross-examine witnesses in a meaningful manner is heightened in circumstances where the defence at issue is one of consent and the only evidence available to the defendant is one of bare denial. The appellant cites the judgment of Hardiman J. in *J. O'C v. DPP* [2000] IESC 58, [2000] 3 I.R. 478 at 504:

> "If a defendant who is innocent is exposed to a trial where the only evidence is unsupported assertion and the only defence bare denial, his position is indeed perilous. Where these cases have been successfully defended it has, in my experience, always been because it has been possible to show that the complainant's account is inconsistent with objectively provable facts relevant to the allegations, or that the complainant has made other allegations against other people which are lacking in credibility."

The argument that there was a lost possibility of cross examination is contingent on the accused person having an evidential basis for such cross examination. None such exists here. The evidence of the two persons was admissible only in limited circumstances and only for limited and narrow purposes. The narrow sphere in which cross examination could have occurred was if the complainant had told her friends a different version of that presented by her in evidence at trial. Here the details are important. The complainant phoned her work colleague who immediately came to her house and discussed the matter with her in "peace and quiet". He and his girlfriend accompanied her to the Garda Station and that fact must be indicative that she was upset and that she had something to report to the Gardaí and that she needed some degree of moral support to do so. It does not matter whether she told her friends the details of the

incident, but the fact is that they accompanied her to the Garda Station, one of them remained with her when she made her formal complaint, and the person who remained was the woman friend, must be suggestive of the fact the friends knew that what was to be disclosed or discussed with the Garda was of an intimate nature.

83. Sixth, in the application of the proviso the appellate court may consider the strength of the evidence taken as a whole with a view to objectively ascertain whether the convicted person did lose a real chance of acquittal. The evidence here of the complainant herself, the medical evidence of trauma to her vagina wall and abrasion on the fossa, and the texts to her from the appellant in which he said that the was "a stupid man", that he was "sorry for everything" and asked for forgiveness cumulatively were strongly indicative of guilt.

84. All of these factors permit this Court to take an objective view of the value of the possible evidence which was not gathered or disclosed to the appellant, and objectively speaking it seems to me that that evidence would not likely to have been of use to the accused, and would have been of extremely limited value having regard to the type of evidence and its source. In the circumstances, the trial has not been shown to be unfair.

85. One very significant factor supports my view. The defence had the victim impact statement of the complainant several weeks before the sentencing hearing. It was therefore apparent to solicitor and counsel that some evidence was not gathered. The trial at that stage still had not concluded but nonetheless no application was made to the trial court to adjourn the sentencing hearing, or to direct the taking of statements from R and his girlfriend. At that point in time the loss of clarity or reliability would not have posed the problem it now presents. No complaint was made by defence solicitor or counsel, no application threatened or made, and this must be because it was apparent to defence counsel, as it is to me now on appeal, that the evidence of R and his girlfriend would almost certainly not have been helpful to the defence.

In fact, the usual approach of defence counsel is to seek to exclude recent complaint evidence as it can play an important part in supporting a complainant's evidence.

86. I would dismiss the appeal.