THE COURT OF APPEAL

Record Number: 138/2021

The President.
Edwards J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

W.I.

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of May 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 19th April 2021, the appellant was convicted of one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended by s. 37 of the Sex Offenders Act, 2001.

2. He now appeals his conviction on several grounds and further seeks leave from this Court to adduce fresh evidence relating to material recovered from the complainant's mobile phone by Cyber Security Experts, VM Group.

Background

3. The sexual assault offence occurred on the 1st December 2017 in County Dublin. The appellant and the complainant had participated in a nikah/marriage ceremony together at a mosque, after which, the complainant alleged that the appellant hugged her, touched her on her breasts and buttocks and pushed her towards his bedroom.

4. The appellant was tried before the Central Criminal Court commencing on the 6th April 2021. Other counts were preferred on the indictment to which he pleaded not guilty and where the jury disagreed.

Affidavit of Ms Aimee McCumiskey, Solicitor, sworn on the 12th October 2022

5. In January 2018, An Garda Síochána extracted materials from a number of telephones including the complainant's phone (GR5). This material was provided to an expert retained by the defence on a USB key/disc.

6. Upon coming on record for the appellant in July 2021, the appellant's solicitors directed that all phones involved in the trial be further analysed to ascertain whether the disclosure provided by An Garda Síochána in 2018 was complete. In September 2021, VMGroup conducted an analysis of the phones and concluded by way of report in November 2021 that the data set collected by VMGroup from GR5 was greater than that presented by the prosecution. These experts extracted additional information from the device.

7. In January 2022, the Director entered a *nolle prosequi* in respect of the counts upon which there was disagreement at the appellant's trial.

8. By way of email dated 9th February 2022, the Garda who conducted the initial analysis of GR5, provided a statement that he could not have obtained the data subsequently obtained by VMGroup in 2021 with the software version of Cellebrite that was available in January 2018.

9. In July 2022, VMGroup were asked by the appellant's solicitors to further analyse GR5. The initial analysis carried out by the Gardaí in January 2018 used a logical extraction method which does not extract hidden or deleted files, as opposed to a physical method which would have extracted a bit for bit or exact copy of GR5. An analysis conducted by VMGroup of the phone using the software immediately prior to that available to Gardaí in January 2018 was capable of extracting both physical and logical images of GR5. VMGroup concluded that a total of 29 data types could be recovered, compared to 15 data types presented in disclosure at trial. Of the 15 data types recovered by An Garda Síochána, VMGroup recovered more information for each date and time recorded.

10. The information recovered in the second analysis of GR5 included *inter alia* internet searches for information regarding asylum and immigration issues and a text conversation concerning the validity of the marriage ceremony between the complainant and the appellant.

11. As averred in Ms McCumiskey's affidavit, following the second report, the Garda explanation was that the 2018 analysis was conducted on a shared device and some data types may have been unselected by a previous user and not reselected.

12. The discovery of this new material from the complainant's mobile phone, GR5, gave rise to the motion to adduce fresh evidence which is addressed hereunder.

Grounds of Appeal

13. This Court was informed in advance of oral hearing that the appellant would no longer be pursuing ground 5, the remaining grounds are as follows:-

> *"1. The Appellant did not receive a trial in due course of law in circumstances where the DPP failed adequately or at all to disclose information contained in handsets of the complainant's cellular telephones wherein such information was relevant to the defence in that the said information inter alia supports the contention, as proposed in the course of the appellant's trial by his defence, that the complaints were false and were motivated to assist the complainant's application for international protection in Ireland.*
>
> *2. The Appellant did not receive a trial in due course of law in that the learned trial judge in his charge to the jury erred in directing the jury as a matter of law to ignore evidence regarding the deletion of phone calls, relevant to the proceedings, by the complainant on the basis that such evidence was irrelevant because no issue concerning deleted phone calls had been put to the complainant in cross-examination.*

3. The learned trial Judge erred in law in restricting cross examination of the complainant in relation to issues concerning phone records and text messages, then available to the defence, in circumstances where the said issues went to the credibility of the complainant, and where the complainant's credibility was the central issue in the case. The learned trial judge further erred in this regard by deeming such cross examination to be the examination of collateral issues where in fact the issues the defence sought to address were of central importance to the nature of the defence relied upon by the Appellant which was that the complaint was motivated by the complainant's plan to remain in Ireland as an asylum seeker claiming international protection.

4. The trial of the Appellant was unfair in that he was convicted by a 10-2 majority verdict of the offence of sexual assault, such verdict being delivered following evidence given to the jury by the complainant regarding three allegations of rape and one allegation of attempted rape and where upon the jury failing to agree on the said counts it convicted the Appellant of sexual assault of the complainant. The Respondent herein directed a re-trial of the counts upon which the jury disagreed and maintained that position from the time the Appellant was convicted in April 2021 until January 31st 2022 when a nolle prosequi was entered in respect of three counts of rape and one count of attempted rape. Accordingly, the Appellant was prejudiced by evidence of three offences of rape and one of attempted rape in his defence of the allegation of sexual assault, for which he was convicted, and where the Respondent has now acknowledged by way of nolle prosequi that the more serious allegations will not be further prosecuted.

6. The Appellant did not receive a trial in due course of law where upon application to discharge his legal team on divers dates prior to the commencement of the trial on April 6th, 2021, the learned judges hearing such applications refused to permit the Appellant to so discharge his then legal representatives.

7. The Appellant did not receive a trial in due course of law where, upon application to discharge the jury on day two of the Appellant's trial (April 7th 2021) on the grounds that on the previous day that the Complainant in describing the Appellant's background stated:-

"…about a previous job he had in bank in Egypt and how a scam or something happened and it ended up with the bank losing money and how he fled Egypt and he got out of Egypt."

Upon submission made on the basis that a reference by the complainant concerning the Appellant, alleging that he had been being (sic) involved in "a scam or something", gravely prejudiced the Appellant before the jury, the learned trial Judge refused to discharge the jury. Accordingly, the verdict of guilty with respect to an alleged sexual assault of the complainant by the Appellant was unsafe and unsatisfactory."

14. Grounds 1, 2 and 3 relate to the motion to adduce fresh evidence and can be addressed in conjunction with that application.

The Motion to Adduce Fresh Evidence

15. Leave is sought to adduce fresh expert evidence pursuant to s. 3 of the Criminal Procedure Act, 1993. This proposed evidence concerns an intensive and comprehensive analysis of the

complainant's handset (GR5) conducted on behalf of the appellant post-trial, which revealed 43,415 lines of information on the handset, whereas the garda extraction file revealed 12,384 lines of information. It is argued that the new information would have been significant and would have served to undermine the complainant's credibility and to enable the proper defence of the appellant, which was that the complaints were false and were motivated to assist the complainant's application for international protection in Ireland.

16. Moreover, it is argued that the absence of this evidence rendered the appellant's trial unfair and consequently, the conviction should be quashed.

Submissions of the Appellant

17. The fresh evidence is that of Dr Vivienne Mee of VM Group, specifically, the reports dated the 23rd November 2021 and the 10th October 2022 and a report of Mr Anderson, AA Forensics, dated the 12th November 2021, all concerning the digital forensic analysis of mobile phones involved in the trial and, in particular, the phone of the complainant, GR5.

18. The fundamental point upon which the application is being brought to this Court is that 12,384 lines of information from GR5 were disclosed to the defence pre-trial whereas, VMGroup recovered 43,415 lines of information from GR5. It is further submitted that the absence of such evidence at the trial put the defendant at a grievous disadvantage and rendered his trial unfair and his conviction unsafe.

19. It is submitted that the respondent failed to adequately secure the contents of the complainant's cellular phone in the investigation of the alleged sexual assault and in disclosure to the defence at trial. What is said to be substantial non-disclosure of the information contained on GR5 first became apparent upon examination of GR5 by VMGroup by report dated the 23rd November 2021.

20. It is submitted that the information contained in the missing categories was relevant and important to the defence where the defence sought to undermine the credibility of the complainant and establish her motive for making a false complaint against the appellant as a means of securing her presence in Ireland and that, therefore, the evidence meets the relevant criteria for admission as fresh evidence. It is further submitted that in the absence of such evidence, the trial of the appellant was demonstrably unfair and the conviction for sexual assault is unsafe and should be quashed.

Collateral Questions Rule

21. The appellant acknowledges that answers to collateral questions are final, however, it is submitted that this rule, which prevented the defence in this case from pursuing further their line of questioning pertaining to immigration and asylum issues, is relaxed in sexual cases. *Vattekaden v DPP* [2016] IECA 205 is cited in support of this submission.

22. Dr Heffernan on *Evidence in Criminal Trials* 2nd Ed is also cited, she notes that one exception to the rule relating to collateral questions is where a previous inconsistent statement is made by the witness. The appellant says that the internet searches of the complainant regarding immigration and asylum as contained in the information not disclosed to the defence at trial amount to previous inconsistent statements.

23. It is submitted that the line of questioning regarding the complainant's intentions in travelling to Ireland was incorrectly deemed collateral when these were questions on matters relevant to the credibility of the complainant and went to the core of the defence. It was the defence position that the complainant intended to remain in Ireland either by applying for international protection or by way of the criminal complaint made against the appellant herein. It is further submitted that the absence of the lines of information recovered from GR5 concerning searches by the complainant regarding immigration and asylum in Ireland meant the defence was unable to introduce evidence that may have rebutted the answers proffered by the complainant.

Cross-Examination

24. It is noted that by virtue of Article 38.1 of the Constitution, the appellant was entitled to meaningfully confront his accuser at trial*. In Re Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129 and *The People (DPP) v MD* [2017] IECA 322 are both cited in support of this submission. The following quotation from *MD* is relied upon:-

> *"The right to cross-examine one's accuser is so firmly embedded as part of the constitutional right to a trial in due course of law guaranteed under Art. 38.1 of the Constitution that by now it requires no authority for its support and can be simply stated as a truism. Subject to the trial judge's entitlement, even duty, to control the trial and give appropriate rulings, the defendant's right to cross-examine should be left unhindered, and should be facilitated as far as practicable."*

25. It is said that this right is heightened where the only defence is one of denial. It is submitted that the defence were entitled to interrogate the credibility and consistency of the complainant and that this could not be done in circumstances where the contents of the complainant's phone GR5 were not complete at the time of the trial. Reliance in this regard is placed on the dicta of Denham J in *DPP v PC* [1999] 2 IR 25 and Hardiman J *JO'C v DPP* [2000] 3 IR 478.

Trial Issues

26. The appellant identifies four topics which he says demonstrate the significance of the evidence now sought to be adduced:- immigration and asylum, the Clonskeagh Mosque, the complainant's sexual experience and the validity of a marriage entered into between the complainant and the appellant.

I. Immigration and Asylum

27. The fresh evidence includes internet searches by the complainant in July 2016 for information regarding immigration and asylum in Ireland. It is submitted that this is of significance as it was the complainant's evidence at trial that the idea of seeking residence in Ireland had only come to her when she attended a conference at the University of Limerick during the week of the 21st November 2017 and that she had not completed any research prior to her arrival in the jurisdiction. Specifically, in cross-examination when asked the extent of her research she responded *"I never researched anything, never, really, I just arrived…"*

28. It is submitted that had this evidence been available to the defence at trial, a much more specific cross-examination would have been possible. Further, this evidence would have lent support to the defence contention that the complainant's allegations were motivated by her desire to gain permanent residence in Ireland.

II. Clonskeagh Mosque

29. VMGroup further recovered internet searches by the complainant as to the mosque in Clonskeagh made on the 21st November 2017. It is submitted that this is of significance as the complainant gave evidence in cross-examination that the first time the mosque was mentioned to her was by a friend she was staying with at the time of her attendance at the conference in Limerick. The complainant participated in a nikah ceremony with the appellant at the mosque on the 1st December 2017. It is submitted that this information which was not available at trial would have greatly assisted the defence in terms of testing the credibility of the complainant.

III. Sexual Experience

30. During both direct and cross-examination, the complainant gave evidence that she had not had sex before and that she knew nothing of sexual matters. VMGroup recovered internet searches for "*hot kisses and sex*" in October and November 2017, messages of a sexual nature during her stay with a friend in Limerick in March 2017, and an internet search as to the effect of diabetes on an erection during her stay with the same friend in July 2017. It is submitted that all of this information was relevant to the complainant's credibility.

IV. Marriage Validity

31. The information recovered by VMGroup includes a conversation between the complainant and another person concerning the validity of the nikah/marriage ceremony between the complainant and the appellant which took place at Clonskeagh Mosque on the 1st December 2017. It is noted that this conversation occurred on the evening of the 3rd December 2017, this person reassures the complainant that the marriage she has entered into is valid. At trial, the complainant refused to accept that a marriage had occurred between her and the appellant.

32. It is the appellant's position that the complainant was determined to remain in Ireland and that when it became clear to her that the nikah/marriage ceremony with the appellant was not going to provide her with a basis for remaining in Ireland, she instead made a complaint of sexual assault against him.

Submissions of the Respondent

33. The respondent contends that the information uncovered by VMGroup does not amount to new evidence, it is submitted that it is simply additional material of the same type already disclosed.

34. It is submitted that the quantity of any additional information in the present case does not affect the conviction in any material way whatsoever and that the appellant has failed to establish that anything new or novel arises from the information which would have affected the course of the trial itself. *The People (DPP) v Carraher* [2018] IECA 141 is cited in support of this submission.

Collateral Questions Rule

35. The respondent distinguishes the present case from the *Vattekaden* case on the basis that the failure to disclose the fact that the complainant had made similar allegations about two other people when she was a child and did not make a complaint about the appellant in relation to sexual assault is in an entirely different field to the material which was uncovered in this case by the defence expert from the complainant's own personal phone. It is submitted that the material in

this case does not reach the threshold found by this Court in *Vattekaden* that the failure to provide this evidence could undermine the accused's constitutional right to cross-examine and as a result, his constitutional right to a fair trial.

Trial Issues

I. Immigration and Asylum

36. The respondent contends that had the trial judge been aware of this additional material he would not have ruled any differently and permitted the defence to continue their line of questioning in circumstances where the complainant's response was final; she had not researched asylum and immigration in Ireland prior to her arrival in the jurisdiction.

II. Clonskeagh Mosque

37. The respondent points out that the complainant's search in relation to the mosque in Clonskeagh was made after her arrival in the jurisdiction and as such could not have amounted to research. It is submitted that it is not material that these searches were not made available to the defence at the trial.

III. Sexual Experience

38. The respondent does not see the relevance in the submissions made by the appellant as regards the complainant's sexual experience. It is submitted that this submission is in the nature of speculation and demonstrates that the additional information is being used to invent issues which do not arise in the case. The respondent rejects the contention that any such issue is material in any respect relating to the safety of the conviction.

IV. Marriage Validity

39. The respondent contends that the conversation that took place between the complainant and another person in relation to the validity of the marriage between the complainant and the appellant is not relevant and has no bearing on the appellant's sole conviction for sexual assault.

40. It is the respondent's position that the appellant has failed to set out any basis for the admission of this evidence as fresh evidence and the submission that the relevant criteria are set out in the affidavit of Ms McCumiskey is rejected. In particular, it is submitted that the appellant has failed to set out how the availability of the extra material from GR5 would have advanced the efficacy of the cross-examination of the complainant and the appellant's challenge to her account and credibility.

Discussion and Analysis

The Handset Analysis

41. The previous legal team sought disclosure of all materials. An Garda Síochána extracted material from several handsets and of interest in the present context was the mobile phone of the complainant, bearing exhibit number GR5. The material extracted from this handset which was contained on a USB key and subsequently on a disc was furnished by the defence to an expert retained by them for analysis. The extraction method used by the Gardaí at that time did not extract hidden or deleted files from mobile devices, thence the deficit in lines of information. It seems that An Garda Síochána employed an extraction method, known as the logical extraction method as opposed to a method known as the physical extraction method, the latter revealing hidden or deleted files.

42. Following the change of legal team, a further analysis of the handset was conducted by VMGroup whereupon it became apparent that a dataset existed upon which an analysis could be conducted. By comparing the material apparent in the first VMGroup report dated the 23rd November 2021 with the contents of the handset disclosed at trial, it was noted that the dataset collected by VMGroup was considerably more than that disclosed by the respondent at trial.

43. The Garda position was that more advanced software was available in 2021 than that which was available in 2018, that it was not a question of material being withheld, but that the material was unrecoverable. Any contention of deliberately withholding evidence was strenuously denied. By statement dated February 2022, the Garda who conducted the original analysis in January 2018, stated that he extracted all the data which was available in 2018 using the Cellebrite software available at the time. Subsequently, he re-examined the same device using updated software and was able to extract the same additional data which he could not do in January 2018.

44. Following the first report in November 2021, VMGroup requested the software employed by the Gardaí in 2018, however, that software was no longer available to the Gardaí or to the experts engaged by the defence and so, the most recent software available which was employed by the Gardaí was requested, both before and after the analysis in the present case. Upon the subsequent analysis by the defence experts, the extent of the discrepancy in information became clear and the respondent was informed thereof.

45. By letter dated the 9th September 2022, the Director attached comments from the Garda expert who examined the handset in 2018. The Garda explanation was that if the discrepancy was not attributable to software, that at the time of examination, the Gardaí were conducting the extraction on shared equipment, whereby the equipment may have been set by another user to exclude certain categories of information.

46. Insofar as any suggestion of deliberately withholding data was concerned, it was explained by the examining Garda that in examining a mobile device, Cellebrite software is used which extracts data from the device and creates a binary file. This file holds all the data but not in a readable format. A physical analyser is then used to decode the binary file. The result is saved in various formats. The Garda examined the binary file created in 2018 using the updated version of the physical analyser and recovered additional data. Any suggestion of deliberately withholding data is firmly rejected, it was said that if such was the case, then data would simply not be selected to be extracted into the binary file.

Applications to Admit Fresh Evidence

47. The criteria governing the admission of fresh evidence on appeal were laid down by the Court of Criminal Appeal in the decision of *People (DPP) v Willoughby* [2005] IECCA 4 and adopted by the Supreme Court in *People (DPP) v O'Regan* [2007] 3 IR 805.

48. The relevant criteria are as follows:-

> *"(a) given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.*

(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.

(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

49. It is apparent that the proposed fresh evidence came to light post-conviction. It is the position that the complainant's device was available for inspection by the defence prior to trial as was the USB key/disc with the extracted data. However, it seems that an examination of the device itself was not conducted. The report by the expert retained by the first legal team and exhibited to Ms McCumiskey's affidavit sets out the history of analysis whereby the instructions were received to carry out a limited analysis of handset content. Following trial, an examination of the device itself was conducted and further material extracted by the experts retained utilising updated software.

50. First, we say that are not at all satisfied that there was any attempt on the part of the Gardaí to deliberately withhold relevant evidence. Two explanations were offered on behalf of the respondent for the discrepancy in information; first that Cellebrite software is constantly updated which is not within the respondent's control and second, that a situation may arise whereby another user of the software may have set the equipment so as to exclude certain categories of information. We are satisfied that there was no question of culpable failure to disclose on the part of the Gardaí.

51. In any case, it is accepted by the respondent that there is now additional material to hand which was not available at trial, but it is contended that the tenor of this material is not such so as to constitute fresh evidence.

52. In *People (DPP) v McCarthy and Others* [2008] 3 IR 1, the Court of Criminal Appeal considered the issue of disclosure stating at para 45 :-

> *"There is no doubt under the modern jurisprudence of our courts that the prosecution is under a duty to disclose to the defence any material held which may be relevant to the case which could help the defence or damage the prosecution and that if there is such material in the possession of the prosecution they are under a constitutional duty to make that available to the defence. These principles were clearly stated in Director of Public Prosecutions v. Special Criminal Court [1999] 1 I.R. 60, where the obligations of the prosecution in relation to disclosure are described in the following terms at p. 71: –*
>
> *"[t]he prosecution must disclose any document which could be of assistance to the defence and establishing a defence, in damaging the prosecution case or providing a lead on evidence goes to either of these two things."*

53. The court went on to say at para. 46:-

> *"The court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis.*

Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question."

54. Kearns J. continued at para. 47:-

"The court is of the view that a failure of disclosure must be shown to have been important, as distinct from technical or trivial, if a conviction is to be regarded as unsafe. To put it another way, this court must engage with the facts of this case to see if the omission disadvantaged the defence in such a way as to render the trial unfair or the jury verdict unsafe in the particular circumstances of the individual case. That is a two-part consideration: ***was there a failure in the first instance, and, secondly, if so, did it materially affect the outcome of the case in the particular circumstances?*** *That any obligation or failure to meet same must be assessed by reference to the facts of the particular case is apparent from a line of recent authorities on the judicial review side which deal with the obligations to seek out evidence, to preserve it and to make it available to the defence."* (our emphasis).

55. Those words are apposite in the present context. It is indeed the position that there are limitations to the respondent's disclosure obligations in a criminal trial. All *relevant* material must be disclosed to the defence. In the present case, as in every case, the reality of the situation must be assessed, due to either older software or multiple users of the same software, the entire download was not available and the respondent disclosed all that was available at the time. There are circumstances where disclosure may occur either during the trial or post-trial and the real issue to consider on this appeal is whether the absence of the disclosed material impacted on the outcome of the particular case.

Materiality

56. While the focus of this appeal has really been on the materiality of the material subsequently extracted from the handset, we say that while the defence before trial did not examine the handset itself, they were entitled to take the view that all material would have been downloaded to the USB drive. Indeed, this appears to have been the reality of the position in that the Garda expert downloaded all the material extracted but additional material was subsequently found. We do not see any tactical decision on the part of the previous team not to examine the handset and indeed this is not the focus of the respondent's reply to the motion. It is obvious that the respondent could not have disclosed what it did not have. In the circumstances, however, we find that the fresh evidence satisfies criteria a), b) and c) of the *Willoughby* test, leaving the issue as one of materiality.

57. That having been said, the focus of this appeal by both parties is that of the materiality of the material subsequently found post-conviction. The appellant argues that the material contained therein would have provided a rich source of cross-examination and that the defence would have been in a position to travel routes which were denied due to the absence of this material. It is necessary then to look at the four categories identified by the appellant to ascertain the impact, if any, on the safety of the conviction.

58. This case turned substantially on the evidence of the complainant; therefore, her credibility was key. It may be helpful to set out a short summary of events leading to the dates of the allegations as given by the complainant in direct testimony.

- The complainant came to Ireland to attend a conference held in the University of Limerick on the 16th November 2017.
- She stayed with a friend in Limerick, MD.
- She was due to return to North Africa on the 20th November 2017, but decided not to do so.
- She travelled to Dublin to the International Protection Office (IPO) to seek asylum.
- She googled the location of the IPO.
- While in Dublin the complainant contacted the Mosque in Clonskeagh having heard about it from her friend, MD. She spoke with the manager of the Mosque.
- She asked whether there was any way to remain in Ireland other than asylum.
- She met with the manager and spoke a little with her. At some point, either on this occasion or perhaps another occasion, an arranged marriage was discussed.
- She remained in Dublin for one or two nights.
- She returned to Limerick.
- She travelled to Dublin during the week of the 27th November 2017.
- She again spoke with the manager of the Mosque and discussed meeting someone for a potential marriage.
- Three potential persons were shown to her and the appellant was recommended.
- She met him in the Mosque and again thereafter.
- She dined in his apartment with his child.
- During that evening, the appellant was trying to contact the Imam of a mosque to arrange a ceremony. The complainant was unsure of the nature of this ceremony.
- She slept in his child's room.
- On the 1st December 2017, the appellant was again trying to contact the Imam.
- The complainant went to the Mosque and a ceremony took place, described as a Nikah ceremony. The complainant said she had never heard of this before. Her understanding was that she was getting to know the appellant.
- Following the ceremony, congratulations ensued.
- The complainant thought this was a kind of "*fiancé stage*."
- The complainant and the appellant went to his apartment.

I. Immigration and Asylum

59. The complainant was cross-examined regarding internet searches in July 2016 concerning immigration and asylum. It is said that in her direct testimony, the complainant's evidence was to the effect that the notion of seeking residence in Ireland only came to her when she attended a conference at the University of Limerick in November 2017. Her evidence on this decision in direct testimony was as follows:-

> *"Q. And can you tell us were you due to go back to [North Africa] the following week?*
>
> *A. Yes. My visa was expiring, like, in five days so 20th was the last date when I was*

meant to go back home.

Q. Okay. So, the visa expired on the 20th, so that would be the Monday; is that right?

A. Yes.

Q. Okay. And can you tell us then did you make any decision at that stage about whether or not you were going to go home?

A. Yes. I was thinking of not going back home and it was a considerable thought, like I would say like 70 %, just 80 % I was making my mind I'm not going back.

Q. Yes.

A. And I remember I discussed this with my friend and he honestly advised me that it's not the best thing to do. He told me that it would be better if I could go back to my family and be with my mother and my parents anyway but I didn't listen to him. I was determined that I'm not going back home.

Q. And can you tell us, broadly speaking, why you didn't want to go back home?

A. I wasn't, I don't know, I wasn't happy with so many things.

Q. Yes.

A. My family circumstances, I had all the time to fight with my brothers who were living in the big house with us with their kids and I wasn't happy with my job either. It was too long a journey for me, the salary, the toxic environment around, lots of problems, administrative issues, the corruption and my family was also trying to force a marriage on me. So, I had to argue all the time, sometimes I'd get into fights with my eldest brother or the youngest. So, I wasn't happy with the way I was treated.

Q. All right. And did you make a decision then in Limerick not to go home?

A. Yes."

60. The appellant contended at trial that the complainant was motivated into making what was suggested to be a false complaint by her desire to seek asylum and/or otherwise remain here.

61. In cross-examination on the extent of her research into international protection and asylum, the following exchange took place:-

"Q. MR MULLOY: Very good. And thank you, Mr Gillane. That shortens matters. So, the thing is you didn't Google her, you in fact mentioned in your own words that it wasn't part of your researches, the mosque?

A. No, no.

Q. Your researches were directed to the IPO office and all the asylum conditions and so on?

A. I never researched anything, never, really. I just arrived. I was torn if I should go or not and I came to Dublin on that day, whatever, Monday I think, and I researched the IPO office and I went there. I submitted an application. Well, I say IPO now, it's because I lived in that system and I know what it is but before I don't know anything about seeking asylum, anything about the refugee system or nothing, I didn't research anything. I did everything myself just Googling like to find the place and I didn't know the process. So, there was guidance all over. There

was officers that would guide you what to do. It was very strange to me. I never was in one."

62. An examination of the 'Autofill' category of the new material reveals that the complainant had carried out some internet searches regarding residence, marrying an Irish resident, visa applications in Ireland. These searches were carried out in 2016 and 2017. She also researched visa UK tourist visa requirements in January 2017 and whether officials could check for illegal entry to Ireland. The appellant's contention is that if the material was available at trial, a more specific cross-examination would have been possible. Moreover, it is pointed out that the defence were stopped from continuing with this line of cross-examination regarding her intentions to remain here before she departed from North Africa.

63. In assessing whether the absence of this material impacted upon the quality of cross-examination that took place, it must be recalled that a number of matters became clear in evidence. The complainant had in fact been in the UK for a period of some months prior to November 2017 and had travelled to Ireland twice before November 2017, once in March and once in July at a time when she did not realise she was not entitled to cross the border. She did not include this in her asylum application. She had said that she had stayed in a B&B in Limerick, and she subsequently acknowledged that she had stayed with her friend, MD. She accepted that she had not initially told the Gardaí of her previous trips to Ireland, and that an additional statement had to be taken to clarify this.

64. The absence of the new data cannot be considered in isolation. The appellant contends that had the material been available at trial, the information would have lent support to the appellant's contention that the motivation behind the complaint was that the complainant was determined to remain in this jurisdiction and that when she realised the "nikah" ceremony would not provide her with a basis to remain here, she made a false complaint.

65. When one looks to the internet searches on residency and asylum, a limited number were made in 2016, and concerned residence in this jurisdiction, and immigration rules concerning marriage here, some concern visa requirements in the UK and Ireland and transit visas from the UK to Ireland. Clearly the latter signal her concerns with travel from the UK to Ireland.

66. There was, in our view, material with which to seek to impugn the complainant's credibility on the issues where the complainant had been less than forthright with the authorities. The additional new material would not have added anything of significance in our opinion. The argument is advanced that the material demonstrates a willingness to be disingenuous on the complainant's part, however, we do not see that the new material would have advanced that proposition over and above that already available to the defence at trial. The material does not reach the threshold for admissibility.

II. Clonskeagh Mosque

67. The complainant was cross-examined about her knowledge of the Mosque at Clonskeagh and stated that the first time the Mosque was mentioned to her was by her friend, MD. The appellant refers to searches in the "Autofill" category on the 21st November 2017 concerning the Islamic Centre, Clonskeagh and contends that this is material. We cannot agree, it is not a matter of any

substance at all and moreover, the searches were conducted at a time when the complainant was already in the State and staying with MD, having arrived on the 16th November 2017.

III. Sexual Experience

68. The complainant gave evidence that she had never had sexual intercourse before and that she knew nothing of sexual matters. The new material discloses internet searches for "*hot kisses and sex*" in October and November 2017, whether it is normal to bleed when the hymen is ripped, which search is dated the 3rd December 2017, whether oral sex causes AIDS, the solution for vomiting during pregnancy, whether sperm can be transmitted by hand touch, whether sperm can be transmitted through clothing and how is the sperm transmitted to the egg. The last three lines coinciding with a visit to her friend MD in March 2017. Further internet searches related to the effect of diabetes on an erection, whether pregnancy can occur directly after a period and, finally, a search enquiry as to what is the pre-ejaculate fluid, again during her stay with the same friend in July 2017.

69. It is submitted that this information was relevant to the complainant's credibility where the complainant's contention was that she had never had sexual relations previously and knew nothing of sexual matters. It is argued on behalf of the appellant that the complainant is not a reliable historian, and that this material would have been of assistance in impugning her credibility.

70. The evidence on this issue of sexual inexperience was first mentioned in direct evidence. When describing one of the incidents the complainant said:-

> *"It was painful because I never had sex before, never."*

71. The following was said by the complainant in cross-examination:-

> *"I never had sex before, I don't even know how it happens, if it just -- for a sexual education, I don't know how it happens in reality…."*

72. At a later stage she said:

> *"[I] don't know how much, I don't know how much even a girl would bleed because I was a virgin. No one touched me before."*

73. It was put to the witness in cross-examination that a conversation took place between her and the appellant following an occasion of sexual contact that she said that:-

> *"…every time I try this it doesn't work?"*

74. The complainant vehemently denied saying those words and responded:-

> *"[I] was a virgin. I never, ever had sex in my life. Never."*

75. This fresh material must be viewed in light of the other evidence at trial. The memoranda of interview with the appellant makes reference to the complainant telling him she was a virgin. He also made reference to the production of a tissue with blood on it which she showed to him after intercourse. He also stated that the complainant sent him a text message relating to the difficulties he said they encountered in having sexual intercourse as follows:-

> *"Question: "At any stage did [the complainant] ever complain?"*
>
> *Answer: "About?"*
>
> *Question: "The sexual intercourse?"*
>
> *Answer: "Sorry, complain in which way?"*
>
> *Question: "Did she ever make any complaints? Did she give out?"*

> *Answer: "She just texted me saying sorry, that she want to talk about* ***it and that she had this problem before, that she can't have sex before. She said she was a virgin, then says this.*** *So that putting something in my mind."*
> (our emphasis).

76. This, it appears to us is the height of the appellant's contention, that while the complainant said she was a virgin, she also said, according to the appellant, that she had had sexual difficulties previously. The new material, it is said would have served to assist the defence in attacking her credibility on this issue, demonstrating that she had sexual experience.

77. It must be noted that the appellant's contention in interview of this text message is not reflected in the device download before the court of trial or in the new material. The question is whether the new material could raise the possibility that she had sexual intercourse on a previous occasion, thus potentially damaging her credibility.

78. When we examine the material, it seems that none of the searches point directly to sexual intercourse, but many are indicative of a curiosity regarding sexual issues. The search relating to the question "*Is it the normal to bleed when the hymen is ripped",* is perhaps the most significant, but that is dated the 3rd December 2017, a time coincident with the allegations before the court and so could be said to be of greater assistance to the respondent and of potential concern to the appellant.

79. The fresh material does not necessarily show that the complainant engaged in sexual intercourse, rather, it could be said that the material is indicative of a person who is somewhat ignorant of matters sexual and is making enquires in that regard. This is supported by the range in the searches, queries of various kinds ranging from – *"does oral sex cause AIDS*", "*what cause a less period*", "*how is the sperm transmitted to the egg*."

80. Having said that, the defence argument bears careful consideration, that is that the material would assist in impugning the complainant's credibility. In that regard, it must be acknowledged that there are some concerning coincidences regarding the timing of certain of the messages, those being while the complainant was staying with her friend, MD. These searches could have provided a fruitful line of cross-examination. Indeed, it seems from a perusal of the transcript that some attempts were made to proceed down this line of enquiry, certainly by way of insinuation regarding the complainant's visits to MD, notwithstanding the absence of an application under s. 3 of the Criminal Law Rape Act, 1981. However, no such application could have been made on foot of the material available at the time of trial.

81. Those searches in respect of which we have a concern relate to queries about sperm transmission, in particular, whether sperm can be transmitted by hand, through clothing and how the sperm reaches the egg. While not directly indicative of queries relating to sexual intercourse, they are potentially indicative of some kind of interest or perhaps even engagement in sexual activity. Those searches were in March 2017, at a time when the complainant was residing with her friend. The second sequence of searches are dated July 2017, and relate to searches about pre-ejaculate fluid, whether diabetes can impair sexual ability and whether pregnancy can happen right after a period. The last search causes us concern in that it is clearly suggestive of a concern

regarding pregnancy. The issue of diabetes is difficult to fathom but would certainly seem to be something which a legal team might pursue by way of pre-trial disclosure.

82. It might well be that the complainant could offer an explanation for the searches if asked, perhaps the enquiry was made on behalf of someone else or perhaps there may be some other explanation, but where the complainant asserted that she had never had sexual intercourse before and had in effect no sexual experience, and where the searches took place at a time when she was staying with her friend MD, this material could well be said to be significant.

83. We do not consider the searches in and of themselves to meet the threshold required, but the timing is significant. The dates of some significant internet searches coincide with the times when the complainant resided with her friend MD, and we believe consequently that the fresh material could have had an important influence on the outcome of the trial.

84. We are persuaded that the fresh material of sexual experience, when viewed in the context of the evidence at trial, is sufficient to satisfy the test and we admit the evidence for the purpose of the appeal.

85. There must be a possibility that if the material had been available to the trial judge, that an application to cross-examine the complainant on prior sexual experience under s. 3 of the Criminal Law Rape Act, 1981, as amended, would have been made and possibly granted in circumstances where the complainant asserted that she had never had sexual intercourse or knew anything of matters sexual.

86. We do not intend to address the balance of the grounds advanced in light of our view of the fresh evidence regarding sexual experience.

Decision

87. As we have determined that the fresh evidence is admissible on appeal and that given that the evidence could have had an impact on the jury's verdict, we will quash the conviction and order a re-trial.