



THE COURT OF APPEAL

Record Number: 41/2022

**The President.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

A.M.

APPELLANT

JUDGMENT of the Court delivered on the 11th day of July 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 13th December 2021, the appellant was convicted of a single 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.

Background

2. The appellant is a Polish national and a long-term resident of Germany. The complainant is a grandniece of the appellant's wife. The offence is alleged to have occurred on an afternoon between the 10th and 13th March 2014 when the appellant and his wife were staying at the complainant's family home on the occasion of her confirmation. At the time of the alleged offending, the appellant was 60 years of age and the complainant was 12 years of age.

3. In a statement made to An Garda Síochána in February 2019, the complainant alleged that following her confirmation ceremony on the 7th March 2014, she became ill and was unable to attend school between the 10th and 14th March 2014. The complainant described that she spent these days in bed and that on a date unknown between the 10th and 13th March, the appellant entered her bedroom and got into her bed with her. They played games and took photos together on her iPad device. She alleged that he touched her inappropriately.

4. The complainant and appellant remained in contact after this via Skype. During these conversations, the complainant referred to the appellant as "uncle" and the appellant referred to the complainant as "my treasure." The appellant enquired as to whether the complainant's mother knew that they were in contact. He also asked whether the complainant was in bed and

commented that it was a "*pity that I'm not there beside you.*" These messages were recovered from the complainant's iPad and exhibited at trial.

5. The complainant first disclosed the alleged sexual assault to a school friend during the course of a school trip in October 2018. Thereafter, in November 2018, she disclosed the incident to her mother and the investigation commenced.

Grounds of Appeal

6. While 5 grounds of appeal were initially filed, grounds 4 and 5 were not advanced. The appeal proceeds on grounds 1-3 which we summarise as being:-

1. The conviction of the appellant is unsafe and the trial was unfair by reason of newly discovered evidence which, if available at trial, might have had a material and important influence on the result of the case.
2. The judge erred in admitting misconduct evidence and highlighted the most prejudicial elements thereof in his charge.
3. The judge erred in charging the jury on recent complaint where no such evidence was adduced.

Ground 1: Newly Discovered Evidence

The Appellant

7. This first ground of appeal arises from the disclosure post-conviction of the counselling notes of a Mr R which record the complainant as saying that "*the sexual abuse happened on more than one occasion.*"

8. Mr R made a statement confirming his experience as a counsellor, that he provided counselling to the complainant on the relevant dates and that the handwriting and signature on the counselling notes are his.

9. The appellant now seeks the leave of this Court to adduce the statement and counselling notes as fresh evidence. This motion is grounded on the affidavit of a Ms. Vignerte, Solicitor, MacGuill & Company, sworn on the 6th October 2022.

10. It is submitted by the appellant that the statement and counselling notes fulfil the admissibility requirements set down in *People (DPP) v Willoughby* [2005] IECCA 4, *People (DPP) v O'Regan* [2007] 3 IR 805, *People (DPP) v Dutton* [2012] 1 IR 442 and *People (DPP) v DC* [2021] IESC 17.

11. The appellant was unaware of the evidence at the time of the trial and could not reasonably have known or acquired them at that time. As averred in the affidavit, a request for disclosure was made on behalf of the appellant but due to a breakdown in communication and/or an oversight within the counselling service, the counselling notes were not disclosed.

12. It is further submitted that had the counselling notes been disclosed prior to the appellant's trial, the fundamentally different account given by the complainant of multiple sexual assaults as opposed to her account given at trial of a single sexual assault might have had "*a material and important influence on the result of the case*" as per the *Willoughby* Principles.

13. As a result, it is argued that the appellant's constitutional right to effectively cross-examine his accuser was affected, resulting in defects in the fairness of his trial. Ref: *In re Haughey* [1971] IR 217 and *Maguire v Ardagh* [2002] 1 IR 385.

14. It is said that inconsistent accounts is perhaps the most significant tool by which a complainant's credibility can be tested and undermined by an accused in the conduct of his defence.

15. The appellant relies on the following portion of Hardiman J's judgment in *O'Callaghan v Mahon* [2008] 2 IR 514:

"[...] the use of prior inconsistent statements in particular and material undermining credibility in general, have been recognised for centuries as an effective way of contradicting a witness; that this can be demonstrated from cases both ancient and modern; that such statements are regarded as disclosable in criminal proceedings and as discoverable relevant and admissible in civil proceedings."

16. Further reliance is placed on Hardiman J's reference to his remarks in a previous judgment, *O'Callaghan v Mahon* [2006] 2 IR 32:

"In my view, it is a matter of common justice, and indeed common sense, that a witness who makes a grave allegation against another may be contradicted out of his own mouth where that is possible. If a right to do this were not assured, cross-examination would be gravely hampered, and even subverted. It is a statement of the obvious to say that the credibility of a particular statement made by a particular person is reduced or destroyed if he has made a contradictory statement on a previous occasion, unless that can be explained in some way. Conversely, consistency enhances the credibility of a statement. These propositions have been recognised for centuries in the common law."

He continued:

"[...] the point is that it has long been established that the comparison of a witness's earlier account with that which he gives in evidence and the establishment of the consistency or inconsistency of evidence with a previous statement is a factor relevant, and sometimes critical, to credibility."

17. Applying the above to the present case, it is argued that had the defence been in a position to establish that the account given by the complainant in counselling was inconsistent with the evidence she gave at trial, or the account she gave to her friend or to her mother or to An Garda Síochána, such may have influenced the outcome of the trial. Attention is drawn to the fact that the verdict was a 10:2 majority.

18. The importance of the disclosure of a prior inconsistent statement was outlined by Hardiman J in *O'Callaghan v Mahon* [2008] 2 IR 514 in reference to *People (DPP) v Wall* [2005] IECCA 140:

"The reason why the making of an inconsistent, false or dubious allegation requires to be disclosed to a person confronted with another allegation by the same accuser is quite obvious. Depending on the context, the making of a previous false or inconsistent allegation may indicate express malice against the victim of that allegation or, if the subject of the earlier allegation was a different person, may indicate a generalised malice or a tendency to lie or to fantasise."

[...]

I wish to emphasise that the manifest utility of evidence of previous false or inconsistent allegations is a matter of ordinary experience, by no means confined to

the context of a criminal (or indeed a civil) trial. It is a matter of natural justice and elementary fair procedures that a person accused of very serious things in a public forum be given all relevant information in the possession or at the disposal of the enquiring body for use in an attempt to vindicate himself."

19. Moreover, the appellant points out that the potential value to the defence of a prior inconsistent statement is magnified where, as in the present case, there is an absence of any forensic or other evidence corroborating the complainant's account. Hardiman J in *PO'C v DPP* [2000] 3 IR 87 is quoted as follows:

"[E]very effort must be made by both parties but particularly the prosecution, to try to avoid a situation where there is no island of fact, and where bare assertion can be countered only by bare denial. This must be done first in questioning the complainant: everything he or she says must be recorded, whether it forms part of the eventual formal statement or not, and whether it appears to assist the prosecution or not. The charges should be no vaguer in point of time, place or otherwise than they need to be, and any variation between an earlier and a later account must be fully noted and disclosed ..."

20. It is submitted that in the circumstances the counselling notes are admissible as fresh evidence and ought to be admitted. It is further submitted that the unavailability of the counselling notes to the defence during the trial, in particular, during the complainant's cross-examination had the result that the appellant "*lost the real possibility of an obviously useful line of defence*" in accordance with *SB v DPP* [2006] IESC 67.

21. It is argued that the appellant has suffered clear and specific prejudice in his defence of the sexual assault allegation and that therefore, his conviction is unsatisfactory and should be quashed.

The Respondent

22. In response, it is said that it is necessary for this Court to have regard to the entire background to the complaint. In that regard, it is stated that the first complaint was made to a school friend in October 2018, this witness' statement in the book of evidence set out an incident of sexual assault. This account was confirmed in cross-examination. In November/December 2018, the complainant disclosed the incident to her mother. Particular attention is drawn by the respondent to the complainant's formal statement of the 25th February 2019 and a Tusla note of the 19th March 2019, both of which record a single incident.

23. In her statement, the complainant outlined a single incident of sexual assault but also that there had been continuing online contact between her and the appellant via Skype. The complainant stated that "*I didn't think much of it at the time. Looking back on it now, I think the messages were very inappropriate.*" It is submitted that the appellant was clearly of the view that she had been taken advantage of by the appellant in the Skype calls and messages that passed between them. Similarly, a note in the Tusla file prepared after an interview with the complainant, refers to both the single incident in the complainant's bedroom but also to continuing "*inappropriate Skype messages.*" It is the respondent's position that these elements of the background of the complaint provide context to the single brief comment in the counsellor's notes.

24. In addressing the non-disclosure of the counselling notes, the respondent explains that a letter from the manager of the counselling service indicated that the complainant had attended the centre on two occasions but that there were no records of these meetings. The respondent had no reason

to doubt the accuracy of the letter and it was included with the Tusla file as part of the disclosure documentation furnished to the appellant. It later transpired that this information was incorrect, and the complainant had in fact undergone six sessions of counselling and there were three manuscript pages of notes of these interactions.

25. In response to the appellant's contention that the defence was deprived of an opportunity to use a prior inconsistent statement by the complainant, the respondent points to the consistency of the complainant in all the accounts made to all persons prior to meeting the counsellor, up to and including her account given to the jury. It is submitted that it is entirely possible to interpret the note as consistent with the complainant's allegation of a single incident of sexual assault in her bedroom followed by the further wholly inappropriate Skype messages as forming a sequence of ongoing sexual abuse.

26. It is contended that the weight which the appellant seeks to place on this "*newly discovered evidence*" is not borne out once one examines the consistency of the complainant throughout the pre-trial process and through her engagement with the relevant authorities and thereafter her consistency throughout the trial.

Developments Before This Court

27. During the hearing of this appeal on the 12th January 2023, upon a consideration of the uncertainty surrounding the alleged statement of the complainant as contained in the counselling notes, this Court deemed it appropriate for contact to be made with the complainant in order to ascertain the accuracy of what she is recorded as having said.

28. Pursuant to s. 3(3)(a) of the Criminal Procedure Act, 1993, the Commissioner of An Garda Síochána was directed to take a statement from the complainant in the context of the particular portion of the counselling notes of the 17th September 2019 and to enquire as to whether the complainant has a recollection of that and also offer her an opportunity to expand or contextualise the impugned portion of the notes.

29. In her statement dated the 23rd January 2023, the complainant denies the accuracy of the notes, stating:- "*I know that I didn't say that to [the counsellor] on this day because it was always the one occasion*" she further proffers the explanation that "*I did tell [the counsellor] about [the appellant] Skype Messaging me after the sexual assault so maybe he had interpreted this as sexual abuse also.*"

Discussion

30. The principles for the admission of fresh evidence on appeal are now well established through the decisions of *People (DPP) v Willoughby* [2005] IECCA 4 and later in *People (DPP) v O'Regan* [2007] 3 IR 805.

31. The relevant principles 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."

32. It is apparent that the proposed fresh evidence in the present case came to light post-conviction. It is common case that due to an error in communication or oversight within the counselling service, the notes were not disclosed until after the trial and so the issue relates to whether the contents of the notes might have had a material and important influence on the outcome of the trial.

33. In that regard, the consistency of the complainant in maintaining that she was abused on one occasion only is significant. When she first disclosed the abuse to her friend, she specified one incident, when she told her mother, she specified one incident, when she made her statement to the Gardaí, she spoke of one incident, her evidence revealed one incident and when she was asked post-conviction at the request of this Court about the counselling by Mr R, she reiterated one incident.

34. It is noteworthy that the appellant was in this jurisdiction for a very short period of time, in March 2014, whilst the length of stay is not in any way determinative, it is a relevant factor in assessing the influence the notes might have had on the trial, where one sentence in the note states that the abuse happened on more than one occasion, whereas the complainant maintained in her disclosures, her statement and her evidence that it was confined to a single occasion.

35. It is argued on behalf of the appellant that the content of Mr R's notes could have been used in cross-examination to impeach the complainant's credibility. The purpose being to demonstrate a material inconsistency between the complainant's evidence at trial and what was noted by Mr R at the counselling session. However, in our view, we can safely say that if the question was posed to the complainant at trial that she informed Mr R that she was abused on many occasions by the appellant, the likely response is that contained within her recent statement. Mr R may well have been called and confirmed his notes, but we do not see how this would have had a material influence on the trial.

36. In addition, the respondent would have been in a position to emphasise the various disclosures made by the complainant, which all indicated one incident of abuse, and so we conclude in the circumstances, that the value of the material if available at trial would not have had a material and important influence on the outcome of the trial.

37. We agree that the evidence was unknown at trial and could not have reasonably been known or obtained for the trial, but we are not persuaded that the new evidence would have had the necessary impact on the trial in that we do not see that it would have caused the jury to have a reasonable doubt in light of the balance of the evidence on the issue.

38. Accordingly, we are not persuaded that the conviction is unsafe on this ground.

Ground 2: Misconduct Evidence

The Appellant

39. The second ground of appeal concerns the decision of the trial judge to admit into evidence the written records of a series of messages between the appellant and the complainant via Skype

between the 13th March 2014 and the 2nd April 2014, after the alleged sexual assault. It is also said that the judge selected the most prejudicial elements of these messages in his charge to the jury and thus compounded the error.

40. It was the defence's position at trial that the record of the Skype messages was inadmissible misconduct evidence and that it did not meet the test for the admissibility of background evidence set out by Denham J in *People (DPP) v McNeill* [2011] 2 IR 669 as follows:-

"Background evidence", in the context under consideration, has a specific meaning. It is evidence which is relevant and necessary to a fact to be determined by the jury. It may be admitted to render comprehensible the relationship between the complainant and the accused. Thus it may relate to such issues as consent or the absence of a complaint over many years. These examples are not exhaustive of the circumstances where background evidence may be admitted. In such circumstances, even if the "background evidence" is of alleged criminal acts not charged on the indictment, such background evidence is not inadmissible and it should not be excluded as such.

Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior to the offences charged. Background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence was admitted, the evidence before the jury would be incomplete or incomprehensible. Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible.

Whether or not background evidence is to be admitted is a matter to be determined by the trial judge in all the circumstances of the case. The fact that the evidence tends to show the commission of other crimes does not render it inadmissible. The test to be applied is that of relevancy and necessity."

41. The defence argued that the prosecution was seeking to have evidence in relation to an innuendo placed before the jury, the innuendo being that the appellant's sentiments of affection for the complainant via Skype were relevant to the issue of whether or not he sexually assaulted her and thus admissible. Emphasis in this regard is placed on the fact that the Skype exchange took place after the alleged sexual assault and the basis of the prosecution was that this was one single incident and not multiple.

42. It was the prosecution's position at trial that the Skype conversation explained the relationship between the appellant and the complainant and therefore ought to be admitted in accordance with *McNeill*. It was argued that the conversation took place very close in time to the allegation of sexual assault and further that as it took place between a 60 year old man and a 12 year old girl, the conversation came within the general rubric of misconduct evidence.

43. The prosecution also argued that the conversation could be used to demonstrate naivety on the part of the complainant and explain the delay in the making of her complaint. The prosecution further pointed to portions of the conversation that they said show that the appellant was anxious that the conversations were not being made public.

44. The defence's response was that there was nothing in the messages which could be used to explain the complainant's delay in making a complaint as the appellant did not suggest at any time during the conversation that she would be in trouble if she disclosed what had happened.

45. The trial judge ruled the conversation admissible on the basis that it was relevant and necessary to render comprehensible and to explain the relationship between the complainant and the appellant and also the delay in the making of the complaint.

46. It is submitted by the appellant that the complainant's own evidence at trial supported the defence's submissions in this regard. It is noted that the complainant said that she "*didn't think much of*" her conversations with the appellant and that "*it just felt like a normal conversation.*" It is said that there was no suggestion that the Skype conversation was such as to dissuade the complainant from making a complaint or caused her to be in fear of him or of the consequences of making a disclosure and therefore, it is submitted that the Skype conversation was not capable of explaining the complainant's delay in making a complaint to the Gardaí.

47. The appellant draws attention to the fact that the Skype conversation took up a very significant portion of the complainant's direct evidence at the trial and that evidence on the matter was given by her mother, stepfather and a Garda witness and that the appellant's partner was cross-examined at length on the issue. Prosecution also spent a considerable portion of their closing speech on the Skype conversation. It is therefore submitted that because of the length of time spent dealing with the Skype messages at trial there is a very real risk that they took on a disproportionate significance in the minds of the jury.

48. It is pointed out that the complainant described her relationship with the appellant as being akin to a grandfather/granddaughter relationship, that they hugged when they met, that there was a good bond between them and that she viewed him as someone who was good fun. In that context, it is submitted that the suggestion that there was something unsavoury about the appellant showing or seeking affection from the complainant over Skype was both unwarranted and prejudicial.

49. It is further submitted that the prejudice suffered by the appellant was compounded by the trial judge's decision to read the most prejudicial parts of the Skype conversation during his summary of the evidence for the jury.

The Respondent

50. While the respondent and the appellant both rely on paragraphs 48 and 49 *supra* of McNeill the respondent also relies on the following paragraph:

"In considering whether background evidence may be admitted, relevant considerations may include:- (i) Consideration of whether the background evidence is relevant to the offence charged. (ii) Consideration of whether background evidence is necessary to make the evidence before the jury complete, comprehensible, or coherent. Whether without such background evidence the evidence may be incomplete, incomprehensible or incoherent. (iii) Consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself a ground for excluding the evidence. (iv) Consideration of whether the background evidence may be necessary to show the real relationship between relevant persons. The test to be applied by the court is whether the background evidence is relevant and necessary. The test is not that it would merely be helpful to the prosecution to admit the evidence."

51. Counsel agreed that the record of the Skype messages was prejudicial to the appellant however, counsel for the prosecution argued at trial that it was relevant and necessary within the meaning of the *McNeill* test.

52. It is submitted by the respondent that it is of significance that counsel for the appellant specifically asked the trial court not to give a misconduct warning to the jury. Further, it is pointed out that the record of the Skype messages was before the jury in its entirety as an exhibit in the case and so the jury had them to go through themselves in the jury room in any event. In that context, it is submitted that should the defence have wished the judge to highlight certain messages, they ought to have made a requisition. It is posited that this may not have been done for tactical reasons.

Discussion

53. The law on the admission of this category of evidence is now well settled with the seminal authority being that of *McNeill*, where the legal principles were distilled as follows at paragraph 50:-

- "(i) Consideration of whether the background evidence is relevant to the offence charged.*
- (ii) Consideration of whether background evidence is necessary to make the evidence before the jury complete, comprehensible, or coherent. Whether without such background evidence the evidence may be incomplete, incomprehensible or incoherent.*
- (iii) Consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself a ground for excluding the evidence.*
- (iv) Consideration of whether the background evidence may be necessary to show the real relationship between relevant persons."*

54. There is no doubt that the material admitted was prejudicial evidence, the Skype messages demonstrated inappropriate communication between a granduncle and his 12 year old grandniece. The material was located by examination of the complainant's iPad, and at trial, the content of the messages was adduced before the jury and the entire thread was exhibited. The messages took place in March/April 2014.

55. The following is an excerpt from the complainant's direct evidence:-

"And it was the 14th of March 2014 at 22.14. He said: "Good night, my sweetie. Uncle." You said: "Good night." He sent a message: "Why are you not sleeping?" And you said: "I can't sleep." He then sent a message: "I have to wait because you are downloading the picture. Shall I lull you to sleep?" You replied: "No, that's okay, I'll manage." And he sent the message: "Is Mum already sleeping?" It's a reference to your Mum, [complainant's mother]?"

A. Yes.

Q. *And you replied: "Yes, she is. She just woke up a second ago because she received a text." He sent a message: "You've off to bed." And you replied: "I am already in bed." He then sent an electronic message: "Pity that I'm not there beside you." With a sad Emoji and you sent a message: "Why?" He sent a message: "I would cuddle with you." And you sent a message: "We will meet one day and then cuddle." He sent a message: "I'm so happy but when will it happen?" And he replied: "I don't know ..." -- or you replied: "I don't know, probably next year." And he replied: "Hooray".*

56. At a later stage the following messages were sent:-

"He said: "I will do anything for you, my treasure." And then you said: "So, what if I asked you to push me from a cliff, would you do it? Would you?" And he replied: "Of course not, or we would jump together as a last resort, but that will not happen, my sunshine."

57. On the 16th March and 17th March, 2014, there were further exchanges including:-

"And he said: "It is not so easy for me to write with a sad face." And you replied with a smile: "Thank you, I love you, good night, smile." And he said: "I love you too. Now we told each other the truth, smile. That's what I've been waiting for you to say." And you said: "Smile, good night." And then he said: "Now, I won't be able to sleep." And you said: "Why?" And he said: "Because you love me." And you replied with heart emotions and said good night and he replied with heart emotions and said my treasure and the date stamp then moves on to the 16th of March at 15.57, where he sent you a picture and says: "Hello, darling. I've just sent you one picture." And you say: "Cool." He sends a kiss emotion and you send a smile. He says: "Why don't you send me a kiss? You don't feel like chatting today?" You then sent a kiss emotion and said: "I'm watching TV." And he replied: "And I play chess on my computers and think of you." And you say: "That's cool but I'm trying to watch TV." And the time stamp moves on to the 16th of March at 22.06 and he initiates conversation by saying: "Hi, are you in bed? If you don't feel like chatting, just don't reply." And the same date stamp turns up and you say: "Hi, I'm sorry, I did not hear your message because I was watching TV and then I went to the kitchen and the iPad was in the living room. Good night any ways." And you sent a smile with kiss emotions and then the date stamp moves on to the 17th of March and the time is 17.46 and you initiate by saying: "Hey." And he said: "Hi darling, I must have come across your mind for the first time. That's very nice." And you replied: "No, it's just I didn't hear your message yesterday. What? You will not talk to me anymore?" He replied: "If you leave your iPad somewhere there and go elsewhere, that's no wonder you don't hear it, my sunshine." You messaged: "I was watching TV and then I went upstairs and forgot about it and then I had to go to sleep." He said: "So, it means you forgot about me too." And you said: "No, I just forgot the iPad."

58. Another sequence reads as follows:

"He messaged: "Okay. Did you talk to grandma about coming to visit us in the summer?" And you replied: "No." He messaged: "So, talk to her when you get the chance. Maybe you could come to us in this time?" And you replied: "Yeah, maybe, if Mum got some days off work." He then messaged: "You could come alone and I would pick you up." And you replied: "I think you can go by plane alone first when you are 16." You were 12 --

A. At the time.

Q. -- at the time. And then he sent a message: "I want to see you again."

59. The trial judge found the material admissible on the basis that the exchanges were relevant and necessary in order to render comprehensible the nature of the relationship between the appellant and the complainant and to explain the delay in complaining.

60. It is important to note that these messages are sent in the aftermath of the offending and so are directly relevant to enable the jury to determine the nature of the relationship between the parties. The messages clearly show an unusual and inappropriate relationship between a grown man of some 60 years old, and a child of 12 years. The nature of the appellant's communications is clearly and demonstrably inappropriate.

61. The evidence was undoubtedly relevant to the offence charged. The temporal aspect of the communications rendered the material relevant as of course did the nature of the exchanges. The evidence was necessary to ensure the jury were fully aware of the relationship between the parties or indeed, and more significantly, the relationship as the appellant perceived it.

62. We do not find any error in the admission of the evidence and reject this ground.

63. Insofar as it is said the judge compounded this error in finding the evidence admissible and caused further prejudice to the appellant by summarising from the most prejudicial portions of the messages, we are not persuaded there is merit in that contention.

64. Firstly, the jury had the entire thread by way of exhibit for their consideration, secondly, the judge was entitled to decide how he would summarise the evidence as he thought fit bearing in mind that the charge should assist the jury in setting out the relevant legal principles and the relevant evidence.

65. It is clear that the judge summarised the relevant evidence from the exchanges, those being the messages which went towards the nature of the relationship. The jury had the thread and were in a position to examine all the messages if they so wished.

66. We reject this ground of appeal.

Ground 3: The Direction Regarding Recent Complaint Evidence

The Appellant

67. This third ground of appeal concerns the trial judge's decision to charge the jury on the issue of recent complaint evidence when, in fact, no such evidence was adduced.

68. The respondent conceded that there was no admissible complaint evidence. A friend of the complainant was called to explain the initiation of the prosecution.

69. Nonetheless, when the trial judge was charging the jury, he said as follows:

"Complaints may be proven in criminal prosecutions for sexual offences where the complaint has been made a speedily as could reasonably be expected and in a voluntary fashion and not as a result of inducements or exhortations made in a spontaneous manner. Once evidence of the making of the complaint is admissible, particulars of the complaint may be proved by calling the relevant witness to whom the complaint was made by the victim. Complaints are admissible not to prove the truth of the matters, but to confirm the testimony of the complainant. Members of the jury, the evidence you have heard relating to the complaint is not evidence of the facts of which the complaint is based, but the conduct in so complaining is consistent with her testimony."

70. It is the appellant's position that this element of the judge's charge must have left the jury confused and may have caused them to improperly treat the evidence they had heard regarding the making of disclosures by the complainant to her friend, her mother and stepfather and/or to An Garda Síochána as recent complaint evidence supporting the complainant's credibility.

71. While a requisition was raised in this regard and the jury was re-charged to the effect that there was no recent complaint evidence in the trial, it is submitted that the harm had by then been done and was irremediable.

The Respondent

72. It is the respondent's position that despite making it clear that it was not the intention of the prosecution to adduce any recent complaint evidence, the defence adopted a strategy of eliciting, through cross-examination of the prosecution witnesses, the nature and content of all of the various complaints which had been made. This was done with a view to undermining the complainant's credibility. In particular, the defence cross-examined the complainant on her disclosure to her school friend in 2018 which ultimately led to the relevant recent complaint portion of that witness' statement being put to the complainant.

73. It is submitted that in his charge the judge was simply indicating that there had been evidence of complaint in 2018 and 2019 and that this evidence only went to the credit of the complainant and was not evidence of the facts upon which the complaint was based. It is further submitted that the trial judge did not fall into error but rather was properly dealing with an issue which was brought into the case by the defence and upon which the jury had to be appropriately instructed.

74. It is contended that, in any event, the issue was dealt with at the requisition stage with the trial judge ultimately acceding to the defence requisition. It is submitted that the trial judge dealt with the issue in an entirely sensible fashion and did exactly what was asked of him by counsel for the defence. No further requisitions were raised.

Discussion

75. The complainant was cross-examined on the complaint made by her to her friend some years after the event in question. The portion of the complaint set out in her friend's statement was read to the complainant for her comment. This was done for the purpose of undermining her credibility. Her mother was also questioned about the delay in contacting the authorities after the complainant complained to her. The notion of a recent complaint was in the case and so no issue of substance can be taken with the judge's direction.

76. However, when asked to re-charge the jury by counsel for the appellant, the judge did so in precisely the terms requested. That is, he instructed the jury that there was no recent complaint evidence to support credibility.

77. No further requisition was raised. It is said that the judge's initial direction to the jury must have left the jury confused, and that they may have thought the complaint evidence to the friend, the mother and stepfather all served to bolster the complainant's credibility.

78. However, where there was extensive cross-examination on complaints made by the complainant, together with the direction to the jury that there was no recent complaint evidence to support credibility, we do not agree that the jury were left under the incorrect impression.

Cumulative Grounds

79. It is contended that even if this Court did not find an error on each ground considered separately, when viewed cumulatively, the alleged errors impacted on the overall fairness of the trial.

80. We cannot agree with this submission, we do not find favour with the grounds of appeal whether viewed on a standalone basis or cumulatively and accordingly the appeal is dismissed.

