APPROVED **REDACTED**

THE COURT OF APPEAL

Court of Appeal Record No. 66/2021

President
McCarthy J
Ní Raifeartaigh J

BETWEEN/

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

PROSECUTOR/RESPONDENT

-AND-

P.K

ACCUSED/APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 17th day of February 2023 by Mr Justice McCarthy

1. This is an appeal against conviction. The appellant pleaded guilty on the 3rd of July 2018 to one count of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by section 37 of the Sex Offenders Act 2001. Sentencing was dealt with in the Circuit Criminal Court on the 5th of March 2021 on Bill No: LSDP0048/2016. The appellant received an effective sentence of four years imprisonment with the final two years suspended on terms. His appeal pertains to the refusal of the judge on the 21st of June 2019 to permit him to vacate his plea of guilty. The judgment comprehensively dealt with all aspects of the matter. That refusal was the subject of unsuccessful judicial review proceedings by the appellant to quash the decision of the Circuit Court. Such application was refused, and the matter is now before us in the ordinary course of criminal proceedings.

2. Initially two charges of sexual assault for offences against two complainants which were alleged to have occurred at the appellant's business premises, were before the Court on that Bill. The facts of the matter now before us are as follows. On the 15th of September 2015 the complainant had left school and with her father at approximately 3.50pm visited the appellant's business premises. Ostensibly for a legitimate purpose the appellant brought her into a back room purportedly to examine her. While carrying out this examination, the appellant proceeded from feeling the complainant's neck glands to moving his hands down to her chest. The appellant was not wearing any gloves and progressed with his hands underneath the victim's clothing feeling her stomach with his bare hands and placing his hand underneath her skirt. The appellant rubbed his hands across the leg of the victim and placing them into her underwear and felt the outside of her vagina. The victim, who was 16 years of age at the time, was in a state of shock and left the premises afterwards. Subsequently she told her father what had happened, and he entered the premises to confront the

appellant. Gardaí were called by the victim's father and she made a complaint. She was then advised to go to the local Garda Station to make a formal statement.

3. In the immediate aftermath of the incident and, after caution, a statement was taken from the appellant. The appellant acknowledged that the victim had been at his business premises but denied any wrongdoing. On the 25th of November 2015, the accused was arrested and interviewed on two occasions. The statement of complaint from the victim was read to him and he denied its contents and described it as "*absolute lies*". He was prepared to accept that he had checked her nose but maintained that that was the extent of the examination.

4. In a victim impact statement, the complainant describes being in her fifth year of secondary school with the hope of doing well in her Leaving Certificate so as to attend university. She stated that the sexual assault had had a major negative impact on her life whereby she no longer felt comfortable in the presence of another male, including friends and family. She struggles with intimacy and she says she could let anyone get close to her. She described herself as feeling "*like a shell of her former self, carrying around the trauma and pain that the [appellant] imposed on her on that day*". She described the difficulty of enduring years of going to Court which placed her life on hold for nearly six years and was a humiliating and difficult experience to sit through. She became moody and withdrawn and, on many occasions, felt like giving up. One of the Court dates was during the victim's Leaving Certificate examinations, she described going to Court in the middle of her exams which sapped all her energy and focus away from studying. She was too depressed to attend school and did not have the ability to focus on exams which in turn resulted in her failing to get the results she had hoped for and her dreams of going to college were crushed. She feels that her life has stood when all of her contemporaries progressed with their lives. Her teenage years were devastated by the actions of the appellant and she was determined that this would not be so during her 20s.

5. The procedural history of the appellant's conviction is as follows. The appellant was represented by senior and junior counsel at all times, though a number of changes of senior counsel had taken place over the relatively lengthy period over which the matter came before the Court on numerous occasions. It is not suggested that such changes of counsel are open to criticism. Initially on Bill No: LSDP0048/2016 the appellant was charged with offences of sexual assault of two complainants. The first complaint arose as a result of an incident alleged on the 10th of August 2015 and the second complaint (being that giving rise to the present appeal) occurred on the 15th of September 2015. Both offences were alleged to have occurred when the complainants attended as patrons at the appellant's business premises. Whilst the matter was before the Court on a number of occasions, the appellant was ultimately arraigned on the 27th of June 2018 and he pleaded not guilty to both counts. Thereafter the appellant applied to sever the indictment. The appellant also sought a ruling to the effect that regardless of which counts or counts proceeded (should severance occur) the evidence of two female witnesses who with allegations of a similar type could not be received. The procedural basis of seeking the latter ruling is not clear but in any event his Honour Judge Johnson delivered a reserved judgment on the 29th of June 2018 where he acceded to the appellant's application to sever the indictment but ruled that the evidence of (what we would call) the (two) "*other female witnesses*" was admissible in relation to the charge with which the

prosecution, after severance, was proceeding and before us. The Circuit Court judge's judgment was comprehensive.

6. On the 3rd of July 2018, the matter was before the Circuit Court for trial before a jury which had been empanelled the previous week. Following a recess at the request of the defence, the appellant was re-arraigned on the single count then before the Court and entered a plea of guilty. Sentencing in the matter was adjourned to the 4th of December 2018, but when the appellant returned to Court the following morning when it was envisaged that he would be arraigned on two other similar indictments, on his evidence he sought to change his plea. The appellant's solicitor and junior counsel in their affidavits address the question of whether or not the appellant would be granted bail after his plea and this was initially agreed with the prosecution on the 3rd of July 2018 but subsequently that position changed on the morning of 4th of July 2018.

7. With new legal representation, by Notice of Motion dated the 19th of December 2018, the appellant brought an application before Circuit Court seeking an order permitting him to change his plea from guilty to not guilty. This application was grounded on the affidavit of the appellant dated the 19th of December 2018. The application for leave to change his plea was adjourned in order to enable his previous solicitor and counsel an opportunity to consider and address the substance of the appellant's application. The appellant lodged a supplemental affidavit dated 3rd of April 2019 exhibiting the medical report of a consultant forensic psychiatrist, dated the 25th of February 2019. Thereafter the appellant's former solicitor and counsel each swore affidavits in reply.

8. By Notice of Appeal dated the 30th of March 2021, the appellant appealed his conviction on the sole ground that the "*Judge wrongly refused to change [the Appellant's] plea from guilty to not guilty*".

9. Counsel for the appellant submitted that the judge in his ruling appears to have asked himself what is described as "*the wrong question*" in determining the application before him. In particular, they submit that the judge sought to decide whether the appellant when he entered the plea of guilty "*had full capacity*" and whether he was "*competent and capable both mentally and physically to enter the guilty plea*". It was submitted that having regard to the psychiatrist report, it was not in debate but that the appellant had capacity and was so competent and capable and the real issue was whether or not his plea was, to coin a phrase, the "*voluntary emanation of a free mind*" (our terms). The appellant's contention was that he had been impaired by the consumption of Xanax tablets and on the fact that he felt a sense of pressure and stress by reason of being confronted with the prospect of imprisonment for a significant period of time if he maintained his plea of not guilty. In fact, it seems to us that the judge quite properly referred to the issue of capacity in light of the fact that he had before him certain psychiatric evidence – although in theory it may not have been necessary. He did not accordingly "*answer the wrong question*". We cannot set out the lengthy judgment in *extenso* but we think that the ultimate basis of his decision can be seen in the concluding portions of his judgment which we will quote here: -

> "*In the light of [the forensic psychiatrist's] report, the evidence of [the appellant's solicitor] and [junior counsel] together with the court's own observations and clear recollection when this accused enter his guilty plea during the course of the trial on 3 July 2018, the court is satisfied that the accused had full mental capacity to give instructions to his legal advisors, to understand the nature of the charges and the consequences of the plea. In other words,*

the accused was fit to enter into his guilty plea. I am further satisfied that given that the accused had the benefit of legal advice he understood the nature of the charge against him and entered a clear and informed plea of guilt. I do not accept his contention that his state of mind was such that he didn't know what he was doing and that he panicked into entering the guilty plea. I am absolutely satisfied that the accused knew exactly what he was doing when he entered the guilty plea. In the circumstances I am refusing the application to vacate the guilty plea."

It can be seen accordingly that he addressed the issue really in contention and that apart from any question of capacity, he rejected the core ground of the application.

10. Apart from the submission that the judge "*asked the wrong question*", which might, if correct, have undermined his ruling, counsel's submissions to us consisted of an engagement with the evidence and the judgment amounting to a criticism of the judge's findings on the merits. There were no perverse findings of fact and no material errors. The findings of the judge were legitimately made on the evidence before him. Heavy emphasis in this respect was placed on what was suggested to be the *volte-face* of the appellant in pleading guilty when over a prolonged period and in consultations with his counsel, he had stood firm in contesting the matter – it was submitted that the change that occurred was inconsistent with what had gone before, and this supported the contention that it ought not to be relied upon.

11. The judge was confirmed in his finding based "*on the evidence of [the solicitor] and [the junior counsel]*". Counsel for the appellant contend that the solicitor in his affidavit stated that the appellant had made known his desire to change his plea on the 4th of July 2018 whereas junior counsel stated that this had occurred on the 10th of July 2018, and this was a discrepancy that the judge did not advert to or attempt to resolve. Counsel contended the judge's approach on this aspect was erroneous.

12. The appellant's solicitor in his affidavit said the following: -

"*23. I say that following the plea of guilty the Jury were discharged… The defence were informed that bail would not be an issue on the remaining counts and they were listed for arraignment the following day…*

24. I say that literally minutes before [the appellant] was to be arraigned – the prosecutor was informed by the Gardaí that bail was not at issue. This intervention did not come from prosecuting counsel and it would appear it took the prosecutor by surprise, as the prosecutor had agreed bail on a counsel to counsel basis following discussions with the Gardaí and now there was a change to that agreement…

26. I say that the development caused [the appellant] to be very agitated and he did at that stage express a desire to vacate his earlier plea, in the context of his perceived "about turn" unfairly by the State regarding the issue of bail."

whereas counsel deposed the following in his affidavit: -

"*18. As per my memo – I accept that [the appellant] did indicate that he wished to change his plea – however this occurred on the 10th of July and not on the 4th of July as I recall. This conversation occurred in the presence of myself and my Solicitor… When [the solicitor]*

stated that he wanted to change his plea – I did state that I would in all likelihood have to withdraw from the case."

13. We think that the discrepancy is of no significance; the dispute on this aspect of the matter is whether or not the change of plea was triggered by the fact that there was an objection to bail on the 4th of July contrary to what had been agreed the day prior. The appellant says that it was only after he told junior counsel on the 4th of July 2018 that he wished to change his plea that "*there was an objection to bail*". It is suggested that the judge erroneously understood that the appellant's affidavit was to the effect that "*the state changed its attitude towards bail after he had indicated his intention to change his plea*". One may parse and analyse the forms of words used but the real question was whether or not the appellant was told of the change before or after he had indicated his change of mind. If one looks at the judgment as a whole, it is quite plain that the judge reviewed all the facts by reference to all the evidence and that his understanding of that evidence was accurate, full, and complete. It is not at all clear to us that there was some error by the judge. In any event it cannot undermine or override his overall conclusions of fact properly reached in the ordinary way.

14. Furthermore, it was submitted by counsel that the judge did "*not accept [the appellant's] contention that his state of mind was such that he didn't know what he was doing"* and the position that the appellant "*panicked into entering the guilty plea*" was entirely misconceived on the part of the judge. This criticism stands ill with the proposition that the judge "*asked the wrong question*" and addressed capacity. What is this proposition other than one going to capacity? Insofar as the judge rejected any suggestion of incapacity, it is our view bordering on the unstatetable on the evidence that the Xanax could have in some sense diminished his capacity to deal with the issue and make what we might call a valid decision. This is clear from what the consultant forensic psychiatrist expressly stated as follows: -

"*With regards to the impact of his use of Xanax (a benzodiazepine, small dose) on the morning of 08/07/2018, this in my opinion has no bearing on his fitness to plead. It may however have impaired his judgment, rather than his capacity to instruct his legal team, in respect of the consequences of entering a guilty plea. In my view, if it is to be believed that he was advised that, in the experience of his legal team, that he was likely to be given a custodial sentence, this would have produced significant emotional distress and it is understandable in the light of this apparent new advice that he accepted it in order to mitigate the length of sentence he may receive. If the Xanax had any impact, which I suspect would have been minimal in any case, it would not satisfy the essential criterion of having a mental disorder as required by section 4 of the CL(I)A 2006*."

15. Counsel for the prosecution in oral submission made a reply primarily focused on this basic proposition: there was simply no evidence to suggest that what the appellant did in entering a plea was involuntary and that is of course the case. Counsel said there was no error on the discretion of the judge. There was no contention that the appellant was wanting of advice, did not know what he was doing and that there was any pressure or coercion. Counsel said that at its height this is simply a case of an appellant who regretted his decision and fundamentally it cannot and has not been

argued where the judge made an actual error in finding that a voluntary decision was made by the appellant to change his plea and there is no basis for this Court to interfere with the decision of the trial judge.

16. As to the approach in law to applications to change a plea, in *DPP v Judge* [2018] IECA 242 this Court quoted with approval the following passage from Walsh on Criminal Procedure (2nd ed) at page 1225 which states as follows: -

> "*34. The trial judge has a broad discretion to permit the accused to change his plea from guilty to not guilty at any stage in the trial right up until sentence is passed. So long as the discretion is exercised judicially and with due regard to the protection of the accused's constitutional right to a fair trial, it is unlikely that a refusal to permit a change from a plea of guilty to not guilty could be upset on appeal. There is English authority to suggest that the discretion will be used very sparingly to permit a change of plea where the accused has understood the nature of the charges against him and entered a clear and informed plea of guilty*."

17. The fact that the judge exercised his discretion in the way that he did is not at all surprising. We reiterate that we think that the judge considered the matter in accordance with the applicable principles of law and was entitled on the evidence to come to the conclusions he did. The judge has a wide discretion which he properly exercised and we see no error.

18. We accordingly dismiss this appeal.