THE COURT OF APPEAL

Edwards J.
Whelan J.
McCarthy J

Record No: CA133/2018

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

DC

APPELLANT

JUDGMENT of the Court delivered on the 20th day of December 2019 by Mr. Justice Edwards.

Introduction

1. On the 22nd of February 2018 the appellant was convicted by a jury in the Central Criminal Court of the following offences:

   - three counts of rape, contrary to s.2 of the Criminal Law (Rape) Act 1981 as amended by s. s.21 of the Criminal Law (Rape) (Amendment) Act 1990 ("the Act of 1990"), those being counts no's 1, 16 and 17 on the indictment;

   - one count of rape under s.4 by an Irish citizen in a place other than in the State, contrary to s.4 of the Act of 1990 and s.2(1) of the Sexual Offences (Jurisdiction) Act, 1996 ("the Act of 1996"), being count no 2 on the indictment;

   - six counts of sexual assault of a child by an Irish citizen in a place other than in the State, contrary to s.2 of the Act of 1990 and s.2(1) of the Act of 1996, those being counts no's 5, 6, 7, 8, 9, and 10 on the indictment;

   - and five counts of rape under section 4, contrary to s.4 of the Act of 1990, those being counts no's 4, 11, 13, 14 and 15 on the indictment.

2. The appellant was sentenced on the 23rd of April 2018 to fifteen years' imprisonment with the final year thereof suspended on conditions, in respect of each of the rape counts; and to six year's imprisonment in respect of each of the sexual assault counts, all sentences to run concurrently and to date from the 8th of February 2018.

3. The appellant has appealed against his conviction on all counts.

4. In connection with his said appeal the appellant brought a motion seeking leave to adduce further evidence. The Court agreed to hear the evidence *de bene esse*, and to rule during its judgment on whether or not the appellant can rely upon it.

The Grounds of Appeal

5. In oral submissions to this court, counsel for the appellant informed us that he would be focussing on three main areas in his presentation of the appeal. First, a contention that the trial was unfair in several material respects, but in particular on the basis that the trial judge's conduct of the trial was objectively unfair. Secondly, that grossly prejudicial material in the nature of evidence of other alleged misconduct not the subject of any charges before the court and that ought not to have been admitted in evidence, being allegations made by MC, a sister of the complainant TC, had been placed before the jury, thereby irredeemably prejudicing the appellant in the eyes of the jury and rendering his trial unsatisfactory and unsafe; and thirdly, that fresh evidence has come to light, which this court is asked to take account of, suggesting that the complainant has now recanted and admits that she lied when giving her evidence at the trial.

6. It is more convenient for the purposes of this judgment to deal with these three main headings of complaint in reverse order. Accordingly, we will consider and rule in the first instance on the application seeking leave to rely on fresh evidence, and, if necessary, deal with the substantive complaint based on the alleged fresh evidence. Then we will deal with the complaint about the inappropriate admission before the jury of misconduct evidence, and finally we will deal with the allegations that the trial was not conducted fairly by the trial judge.

The complainant's evidence at trial

7. The complainant in the case was the appellant's daughter, TC. We know from her affidavit sworn in connection with this appeal that she was born on the 9th of April 1999. She gave evidence by video link over seven days at the trial, during five of which she was under cross-examination. The jury learned that the appellant was originally partnered with, although not married to, JC with whom he had two daughters TC and MC. JC has since died of a brain aneurysm. His relationship with JC was a second relationship. The appellant had earlier had two daughters with a previous partner. Accordingly, TC has one full sister, namely MC, and two half-sisters, KC and SC, respectively, all older than her.

8. The court has reviewed the transcript and the core of TC's testimony in chief was to the effect that on the day after her mother JC died, i.e., on the 11th of March 2006, she was vaginally raped by the appellant in the then family home in a provincial town in the west of Ireland. Subsequently the appellant and his then girlfriend, RC, who is now married to him, together with TC and MC, went to live in New Zealand. While there they lived temporarily in various dwellings before obtaining a home of their own. While in one of these dwellings, described by her as being in an estate, the appellant and RC were drinking, and a row broke out in the presence of TC and MC. RC and MC were then, in TC's words, "*kicked out*", leaving TC alone with the appellant. During the period the appellant was alone with TC he anally raped her.

9. TC further described being repeatedly sexually abused by the appellant, both in New Zealand, and upon their later return to Ireland. She said that he would put his fingers in her private place and she recalled him on one occasion smelling his fingers having done so.

10. TC also testified that following the initial incident of anal rape there were repeated further such instances while they were living "*in a white house*". TC had up to that point shared a room with MC but in this house she had her own bedroom. These further anal rapes would take place in that bedroom. She stated, "*he would just come in and he'd just pull down my trousers and he would just bend me over*" … "*like I was a rag doll*". During these incidents the appellant would always address TC as "J", being her late mother's first name. He regularly told TC "*You have to die, you have to die*". TC described an incident that occurred following receipt of her fifth-class school photograph. She disliked the photograph and pleaded with the appellant to get rid of it, saying that she felt she was ugly in the photo. The appellant became angry and assaulted her physically, following which she retreated to her room upstairs and attempted to hang herself from a lamp shade. The appellant entered the room as she was doing this. He approached the bed where she was and took hold of her kissing her neck slowly and calling her beautiful. He then pulled up her skirt and raped her. TC was unsure if he had raped her anally or vaginally on this occasion but was certain that he had raped her. She explained that her uncertainty arose because there had been an occasion where she had been subjected to both forms of rape but was unsure if this had been the occasion.

11. TC stated that on another occasion she was "grounded" for having run up a large phone bill and was alone sitting on a sofa with her legs tucked underneath her in the sitting room of the house they were then residing in in Ireland. The appellant approached her, removed her trousers, lowered his own trousers and then had vaginal sexual intercourse with her.

12. On another occasion TC said she was anally raped by the appellant in the bathroom of her home after emerging from the shower. She said that she was just about to pull up her underwear when he came in to the bathroom, pressed her by the head or neck against the wall in circumstances where he was much stronger than her, then "*he raped me in my bum*".

13. The complainant said that on yet another occasion she was bent over a washing machine in a downstairs toilet and again was anally raped by the appellant.

14. TC further gave evidence that on yet another occasion she had gone up to bed and was in MC's room. The appellant then came up the stairs calling "J", TC's late mother's first name. He came in to MC's room whereupon he then grabbed TC by the hair, dragged her to her own room, and in her own words "*just slammed me on my bed and then he turned me around so I was in a position of doing press-ups and he raped me…*". She confirmed that this was vaginal rape, and that her father had been drunk at the time. According to TC this event occurred two or three days before she and her sister MC were taken into care, which was during the Easter holidays of 2010. TC remained in care until April 2017.

15. TC related how she came to be taken into care. It arose in circumstances where she was having difficulty in doing her homework arising from being persistently subjected to molestation at home. She told the jury that she was confronted by a teacher who demanded an explanation from her for her persistent default on the homework front. This

occurred in January 2010. She did not disclose the sexual abuse but instead told the teacher that the reason she could not do her homework was because her father drank all the time and that he would hit her and the other children. She was then taken to see the Principal who further interviewed her, and arising from this the social services were informed, which eventually led to both TC and MC being taken into care.

16. TC stated in evidence that after her interview with the School Principal, and before social services had moved to take both her and her sister into care, she was sent home on the bus. She told her father what she had done. He had been drinking, and he told her "*Say it's lies, say it's lies, you better say it's lies.*" She claimed that he then sought to bribe her with the offer of a new mobile telephone. Her evidence was that she succumbed, and in due course told the social workers "*I lied, he doesn't hit me*". She was cross-examined about this and she made the point, which she also reiterated in regard to a range of other issues, that she was a mere child at the time. On the available evidence this incident would have occurred close to her eleventh birthday.

17. Notwithstanding the purported retraction of her complaint, TC and MC were still taken into care and were initially placed in a girls' home before being placed in a long-term foster placement. While in foster care TC completed primary school and moved on to secondary school.

18. While in secondary school TC's behaviour deteriorated because, in her own words, "*I was really messed up in the brain*". Ultimately, she was suspended indefinitely from school and had to find a new school. She then became very depressed and took an overdose of paracetamol which resulted in her hospitalisation for several days.

19. She said at the trial that her father, although he was not supposed to, persistently maintained contact with her while she was in foster care. He would do this mainly through two Facebook Messenger App accounts using what TC characterised as "*really weird names*", one of which was "*Scriosta Athair*" (a Facebook Messenger App account also sometimes used by RC), and another of which was, initially during the period of interest, "*Sinead O'Callaghan*", although that name was later changed to "*William Molyneux*". Despite the name having been changed, it was the same account. Printouts of conversations/communications using these two accounts (i.e., "*Scriosta Athair*" and "*William Molyneux*") were exhibited at the trial by the defence, and TC was extensively cross-examined with respect to them. Although the name "*Sinead O'Callaghan*" does not appear on any of the printouts, this was explained, although nothing turns on it, by evidence that when a printout is requested from a Facebook Messenger App account the name of the account at the time of printing will be used throughout any document generated rather than any alternative name that the account may have borne at the time of any communications of interest. Indeed, evidence emerged on day 5 of the trial that at different times the "*Scriosta Athair*" account bore the alternative names "*Celtic Fern*" and "*Tir Na nÒg*", although again nothing turns on it.

20. At different times the appellant was also in telephone contact with TC, they having exchanged numbers.

21. The Facebook conversations between TC and the appellant formed the subject of very detailed cross-examination of TC at the trial. The printouts in respect of the "*William Molyneux*" account run to 98 pages of dense text in single line spacing and cover the period from the 30th of November 2012 to the 9th of November 2014; the latter date being that on which, the evidence reveals, TC blocked the "*William Molyneux*" account. The printouts in respect of the "*Scriosta Athair*"account run to 8 pages and cover the period from the 9th of November 2014 to the 19th of December 2017.

The Facebook Messenger App conversations

22. The printout of the *William Molyneux* conversations commences on the 30th of November 2012. The first of these conversations appears to have been initiated by TC. She was aged 12 ½ at that time. Up until 6 June 2013 there are frequent exchanges. During this time the appellant appears to have been in New Zealand. The relevant content of these messages can be summarised as TC discussing the fact that she is depressed, that she is lonely for her family, that she has been self-harming by cutting herself, that she is under the care of a psychiatrist and psychologist, that she is on medication and that she wishes to return to New Zealand. She repeatedly pleads with the appellant not to disclose to anyone that they are in contact or "*I'll get into serious trouble*". The appellant references several times how he is trying to get TC back to New Zealand and questions her about what medication she is on. He promotes a persistent narrative about social services cruelly tearing families apart and suggests that he is the only person in the world that she can trust. There are expressions of affection from TC towards the appellant, and it is fair to say vice versa.

23. TC was cross examined as to her expressions of affection and stated "*I was a child, I was not matured*" and that "*I missed belonging somewhere*".

24. In stark contrast to the overall tone of the conversations recorded during this period, on the 29th of December 2012 the appellant is taken to task by TC for having described his late wife, i.e., TC's mother, as having been evil, and for saying that that was why she was in a grave, during a phone call with his own mother, i.e., TC's paternal grandmother. The appellant denied the accusation, claiming that instead "*I said your granny was evil*". The granny referred to is understood to be TC's maternal grandmother i.e., granny [M] not granny [C]. Although it clear from the evidence adduced at the trial that the appellant did bear a deep animus towards his late wife's mother, the explanation he was putting forward was not accepted by TC who said:

> *"I can't believe you done that! Nan didn't get us taken … Your addiction to Alcohol did! So stop blaming others … You've ruined the communication for yourself."*

The appellant continued to protest his innocence, prompting TC to further respond:

> *"I was there. Stop lying."*

The exchange concludes with the appellant saying:

"I'll go get help for my drinking if you find out the name of the meds they have you on."

TC then responds "I'm not taking them anymore x"

25. The relevance of the exchange just recounted is that TC was cross-examined about it on day 4. It was put to her that although she had been prepared to take her father to task "*there's no mention of rape or sexual abuse or anything of that nature*". She was asked "*Can you provide an explanation as to why you don't accuse him here of sexually assaulting or raping you?*", to which she replied: "*This is 2012, Mr O'Higgins. I made my statement in 2013. Maybe I hadn't come to acceptance then, I was 12 years old. How was I supposed to know?*"

26. By the 9th of January 2013, TC is exhibiting low mood, is claiming to have "*severe depression like everything is upside down*", and threatening suicide. She says "*I'm going to commit suicide one day and everyone needs to except(sic) that*". The appellant responds: "*I'm in bits that I will lose you twice. Why would you want to give up your life when its just about to start?*" The immediate precipitating event appears to be "*I'm moving foster care*".

27. On the 13th of January 2013 TC relates that she has had to move school due to being accused of bullying. The appellant responds: "*You bullying, nah, I don't buy that, their loss princess …, that bitch principal in [a named school] told lies about me to the court, remember she took [MC's] phone? I went and asked for it back, she told the judge I was violent and aggressive about getting the phone back …such lies*" This elicits the riposte "*TRUTH*" from TC.

28. Several times during this period the appellant acknowledges his drink problem and on the 3rd of April 2013 says:

"I've been to the hospital to detox from alcohol, …I'm going to AA every day. I'm doing all the programs to beat this disease, I've got an 8 week course coming up to teach me how to deal with life without drink, if you think I was bad before you were taken, you would have hated me after, I spent so much time drunk, covering up the pain of losing my children."

29. In exchanges during May 2013 the appellant outlines to TC that "*there are 3 ways of getting to come to New Zealand*". He identifies these as being for him to successfully challenge the Care Order before the Irish courts; alternatively for TC to travel to New Zealand and live openly with him there while he would attempt to challenge the Irish Care Order before the New Zealand courts; alternatively for TC to travel to New Zealand and live in hiding with him there although "*that would mean no school*". TC herself rejects the last option stating "*but I love school, like I love getting education! Could I not go down as TM* [M being the first initial of her late mother's surname] *or something in school*? There is discussion about whether TC's boyfriend could come with her, and also MC. The appellant urges that she should "*try and persuade her*". He says "*ss* [i.e. social services]

here will try to put you in care because of your age … you will have to tell the judges you want to live with your dad …it will be scary …. but we will win."

30. On the 6th of June 2013 the appellant messaged TC saying, inter alia, "*I love you more than words could express but you and [MC] have broken my heart and sullied the C name in* [a named town where the C family had lived while in Ireland], *they say there that your dad is a paedophile*". The exact circumstances that precipitated this outburst are unclear. However, he goes on to speak in derogatory terms of other relatives/in laws and concerning one of TC's foster parents, suggesting that he was inclined to attribute the source of rumours of which he had seemingly become aware to them. Be that as it may, the evidence was that TC had not yet made disclosures either to social services or to the Gardaí.

31. According to Garda Jude Gallagher who testified in the court below, on the 3rd of July 2013 TC disclosed to social workers that her father had behaved in an inappropriate way towards her and that led to the matter being reported to Gardai on the following day, the 4th of July 2013.

32. Before that, however, the Facebook Messenger App printout of the *William Molyneux* conversations indicates a deterioration in relations between TC and the appellant in mid-June 2013. During a conversation on the 16th of June 2013 TC says "*Everyones telling me ur home and I'm search the town for ya and can never see ya!"* The appellant denies it saying "*I'm not at home Princess, you would be the 1st to know if I decided to visit there, I'm in Auckland waiting for my girls …*" The appellant changes the subject, but TC returns to the topic and demands to know "*Are you in town? Tell me the truth! And I'll meet u*". The appellant avoids the question and continues with the changed subject. TC again asks: "*Are you in town? answer the q*" which elicits the reply: "*No, I'm in New Zealand. Shall I phone you, send you a text*". TC responds: "[MC] *seen u tho*?". The appellant replies: "*Nope she didn't* [T]", before adding, "*haven't been in Ireland since last November, love you xxxxxx.*"

33. It is manifest from the record that TC doubted her father's denials because after that, despite numerous attempts by the appellant to further engage TC in conversation, TC ignores all further messages from the appellant for more than ten months. Throughout this time the appellant persistently sends messages to TC that are variously cajoling, pleading, critical and arguably manipulative in tone. The metaphorical "radio silence" is then broken by TC on the 25th of April 2014, when she messaged him asking "*What's your number? Where are you*?"

34. The appellant responded three days later stating that he was in the far north of New Zealand. He tendered a phone number and expressed the hope that she was ok. Two days later, on the 30th of April 2014 TC then asks: "*How will I get back to New Zealand?*"

35. The context for this was that TC had just turned 15 years old and was in a new foster placement. She had moved from her original foster placement and was now in a different town.

36. The record exhibits no further exchanges during May of 2014, despite numerous attempts by the appellant to engage TC in conversation. However, on the 2nd of June 2014 TC messages him asking "*When you in Ireland?*" to which the appellant responds that he had "*nothing sorted yet*". TC then says, "*Let me know, can't talk.*"

37. There are no further exchanges either during the rest of June, or during July 2014. During this time the appellant continued to message TC, although his messages were not responded to. The content of these messages, up until TC eventually breaks "radio silence" for the second time on the 6th of August 2014, can be summarised as the following:

    - the appellant stating how he misses her and wishes to see her, giving her his contact details;

    - the appellant reminiscing over the times they were together as a family;

    - pleas from the appellant to TC to stop ignoring him as well as anger and abusive language; directed at her, her sister [MC], the social services, TC's original foster parents and TC's maternal grandparents, the [M's]. He says, inter alia, "*when I'm ready I'm going to make a statement in [a named west of Ireland town]*" and "*I must do a Pontius Pilate soon and wash my hands of everything … for my own sanity xx*" and "*Though I won't always be around to remind you of that fact I will never forgive either of you for the way you both have treated my Mother …ever* [T] xx".

    - On July 7th the appellant states that he will not allow himself to be hurt by "*you or your sisters hateful actions anymore*".

38. On the 6th of August 2014 TC was provoked into lashing out at the appellant in an angry response, in the following circumstances. The appellant provoked her into a response by sending TC's half-sister, KC, Facebook friend requests purporting to come from TC, and including pictures of TC and MC, but which he was in fact sending. She responded robustly telling the appellant "*I want nothing got to do with you ever again now stop texting me child/woman abuser, stay the Fuck wherever you are and stop putting up pictures of me and [*MC*], sick, sick, man*". TC was 15 years of age at the time.

39. Following this TC reverts to what I have already characterised as "radio silence". In October 2014, the appellant and/or his partner send TC a stream of messages from the account expressing anger at her accusations of sexual abuse:

    - On the 20th of October at 1.16pm he states that "*like your sister I'll see you in court*" and threatens that she and her sister will see jail time.

    - At 1:31 pm on the same date he states that TC has "*taken his life away*" and threatens to sue her for the sum of €4 million.

- At 3:16 pm on the same day RC messages TC from the *William Molyneux* account asking why she would tell such "*rotten lies*" about her father and asks her to tell the truth. She asks TC if she has been given drugs and accuses psychiatrists and pharmaceuticals of causing her to make the accusations. She finally threatens TC with "*karma*".

40. On the 4th of November 2014 the appellant states in a message that he is the only person who can genuinely help and asks TC to refuse any medication she may be taking. He states he "*read of a girl who accused her dad of the same sick acts you and [*MC*] have accused me of, the Dad went to prison for almost 10 years before she finally told the truth and he was released*".

41. On the 5th of November 2014, TC breaks her silence and messages the appellant as follows at 7.15pm:

> "*To Dad, I've been moved foster home now, I'm living in absolutely NOWHERE, and there (sic) trying to move me again. I've really been messed up the last while, I want someone to care for me, and look after me and to have a home, but there is nowhere to go, and there is no way of me getting out of the country to you cause I have no passport, the social workers have it. I need you to get me out of here, but you would have to promise you're not drinking anymore? I'm sorry this is a short message after all the long paragraphs you've sent me, I'm so sorry."*

42. The context here as explained by TC in her evidence before the jury is that she was moved temporarily to another foster placement in an isolated rural area to afford respite to her long-term foster carers who had been having difficulty in coping with her due to her increasingly difficult behaviour. Another relevant contextual detail is that after she had been taken into care she had been facilitated as a rule, and from time to time, in visiting her paternal grandmother's house. TC told the jury that she was lonely and isolated and had mental health difficulties at this time.

43. Returning to the record of the *William Molyneux* conversation for the 5th of November 2014, just under two hours later, at 9.09pm, TC messages the appellant again and says: "*I love you and I'm going to sort this all out I promise*", to which the appellant responds: "*I love you too, we'll sort it out between us, you're not on your own [T], going to ring you in 5 minutes.*"

44. On the following day, 6th of November 2014, TC messages "They wouldn't let me go to Nanny's today". The appellant replies: "Nanny has a room and a bed waiting for you whenever you want to stay". TC then says, "I know pops, just hoping I can go there tomorrow or the weekend."

45. Minutes later, TC then says:

> "*I told my social worker I was talking to you and I text her saying I wanted to break the statements, I'm sorry for my behaviour, I wish I could control it, but I'm*

so wound up and everything seems to affect me in every way possible. But I want to live with my nanny in it would make so much sense and would be easier on everyone, ye wouldn't have to check up on me as much as ye do, I'd be attending school, and I'd go back to football, it would just be so much easier. I've been talking to my Dad and I forgive him, I'm not sure what my Dad has done to me but I'm pretty sure I've been brainwashed by the [M] side of my family, I know I'm going to lose them, but I'm willing to do so to get back to living with my dad, I forgive him and I will fight until he gets custody back of me. I want my statements broken, I don't want them to go ahead, I want a normal life and ye aren't helping me gain that. I do want to apologise to you tho (sic) for shouting and stuff, but I know what I want and that's to live with my nanny, and I really would appreciate if you looked into that as soon as possible. I want to visit her on Saturday and catch up with her … so PLEASE understand everything I've said, and take it on board, and sort me out please. That's what I said to her."

46. TC was cross-examined at length about this and accepted that her reference to wanting "*to break the statements*" had meant that she wished to withdraw the statements she had made accusing the appellant of raping and abusing her. However, while she did not dispute having said that she was adamant that she had not in fact broken or withdrawn her statements. Her evidence was:

A. I didn't send that to the social workers. Maybe I indicated it towards him, yes, maybe I did, but I'm pretty sure, like I said, I'm pretty sure I've been brainwashed sorry, "I'm not sure what my dad has done to me" I am sure now what my dad has done to me. This is four years ago, this is four years on. I have accepted and I've grieved.

Q. You are sure?

A. I'm pretty sure now, I'm pretty sure, I'm a hundred percent sure, Mr O'Higgins, what that man has done to me.

Q. You are pretty sure, a hundred percent sure now?

A. This is four years ago.

47. Returning to the William Molyneux conversation, the appellant then asks "what did the SW say when you told her we were in contact?" and TC replies "Nothing, she didn't say anything, she just asked me why I was so upset and I said because I want to be back with u."

48. There follows a diatribe of invective from the appellant about the social worker in question, at the end of which he states: "*you need to write a letter*". TC asks what sort of a letter, and he responds:

"An open and honest kind, it needs to be written to Emily Logan, she's the ombudsman for children in Ireland. She's there to make sure social services are

doing their job correctly and in the 'best interests of the child'. Her address is Millennium House, 52 – 56 Great Strand Street, Dublin 1, there is also a free telephone number for teens to ring if they are in distress, I will try to find it if you want it, in the letter you need to tell her everything that has happened in your life, tell her what you want and she must listen and investigate your case, just be honest. Freephone 1800-20-20-40. Tell her in your best knowledge how you came to be in foster 'care', tell her how your life has been panning out since then, also tell her what life was like before you were taken, tell her what you would like to happen, she'll help you, you need to summon up the courage to ask but more importantly to be honest with yourself, that means facing up to your own faults, it can be frightening to do but once it's done it will feel like a weight has been lifted off your shoulders, give it some thought [T], I love you, will check back later".

49. TC replies "I'm gonna write that tomorrow"

50. On the following day, the 7th of November 2014, TC messages the appellant with the draft of a lengthy letter to Emily Logan which included the following extract:

"… I realise that I never got enough support at the beginning of foster care to overcome and deal with the death of my mother and the grief of being taken away from my Dad. Every time I got low I would always make contact with my dad over Facebook and would keep it a secret from anyone. My dad and I would keep in contact for days to weeks until I had dealt with whatever troubles I was having at the time, he was the first one I told I was self harming, and he gave me ideas and great help to overcome it, such as getting a red pen and putting lines of scars to try to take my mind off it, this really needed help, and I wouldn't have overcome self harming without him. The family I was living with at the time was the [S's] they got mad at me and would punish me and blame me for self harming so I had no one to go to. My Dad was a great help to me and it seemed that there was no matter how big or small the problem was he was always there for me. I always dreamt and thought about going back to my Dad but social workers said it was 'impossible', I was so brainwashed by them and my mum's side of the family that my dad had abused me. I soon started to think that my dad was a child abuser and rapist, but I have came to my sense to know that if he was and if he did abused me in any way I would clearly remember because I'm sure that something nobody could ever forget if done to them. So my social workers decided to get me an appointment with regards in [a named town] to try to get me to make statements about him, so everything I was told by either social services or my [M] side of the family I had said. So did my sister, but I was getting my Dad into serious trouble due to false accusations that he didn't deserve, and I told my social worker [a named person] to cancel my statements and to have my dad's name cleared from court. What I did was wrong and I only started to realize that now, and if I could do anything I would take it ALL back."

51. At the trial in Central Criminal Court, TC was asked by counsel for the prosecution when eliciting her evidence in chief:

Q. There's a suggestion in this letter to Emily Logan that you are brain washed by social workers on your mum's side of the family that your father had abused you. Was that correct?

A. That's not correct. What you need to understand, and I can't really expect anyone to, but I was on my own in the middle of a county or a town that I didn't know anyone. I was isolated. I had nothing. I had nobody. I was self harming. I was completely in a different stage in my life. I was not well, like, I wasn't I had mental health difficulties, like, growing up and this was obviously one of the worst stages of that. What I did was wrong, what he did was wrong.

52. Not surprisingly, TC was cross-examined by defence counsel on this. She was asked:

Q. Why did you write these words? Why did you write these words?

A. Like I said this is a letter to the man who raped me. This is to him, the man who had control over my life, the man that took my body away from me at 6 years old. This is a letter to your client, not to anyone else, to your client, Mr O'Higgins.

Q. I suggest to you it demolishes your allegations?

A. You suggest that. I don't. I am here today for justice, not for you to criticise what I said four years ago.

53. It was put to her:

Q. At a time when you have had the wherewithal, even on your case, to make your allegations to the guards, a year and four months later you're saying it's a whole pile of rubbish?

A. A year and four months later I was still a child, Mr O'Higgins. This is a letter to the man who destroyed my childhood. This is to that man. This is not to anyone else. This is to your client. A year and whatever it could be 10 years down the line, this is to your client, not to anyone with relevance.

Q. The letter continues, "So everything I was told by either social workers or my [M] side of the family I had said, so did my sister but I was getting my dad into serious trouble ..." then it says "... due to false accusations that he didn't deserve"?

A. This is to the man who raped me.

Q. Could this be clearer, Ms C, you are saying here the allegations are false?

A. This is to the man who raped me. This is a letter to the man who raped me, not to anyone else.

Q. We're agreed you wrote those words, "False accusation that he didn't deserve"?

A. Yes. This is to the man who he does deserve he does deserve this because of everything he said to me, done to me and even in some of the Facebook messages that I read over yesterday, "You don't deserve this [T] after all life has handed to you" blah blah blah, him basically saying that I don't deserve what has happened to me by him but you missed that part, didn't you?

54. Returning to the record of the *William Molyneux* account, the appellant is seen to compliment TC on her draft and he urges her to send it off by registered post and keep the slip. He tells her "*it's very important for you to understand that you have NOTHING to feel guilty about*".

55. TC was adamant during her evidence at the trial that although she may have drafted the letter she never in fact sent it.

56. Later that same evening, i.e., the 7th of November 2014, TC messages the appellant again to complain that she is still not being allowed to visit nanny, that the guards have now become involved and that there is to be a meeting about her situation between the HSE and her nanny on the following Monday.

57. Two days later, on the 9th of November 2014, TC messages the appellant at 3:43am saying "*Ring me straight away quick it's urgent*". Despite the suggestion that he should ring, the appellant in fact responds via Facebook Messenger App. It unfolds that TC has run away from her foster placement and is in a taxi heading for her grandmother's (nannie's) house. The bill is going to be €80 and she doesn't have it. She wants the appellant to contact nanny, to get her to pay the taxi man and to "*tell her I'll pay her back, please Dad.*" There is much toing and froing in the conversation but eventually the appellant messages saying, "*she's getting up to wait for you now, she has very little money and won't be able to pay the driver*". At 4.05 am there is a message to TC stating, "*This is [RC] now, dad gone out for a breath of fresh air*". RC converses with TC for a time before suggesting to her that she should get the taxi to stop some distance short of her destination and that on getting out of the taxi she should "*run as fast as you can back the hill to nannies*". TC suggests she is freaking out and can't do it. RC then asks her to get the taxi man's phone number and says the appellant will ring him and sort it out. TC then says "*I'm so afraid, I really am. If you ring him now he might turn around. I wish Dad was there so I could just run into his arms*"

58. TC was cross examined about the last sentence as follows:

Q. So, insofar as you're saying, Ms [C], "I wish Dad was there so I could just run into his arms", we're agreed, I take it, that you're indicating affection for your father there, I mean that's an obvious point isn't it?

A. You keep coming with affection, I was a child. You keep bringing up affection.

Q. Well, it's actually you

A. I only learnt what affection was two years ago, Mr O'Higgins. If that's showing affection at the age of 14 very well then.

Q. These are your words, they're not my words, they're not your father's words, these are your words?

A. You keep stating every time in regards of oh I miss New Zealand, I want to go back to New Zealand, I miss my dad, I just want a family, this is me showing affection to someone. You need to realise I was 14 years old. I didn't know what affection was. You weren't the one they are your words, your affection, not mine.

Q. You were indicating a desire to be with your father?

A. So you say, yes.

Q. Well, is there anything controversial about that? Isn't that blindingly obvious?

A. So you say, yes."

59. Ultimately TC arrives at her grandmother's house and all ends well. Later on the same date the appellant messages TC to find out how she is, and TC replies:

> *"The guards rang me at 11 and me and nan went down to the guard station and I'm allowed stay with her tonight until social workers get involved :) thanks for everything Dad xx"*

60. There is then some further discussion about what TC has been doing that day and the appellant signs off saying "*will phone nannies in a little while x*" When he next attempts to engage TC in further conversation he finds the account (i.e., the *William Molyneux* account) has been blocked by TC. It remained blocked thereafter. TC's evidence at trial was "*I stayed in my grandmother's (that) night, like my father's mother, I think it was the 9th of November it was and then the 10th of November I obviously went into the garda station with his mother and she was given permission to have me for the night until the Monday morning until social workers got involved. So, then the 10th of November I got I arranged for my own lift back to the placement and I stayed there and I blocked my father straightaway on Facebook*"

61. Following the blocking of the *William Molyneux* account the appellant moves to trying to re-engage in conversation with TC via the *Scriosta Athair* account. The printout of that account reveals a series of messages from the appellant to TC, sometimes angry in tone and at other times cajoling, trying to persuade her to re-engage. None of his many messages are responded to between the 9th of November 2014 and the 17th of June 2016, a period of more than nineteen months. However, on the 18th of June 2016 TC re-engages by responding to a message that said, "*growing up too quick* [*T*], *I miss and love you always despite what you've done to me*". TC replied: "*You're a wierdo, your gone in the head*".

62. The appellant says, "If I'm a little gone in the head it'll be thanks to you and your sister". TC retorts "You did all this to yourself, that's how sick you are you think it was us two innocent girls that did wrong. You left my mother in a grave remember that, and there you are living happily while we're still here grieving over OUR DEAD MOTHER"

63. The appellant responds himself denying responsibility. He asserts that she has been brainwashed by her maternal grandmother and that TC and MC must live with their "*disgusting allegations*". He predicts that TC will have her own children removed in the future and asks her not to contact him again.

64. RC then intervenes and messages TC defending the appellant at length. She puts forward the idea that TC had been "*poisoned*" by her mother's family and asks why she lied about the abuse and other incidents such as not being fed and being locked in room, telling her that she has "*drove another dagger*" into her father. She states that TC and MC both told "*vile lies*". She reiterates that TC will have her children removed in the future and states that had TC trusted her father, she would have had a successful life living in New Zealand. She concludes by saying "*don't message dad anymore all you do is upset him and bring him pain*"

65. Notwithstanding this, it appears that TC may have spoken with the appellant by telephone approximately three weeks later. The circumstances in which that appears to have occurred are unclear, but TC messaged him on the 13th of July 2016 stating, "*was so good to talk to yo, you've made my week …thanks*". There is sporadic contact in the fortnight thereafter, and then in early August 2016 TC contacts the appellant to say that social workers were trying to return her to a certain foster placement and "*I don't want to go back I wanna stay with K*" (her boyfriend at the time).

66. The circumstances, piecing it together from TC's evidence at the trial and the *Scriosta Athair* record, appear to have been that TC had either left or been discharged from an earlier placement (it is not clear which) and had gone to live in a town in a different county close to the border with Northern Ireland, where she had taken up with K. She had become involved in an altercation with another girl arising from which she had been arrested and was detained briefly in a Garda station before being taken to hospital to have an eye injury attended to. While at the hospital she ran away and back to K's place "*and now my social …and the guards are looking for me to go back to [*foster care*]*"

67. The appellant advises her "*why not cross the border and live there till April, then they're out of the picture*". The reference to April was to TC's impending 18th birthday when she would have to be discharged from care. TC does not appear to have taken the advice but does appear to have been successful in avoiding both her social worker and the gardai. On the 29th of August TC messages the appellant to say that she and K had moved into a house. She is looking for a mattress, the appellant advises looking on Done Deal, and TC then says she has no money. She says she will ring him later and that K's head is "*FRIED*". Two days later on the 1st of September 2016 TC messages the appellant saying, "*I'm homeless*". The appellant offers to send her keys of a property he has access to. TC says K's mother has lent them €150 as a deposit for temporary new

accommodation. On the 2nd of September TC says, "*thank you so so much for trying especially after everything, you're the best.*" The appellant makes a Facebook Messenger App call to TC just before midnight and going slightly into the following morning, lasting 22 minutes.

68. After that the *Scroista Athair* record continues to the end of 2016 but contains only messages from the appellant to TC that were not responded to and which are unremarkable, save for a suggestion contained therein that appellant has become aware that TC has been returned to residential care. He says at one point "I *know you can't read this right now but my heart breaks for you*" suggesting a realisation that she is probably being denied access to any facilities by means of which she could communicate with him.

The appellant's arrest, trial and conviction

69. The evidence was that during a trip home to Ireland the appellant was arrested in early September 2014 on suspicion of sexual assault and was interviewed several times while in detention. The interviews with him were wide ranging and dealt *inter alia* with the family dynamics in the "C" family both before and after the death of the appellant's late wife, and his admitted alcoholism. They were entirely exculpatory in so far as the allegations of rape and sexual assault of TC were concerned. It appears to be the case that the appellant was subsequently released from detention and that, as frequently occurs, a file was sent to the Director of Public Prosecutions for her consideration.

70. The Director of Public Prosecutions subsequently directed a prosecution in respect of the allegations made by TC, and also in respect of an allegation made by MC. The appellant was in due course re-arrested and charged both with the offences in respect of which he was tried in these proceedings, i.e., those relating to TC, and in respect of the allegation made by MC. The Book of Evidence that was served related to the allegations made by both complainants. However, on the eve of the trial the respondent indicated to the Central Criminal Court that she would not be proceeding with any count based on alleged sexual abuse of MC. We were told during this appeal that the reason for this was that MC was adjudged psychologically unfit and too vulnerable to give evidence. While the jury subsequently learned, in circumstances we will return to, that there had been a count on the indictment arising from an allegation by MC, and that that was not being proceeded with, they were not told the reason for it.

71. The main evidence against the appellant at the trial was the evidence of TC. The prosecution also relied on the record of the Facebook Messenger App conversations. The memoranda of the interviews with the appellant were exhibited before the jury. The appellant did not go into evidence, but RC gave evidence for the defence, again dealing inter alia with the family dynamics in the "C" family as she had witnessed and experienced them. She contended that the "M" family bear hatred towards the appellant and blame him for J.C's death and she claimed that the "M's" had "*poisoned those two girls*' (i.e TC's and MC's) *heads*".

72. In relation to the count involving MC that was not proceeded with, this was addressed before the jury through the evidence of Detective Garda Aidan Brennan according to the following formula agreed between the parties on day 9:

> *"MR O'HIGGINS: I want to reduce down the opportunity for mishap and I want to ask the witness -- I was hopeful and we have agreed a formula between the prosecution and defence as to how we might treat of the [MC] allegation and as to what could be said to the jury and also as to the question as to whether charges were or were not directed as against [RC].*
>
> *JUDGE: Well, the evidence seems to suggest they weren't.*
>
> *MR O'HIGGINS: Yes.*
>
> *JUDGE: That has been the evidence.*
>
> *MR O'HIGGINS: That has been the evidence.*
>
> *JUDGE: The DPP decided not to proceed.*
>
> *MR O'HIGGINS: That's right. So, I was proposing to indicate and ask the guard to confirm that the Director is not proceeding with the prosecution with respect to [MC]'s allegation and that no prosecution*
>
> *JUDGE: Well now hold on, I mean it's a question of there is medical evidence that [MC] isn't fit to give evidence. That's the medical evidence before the Court which we had in relation to the video link.*
>
> *MR O'HIGGINS: Well, I understand there's no objection this to formula. I want to just reduce it down so that there's no opportunity for mishap and to do it consistent with the evidence, consistent with the factual position and, subject to the Court, what's proposed to be said is that, dealing first of all with [MC]'s application, simply the Director is not proceeding with the prosecution with respect to the allegation of [MC] and the other formula, no prosecution has been directed as against [RC] and simply leave it at that and not dwell on it for --*
>
> *JUDGE: You agree with that, Mr Owens?*
>
> *MR OWENS: I have no problem with any of that. I don't think it's of any assistance to the jury with one or the other. It's not evidential as such. It's just background essentially.*
>
> *JUDGE: Very good."*

73. At close of the evidence, the jury were addressed by counsel for both prosecution and defence, as is customary. The prosecution case was that while TC was undoubtedly a troubled child, who had faced numerous adversities, she was truthful and reliable in the evidence that she had given, and that the Facebook Messenger App messages, coupled

with her evidence, spoke volumes concerning the appellant's personality and his capacity for manipulation, bad temper, violence and controlling. The defence case on the other hand was that that TC was neither reliable nor credible, and that both the narrative of, and her demeanour throughout, the Facebook Messenger App conversations gave the lie to her allegations.

74. After deliberating for a total of nine hours and sixteen minutes the jury returned verdicts of guilty on counts No's 1, 2, 4, 5, 6, 7, 8, 9,10,11,13,15,16, and 17. The appellant was found not guilty by direction of the trial judge on two counts, being count's no's 3 and 12 respectively.

The application to rely on fresh evidence

75. On the 7th of March 2018 the complainant TC met with Garda Jude Gallagher, a member of the investigating team. At this point the appellant had been convicted but not yet sentenced. He was scheduled to have a sentence hearing on the 12th of March 2018. As matters transpired that was in fact put back to the 16th of April 2018 when evidence was heard. The appellant then received the sentences imposed upon him on the 23rd of April 2018.

76. TC made a statement to Garda Gallagher on the 7th of March outlining contact that had been made with her on Facebook Messenger App by a niece of the appellant's wife RC, named KD, and by RC herself. TC outlined in that statement that she had visited her father, the appellant, in custody and she had been contacted by his solicitor, Tony Collier.

77. The statement made by TC to Garda Gallagher on the 7th of March 2018 was in the following terms:

> "On the 23rd of February 2018 at 6.47am, the day after my father was found guilty, I received a Facebook message from a person named Mai Mai, I think its R[C]'s niece. She basically said that I'm a liar and for me to leave R[C] alone, even though I had no contact with R[C] at that time. She also said that R[C] was going back to New Zealand. She said that I didn't know how many lives I had affected and she named out various relations of R[C]'s. I basically told her to leave her alone. On last Thursday the 1st of March at 1pm I received a message from Scriosta Athair on Facebook messenger. I think it was sent from R[C]. In the message she basically said that she couldn't understand why I had done this. She said he, my father, never physically harmed me and that his only problem was that he was an alcoholic. She said that I lost my mother and then my dad's contact was taken away and that this was very damaging for a child — 'You know what happened you from there — doctors, psychologists, very bad pharmaceuticals, they have a lot to answer for'. She then went on to say that my father will die in prison and that I have taken what life my father had left in him. She said that social services and the Guards had made many mistakes, that I joined the wrong team and that if I'd joined forces with them and sued that I'd become a very rich girl and I'd have the security of a loving father. When I read the message I just broke down. I feel guilty for him lying in that cell every night. I wasn't the one that took

someone's childhood away but I still feel for him being there. He still is my father. Since the trial and since I've been receiving all these messages I just been feeling so low in myself. I don't want to know about what happened to me — it makes me sick every time I think about it. Since the trial knowing that 12 people that were selected at random could tell the court that this is what happened to me just hits my bones. I can't pretend to myself any more that it didn't happened. Since the trial its like my scars have been re-opened. The contact with R[C] continued. I told her that I'd speak to her before the 12th. I said that because I was shocked that she even texted me. The court wasn't even over 3 days and she was telling me that my father was going to die. She texted me again a big long message and in it she said that my Dad had a message to pass on to me but that she didn't want to do it on messenger and she asked me to ring her so she could pass on the message. I rang her and the message was that he wanted me to visit him before he died. I arranged to go with her the following day — Monday the 5th of March. I went on the train as far as [named town] and my boyfriend brought me the rest of the way. I went in for the visit with R[C]. He kept saying I forgive you, that he didn't hurt me and that he didn't hurt my Mum and that he didn't hurt K and that my Mum's family hated him. He asked me to stand with him and fight the State. I said yes — because at the end of the day he's my father because I wanted to believe that what happened didn't happen and that the social workers did give me drugs but I know that that's not what happened. Yesterday I went to work and at around 7.30pm last night a solicitor named Tony Collier rang me. He said that he cannot advise me that he can just direct me. He told me about a solicitor named Salome (sic). He said something about an affidavit and that the latest my father would be released would be Monday coming, the 12th. He said they were going to postpone the sentencing if I went up and signed it. This morning I spoke to Salome (sic) and we arranged to meet in Dublin tomorrow at 11am. She said she wants to talk to me face to face. When I got home from work today my sisters knew something was wrong as I had been avoiding them. My sisters were there and we were talking and I just came to my senses and realised what I was doing was wrong and could affect my life forever. I was feeling completely raw when R[C] was contacting me and when I went to visit my Dad. It was a huge mistake and I wish I could forget it all. I wish I could forget everything. Every time I closed my eyes since the trial ended I could see a cell — it's a bare cell. I was just so low and I am still. I was shaking today on the couch. I've never been so upset ever, I really scared myself. It like my tears would never stop and the feeling would never go away. My housemate came home then and I was just chatting a little to her and then I text Jude and asked if I could talk to her. During all the messaging R[C] sent me a load of photos of me and my Dad and M[C] when we were young. It warmed my heart a little but it also made me feel really sad. I feel as if R[C] was playing a game and that I was the last resort to get him out of jail. I give Gardai permission to access my Facebook messenger account to download whatever messages they need. This statement has been read over to me and I have been invited to make any changes or alterations I deem necessary.

This statement is correct.

I want to add that I know that my father plays on my insecurities. He tells me that he loves me and that I was a beautiful child and that he wants me and he knows that this is what I want to hear. He knows that all I want is to be wanted and to be loved by someone and to belong. Deep down though I know that he doesn't. This is why its so easy for him to get to me. I feel like he knows me better than I know myself and that he' s always a step ahead of me which is so rare as I'm always a step ahead. I feel like I should have had counselling all through the trial and afterwards. I going to look into getting some now as I feel I would benefit from it.

This has been read over, is correct.

Signed: TC.
Witnessed: J. Gallagher, Garda

78. There were follow up interviews with TC on the 24th of March 2018, the 1st of June 2018 and the 27th of October 2018. In the interview of the 24th of March 2018 TC further elaborated on aspects of the account given by her on the 7th of March 2018. In the interview of the 1st of June 2018 TC emphatically asserted to Gardai that she had told the truth at the appellant's trial and in the interview of the 27th of October TC again re-iterated and provided some further elaboration of the account given by her on the 7th of March 2018.

79. By a Notice of Motion dated the 18th of May 2018 the appellant sought inter alia leave to reduce fresh evidence at the hearing of his appeal to this court. The alleged fresh evidence is understood to relate to the events of the 5th of March 2018 when TC visited the appellant in prison; also to an alleged acknowledgment by TC to the appellant, in the course of that visit, that she had lied at the trial in maintaining her allegations against him; also to evidence of TC's dealings with Tony Collier Solicitor in the course of which it is contended that she again stated that she had lied at the trial in maintaining her allegations against the appellant; and to evidence that TC had allegedly said to one KD, a family friend based in New Zealand, in the course of a video call via Facebook Messenger App since the appellant's trial, that her father "*was not a rapist*".

80. This application was therefore grounded upon an affidavit of the appellant sworn on the 4th of May 2018; an affidavit of his solicitor, Tony Collier, sworn on the 17th of May 2018, and a supplemental affidavit of Tony Collier sworn on the 6th of November 2018; and an affidavit of KD sworn on the 24th of July 2018, and the documents exhibited in those affidavits respectively. A Notice to Cross-Examine each of these deponents was subsequently served on behalf of the respondent.

81. An affidavit in reply to those affidavits was sworn by TC on the 31st of October 2018. A Notice to Cross-Examine TC as to her affidavit was then filed on behalf of the appellant.

82. It is necessary in the first instance to review the affidavit evidence.

The appellant's affidavit

83. In his affidavit sworn on the 4th of May 2018 the appellant deposes to the fact that on the 5th of March 2018, whilst remanded in custody at the Midlands prison, he received a telephone call from his wife RC who informed him that TC was on the train and heading to the Midlands prison to see him. Later that day he was brought to the visiting area of the prison and both RC and TC were there. There was no screen or barrier separating visitors from inmates and the appellant says that he and TC hugged and embraced one another. He states that he told her that he did not blame her for what had happened at the trial. He states that they were both highly emotional and crying throughout the meeting. Moreover, TC was at all times affectionate towards him and referred to him as "Dad". At paragraph 10 of his affidavit he states:

> "I say that [TC] stated 'I'm going to get you out of here, Dad.' She further stated, 'It's all my fault and I'm going to put it right'. I say that I told her it was not her fault and [TC] replied 'nothing is ever my fault, if I pushed three people off the cliff it wouldn't be my fault'. She then went on to say, 'I want to take you home, Dad'. I further say that she then inquired of me what was the fastest way to get me out and I replied that she should speak to a solicitor. I further said that she should tell the truth."

84. The affidavit goes on to describe further conversation between the appellant and TC concerning the involvement of the social services in the life of the family, the care proceedings, TC's relationship with MC, the appellant's relationship with the late JC, and TC's fears that because of what she had said during the trial the relationship with her nephews and with her half-sisters might be damaged. Further, it attributes to TC a concern that her grandfather and uncles on the M side of the family would kill her. The appellant says that TC repeatedly stated that she was "*so, so sorry*", and that she and he held hands. They did not discuss the matter of the appellant threatening or attempting suicide. The appellant further stated that TC expressed concern that as Garda Jude Gallagher had put so much work into the case that Garda Gallagher might be mad with her. The appellant then stated at paragraph 20 of his affidavit:

> "I say that my conversations with [TC] and everything I have set out above led me to the view that [TC] was acknowledging that she had told lies during the trial in maintaining her allegations against me."

85. The appellant went on to say that following that meeting on the 5th of March 2018, he received a phone call from RC on either the 6th or 7th of March 2018, and that both RC and TC were on the line. It appeared to be a three-way call. TC informed him that she had spoken to a solicitor in Dublin called Shalom and that she (TC) was due to attend her office on Thursday the 8th of March 2018 for the purposes of making an affidavit. The appellant states that he told TC that he would get justice for her and that she responded by asserting that she intended to get justice for him. Further, he stated that TC had encouraged him to be brave and informed him that she believed he would be released from custody by the 12th of March 2018, which was the date originally fixed for his sentencing.

The Affidavits of Tony Collier, Solicitor

86. In his affidavit sworn on the 17th of May 2018, Mr Tony Collier, Solicitor, sets out the procedural history of the case. He outlines what he believes to be the new evidence that has emerged since the conviction and he sets out the general background to his involvement in the matter including that he acted as solicitor for the appellant at his trial, having taken over the case from a previously instructed solicitor. In a section of his affidavit entitled "Pretrial requests for disclosure", Mr. Collier deposed to the fact that due to significant interactions within the appellant's family with various agencies of the State including counsellors, psychiatrists, psychology services, medical professionals and social workers it was necessary to seek extensive disclosure. He points out that the prosecution disclosed the fact that both complainants in the book of evidence (TC) and (MC) had made allegations of being the victims of rape and sexual assault on previous and entirely separate and distinct occasions against innocent third parties in the period from December 2014 to January 2015. In both instances, the matters were fully investigated by the Gardaí resulting in accused persons being arrested and detained for interview. However, in subsequent interviews under caution, both complainants admitted to having made up false allegations against the said third parties during their witness statements of complaint to the gardaí.

87. Mr. Collier stated that the disclosure material provided by the DPP identified several other issues of concern, including the complainant's history of engagement with psychiatrists and mental health professionals, a reported history of her hearing voices, and the fact that since being taken into care she had made a number of conflicting statements to mental health practitioners as to the circumstances of her father's alleged offending. He then referred to the history of Facebook Messenger App conversations between TC and the appellant (involving the *William Molineux* account) some of which were disclosed by the prosecution, and more which were disclosed by the appellant, including the draft letter to the Children's Ombudsman Ms. Emily Logan. Notwithstanding the existence of this material the prosecution had elected to proceed with the trial.

88. After outlining that there had been a previous attempt to try the appellant which had had to be aborted, Mr Collier described the course of the trial which resulted in the appellant's conviction. He stated that following the verdict of the jury the appellant had maintained his innocence and maintained that the complainant TC had made up the allegations and had told lies throughout the course of the trial. He confirmed that the appellant had immediately inquired about the possibility of appealing and that he had received instructions from the appellant to appeal his conviction.

89. Mr Collier's affidavit then goes on to outline, on a hearsay basis, the instructions he had received from the appellant concerning the events of the 5th of March 2018. He states that following the visit, the wife of the appellant indicated that the complainant wished to speak directly with him concerning her evidence at the trial. Mr Collier states that he was provided with a phone number, and that having made specific inquiries with the wife of the appellant it had been confirmed to him in no uncertain terms that the complainant wished him to ring her directly. He stated that he took advice from senior and junior

counsel and, on foot of that advice, decided that he should at least ring the complainant who had reportedly asked to speak to him.

90. Mr. Collier states that on the evening of the 6th of March 2018, he rang the complainant's telephone number and spoke with her. He informed her why he had called her, namely that she had requested the phone call to discuss the case involving her father. He says that the complainant confirmed that she had requested the phone call. He pointed out to her that he was not able to give her legal advice and he sought and obtained confirmation yet again from the complainant that she was aware that he was her father's solicitor. He pointed out to her that it was unusual for a defence solicitor to call a complainant in a case and that he was doing so on the basis that she had specifically requested the call.

91. It is desirable to set out *verbatim* paragraphs 40 to 43 inclusive of Mr. Collier's affidavit. He stated therein:

> "40. I say that during the brief conversation, the complainant stated that the "whole situation is crazy" and that "D should not be in prison". I say that the complainant stated that she had lied during the trial but did not elaborate.
>
> 41. I say that I advised her that she required independent legal advice and I recommended Shalom Binchy as being a highly experienced solicitor who could provide independent legal advice to the complainant. I say that I advised her that if what she was saying was the case, she would likely need to swear an affidavit to that effect.
>
> 42. I say that the complainant stated that she was very concerned about the other parties in the case such as the investigation team from [a named county] and family members. I say that she expressed a wish to come to Dublin and have one meeting only to resolve the matter. I say that out of fairness to the complainant, I informed her that this was unlikely and that the gardaí may wish to take a statement from her. I informed her that Ms. Binchy would advise her accordingly.
>
> 43. I say that with her consent she asked me to pass her details to Ms. Binchy with a view to arranging an appointment to swear an affidavit concerning the lies she had told in her evidence. I explained that if she wished to deal with the matter, she should do so urgently given the serious nature of the situation and that the applicant was then due to be sentenced on March 12, 2018. I say that she stated that she was suggesting seeing her father later in the week of March 5, 2018 and coming to Dublin on Thursday or Friday of that week."

100. Mr. Collier then goes on in his affidavit to say that his impression of TC's demeanour during his phone call with her was that she was relaxed. However, he was doubtful as to whether she fully understood the consequences of her actions and/or the significance of her having told lies under oath at the trial. In the next section of his affidavit he describes contacting Ms. Shalom Binchy concerning the matter and receiving confirmation from Ms. Binchy that she had spoken with the complainant and had set up an appointment with her

for the morning of March 8, 2018. He was subsequently advised by Ms. Binchy that the complainant did not attend at that appointment.

101. Mr. Collier confirms that he wrote to the prison authorities asking them to preserve any footage of the prison visit that had occurred on the 5th of March 2018. He goes on to describe how in the light of what had occurred the sentence hearing scheduled for the 12th of March 2018 was put back until the 23rd of March 2018 initially, and then to the 16th of April 2018. He then deals with the sentencing hearing and the sentences imposed. Following this he outlines that the appellant sought to appeal by means of a Notice of Appeal dated the 24th of April 2018, and his affidavit sets out the grounds of appeal stated therein.

102. In the next section of his affidavit Mr. Collier avers that the matters that he has deposed to, together with the matters referred to in the affidavits of the appellant and KD constitute fresh evidence post-conviction which would reasonably impact on the verdict of the jury. He contends that the following matters constitute exceptional circumstances which would allow this Court to admit further evidence at the hearing of the appellant's appeal:

    i. The mere fact of a visit of the complainant to the appellant in the Midlands prison on March 5, 2018 given the content of her evidence in the criminal trial that she was in fear of him and her stated belief that her life was at risk;

    ii. The words spoken by the complainant during the visit and the indication and her stated intention to seek legal advice about her evidence;

    iii. The conversation referred to by the applicant in his affidavit concerning the three-way telephone call involving the complainant on either March 6 or 7, 2018 and that she (the complainant) was intending to get justice for the applicant;

    iv. The contents of the telephone conversation between the complainant and Tony Collier on March 6, 2018 and the statements made that the complainant had told lies during the criminal trial;

    v. The acknowledgment by the complainant that she agreed to meet with Ms. Binchy on March 8, 2018;

    vi. The content of the phone call with KD where the complainant stated that her father was not a rapist.

103. Mr Collier further averred that in circumstances where the truthfulness, reliability, credibility and motivation of the complainant formed to a significant extent the basis of the appellant's defence, the evidence which has emerged since the appellant's conviction would have a material and important effect on the status of the evidence of the complainant at the trial.

104. In his supplemental affidavit, Mr Collier asserts that in so far as TC may have purported to reject his earlier assertions in the replying affidavit sworn by her, he categorically stands over what he had said. He adds that having reviewed his file he has located an attendance note with respect to his actions in and around the 6th of March 2018, and his correspondence with Shalom Binchy, which he exhibits. He also confirms having made a statement to the Gardaí reflecting what he has deposed to on affidavit.

The Affidavit of K.D.

105. As previously alluded to, KD also swore an affidavit in support of the application. She stated that she is a family friend of the appellant and his wife RC. She lives in New Zealand. She has known them for around 23 years and states that the "C" family and the "D" family were close and spent a significant amount of time together. She stated that when she heard about the allegations made against the appellant she was shocked and upset. She believed what was alleged by TC and MC was entirely inconsistent with their life as she knew of it during the time they were in New Zealand. She stated that when the "C" family returned to Ireland the families remained in contact including via social media.

106. KD describes a video call with TC via Facebook Messenger App on the 6th of March 2018 and exhibits a printout of the call log. She describes how TC had related that she had been to see her father, how she had found it very overwhelming and that tears were shared by her and her father, that TC had stated on a number of occasions words to the effect that prison was a horrible place and her father did not belong there, that "D" looked old and that she wanted "*to take him home and make him a cup of tea*". KD stated that notwithstanding the solemnity of the subject matter TC had been very happy and jovial and had talked freely about her father in a positive manner. She stated that TC had said to her, referring to her father, that "*he [is] not a rapist*" and that "*he did not do those things to me*". KD said that TC repeated on numerous occasions that "*he is not a rapist"*. KD stated that because the nature of the interaction involved a spoken conversation she does not have a verbatim note of what was said. Nevertheless, she asserted that she has given her true and honest recollection of the call.

The Affidavit of TC relied upon by the Respondent

107. The affidavit of TC was sworn on the 31st of October 2018. At paragraph four thereof she says that she was in contact on Facebook with AD and her mother KD, each of whom had accounts in their respective names, and TC exhibits relevant printouts of her conversations with those parties. The printout of the AD account, which is exhibit "TC1", runs to 99 pages of closely spaced type script commencing on Wednesday, the 10th of March 2010 and continuing to Wednesday, the 7th of March 2018. The printout of the KD account, which is exhibit "TC2", comprises nine pages commencing on Monday the 19th of October 2009 and continuing to Wednesday, the 7th of March 2018.

108. TC drew attention in her affidavit to a message received from the AD account on the 27th of February 2018. She averred:

> "I received messages on the 27th of February 2018 from this account where I was told that the appellant was starving himself to death and it could be a matter of

days. On the 1st of March 2018, I received a message saying that he was going to die and that I was the only person who could stop that from happening."

109. TC also drew attention in her affidavit to the KD account, saying that:

> "The first time that KD messaged me after the trial, I was at my friend's house and I broke down because she said I hadn't told the truth. Once I replied to her, RC, my father's wife, started to message me."

110. TC denied in her affidavit that she had video called KD, contending on the contrary that any video call conversation was actually with AD. TC maintained that KD would only have been present for two minutes. She denied saying that she wanted to take her father home and "*make him a cup of tea*". She denied saying that he was not a rapist, or saying that "*he did not do those things to me*".

111. TC averred that on the 1st of March 2018 she received a message from the *Scriosta Athair* account. She knew immediately that this message was from RC or her father. She believes it was from RC. She exhibited a printout of the *Scriosta Athair* account from the 1st of March 2018 to the 7th of March 2018 as "TC3".

112. At paragraph eight of her affidavit she avers:

> "When I read the message from RC broke down. I felt guilty for my father lying in the cell every night as he is still my father. I started to feel very low myself. I felt that since the trial, I could not pretend anymore that the abuse has not happened and I felt like the scars has been reopened. In one of the messages she asked if I would call her as "Dad has asked me to ask you something but I don't want to do it over messenger". I rang her on 4 March 2018 and she said to me that my father didn't deserve to be in there, when he was good, he was good, and when he was bad, he was bad. She also said that he was starving himself and that he had dropped a size since he was in prison. She was basically saying he was going to die. She said that she was going up tomorrow to the prison and that he had sent up a message to her for me to come up and visit him. I told her that I would go and see him"

113. TC goes on to make the point that KD, AD and RC had all said that her father was going to kill himself. She stated that she was upset as that was her fear and she didn't want someone's life as her responsibility.

114. TC then relates:

> "The following day, the 5th of March 2018, I got the 9:30 AM train from [a named place]. I was aware that RC was on the same train and I panicked. I phoned my boyfriend who told me to get off at [another named place] and that he would bring me from there. When we arrived at the prison, initially I wasn't allowed in as the prison officers said I wasn't on the visitors list. RC then arrived and she got me in. RC and I met the appellant in the visitors' room. We walked in and he came over

and hugged me, he was crying and he rubbed my hand and said "my beautiful girl, my beautiful girl." He kept asking "what are we going to do". I asked him what he wanted me to do and he said to join his team and sue the State, the State are responsible for me being brainwashed and giving me tablets to have real life visions. He kept saying that he didn't deserve to be there and that he forgave me. I agreed with RC and my Dad to sue the State and that I would withdraw my statement. I said yes because at the end of the day he's my father and because I wanted to believe that what happened didn't happen and that the social workers did give me drugs. But I know that that is not what happened.

When we left the prison, RC said she would be in contact with the girl on my father's legal team. I didn't agree to take a phone call from anybody. On the 6th of March 2018 I received a phone call from a solicitor, Tony Collier. He says that he cannot advise me, that he can just direct me. He said that I could be charged for lying under oath but I didn't lie under oath. He told me about a solicitor named Shalom and said something about an affidavit and that if I signed it saying that I lied and that I made it all up, it would be done quietly and my father would be released to the following Monday as they can't keep an innocent man in prison. I may have said to him "the whole situation is crazy". I did not say to him that "*D should not be in prison*". I did not tell Tony Collier that I had lied during the trial. I felt overwhelmed when he rang me."

115. TC then relates how on the 7th of March 2018, "*I spoke to the solicitor Shalom and arranged to meet her in Dublin on the following morning*". However, that same day she received a further Facebook Messenger App communication from an account named [R] Fuhrer. She understood this to be another account used by RC, and she has exhibited a printout as "TC4". It contained the single message "*Hope you are OK*". TC states that when she got home from work her sisters knew that something was wrong and she told them what she had done. She then contacted Garda Jude Gallagher to tell her about what had happened and she made the statement which we have quoted above at paragraph 77 of this judgment. TC exhibits the statement and the subsequent statements made by her as exhibits "TC 5", "TC 6" and "TC 7".

116. TC concludes her affidavit by stating:

> "I confirm that everything that I said in my statements to members of An Garda Siochána is true and that at no stage did I tell any lies to members of An Garda Siochána. Everything that I said in evidence to the jury, about what my father, the appellant, did to me is true. I said to my father that I would withdraw my statement because I believed that he was on his deathbed and would die in prison."

Cross-examination of the various deponents

117. On the 11th of November 2018 this Court sat to hear Tony Collier, KD, and the appellant DC, being cross-examined by counsel for the respondent as to their respective affidavits.

118. The cross-examination of KD, who was in New Zealand, was conducted by means of a Skype connection. It was not possible because of the time difference, New Zealand being eleven hours ahead of Ireland, to utilise the more usual video link technology, which typically involves a direct video connection from the remote location to the courtroom, with the possibility of recording both audio and sound. Because of the time difference KD was required to submit to her cross examination late at night when neither courthouses nor commercial video link providers in New Zealand were open for business. However, the Skype link proved adequate to the task, and the audio of the cross examination was recorded on the DAR in the courtroom at the Irish end of the link.

119. On the 11th of January 2019, the Court sat to hear the cross-examination of TC. She was cross-examined via a video link between the courtroom and vulnerable witnesses' suite in the CCJ, which was the same arrangement as that by means of which she had given her evidence in the court below.

Cross-examination and re-examination of Tony Collier

120. Mr Collier was cross examined by counsel for the prosecution. Mr Collier stated that he was informed by the solicitor in his practice running the trial, Ms Sherry, that TC visited the appellant in prison, and no longer wanted to stand over her evidence. Mr Collier then got in touch with RC, who told him that TC wanted him to contact her. He said he took over the matter due to its unusual and serious nature. When asked why he made contact with TC, Mr Collier said that the purpose of the phone call was to confirm the position from TC herself and to ensure that another solicitor would be put in place to deal with the matter. When asked whether he inquired into the circumstances which brought TC visit the appellant in prison, Mr Collier said that he did not make such inquires. He said that he became aware of the visit after the fact and he was not aware of the surrounding circumstances. He confirmed that he did not ask TC in their discussion on March 6th as to how she came to visit the prison.

121. Mr Collier confirmed that he recommended a solicitor to TC, Ms Shalom Binchy; he said that he wanted to ensure that a solicitor would be in place once he confirmed the position from TC that she had visited her father in prison and wished to recant. She further indicated to him that she would be prepared to swear an affidavit to that effect.

122. Mr Collier was then re-examined by counsel for the appellant. Mr Collier stated that he acted very cautiously in deciding to speak to TC. He said that it was a serious situation and he approached it with caution; in his judgment he saw it best to speak with TC and tell her that she would need an independent solicitor. He confirmed that TC never requested him directly to contact her; that the request from TC came though RC. He explained to TC that it is highly unusual for a defence solicitor to contact a complainant. He said he only contacted her due to her requesting that he should do so and the serious nature of the matter. He also told the Court that he explained to TC that this would not be a matter that could be resolved with one meeting in Dublin, and that she would need legal advice.

Cross-examination and re-examination of KD

123. KD was cross examined from New Zealand via a Skype connection. Mr Owens SC questioned KD about Facebook messages she sent to TC on the 1st of March 2018, where she said *"Darling, please make it soon. I'm worr (sic) about you and your dad has not much time left. Would it help for you to talk to him?"* KD answered that this was meant in relation to the appellant's upcoming sentencing. She said that she had been told by RC that the appellant was "not eating well" in custody but was not aware of him being close to death or seriously ill. She confirmed that RC had told her that the appellant was not coping well in custody but stated that she was unclear as to the extent. KD stated that she did not discuss the matter of the appellants conviction with her daughter AD, but was aware that AD may have been in contact with TC. It was put to KD that her messages to TC had nothing to do with sentencing but were in fact an attempt to convince TC to meet with the appellant as he was going to die. It was put to her that she was leaving it with AD to convince TC to visit the prison.

124. KD confirmed that she received a call from TC on the 6th of March. It was put to her that most of that telephone conversation was in fact with AD, for the purpose of encouraging TC to go and see the appellant. KD denied that that was her intention. After the phone conversation, KD sent a further message to TC whereby she wrote *"..my darling, you're the most courageous girl I know, you're amazing and beautiful to do what you're about to do. Saved his life and yours."* When asked what she meant by the words "saved his life" , she said, "that could be taken a number of ways". Counsel presented a message from AD to TC on March 5th which read: "*Did they by any chance manipulate you into thinking your dad did things that maybe he didn't do? Like, you can honestly tell me that you can be completely truthfully know (sic) he did those things. Be strong, my sister.*" KD replied that she was not aware of that message. KD said that she became aware of TC visiting the appellant during a phone conversation where TC said: "*I went to see him*". KD denied having encouraged TC to visit the appellant and said "It was [TC]'s decision to go and see her father". She went on to say that she couldn't be "a hundred percent sure" if there was discussion about trying to get the appellant out of prison or speaking to a solicitor. KD said she did not ask about the circumstances which brought TC to visit the appellant but that she was "shocked" when she heard that TC had gone to see him. Counsel further pressed her on the message, "*what you are about to do...saved his life and yours.*" KD answered that she meant that TC and the appellant "*would both be set free when she told the truth*". When asked about what TC was "*about to do*", counsel asked was this in reference to TC going to withdraw her evidence against her father. KD replied that TC "*actually never said that*", and what TC had said was that the appellant "*was not a rapist and that he did not belong there*". Counsel asked KD whether she was aware of TC going to Dublin and for what purpose. KD answered that she had heard of TC's intention to go to Dublin, possibly from RC, to see a solicitor. KD had communicated with TC saying "*it's going to be a huge day with a lot of emotions*"- counsel asked her what she was referring to here. KD answered that she knew that TC was going to see a solicitor to "*talk about the case, that's all I knew*". KD had sent another message to TC, "*of course you would tell your sisters*"; counsel asked was this a message of concern that TC's sisters would put a stop to her seeing a solicitor. KD answered that she believed that TC's sisters would influence her decision and that TC wanted to go.

125. KD was then re-examined by counsel for the appellant. He asked her about her affidavit, where she described TC stating that "*prison was a horrible place and her father did not belong there*" and that "[*the appellant] looked old and that [TC] wanted to take him home and make him a cup of tea"*. She confirmed that she recalled TC saying that. KD described TC's disposition when talking to her on the phone as "*happy*" and that she could hear "*the excitement in her voice*". She described the conversation with TC as "*positive*".

Cross-examination of the appellant, DC

126. The appellant was cross examined by counsel for the prosecution. The appellant denied being on a hunger strike in prison after his conviction. He said that he "fasted" for three days for religious purposes. He denied having any knowledge of anyone communicating with TC suggesting that he was starving himself. In relation to TC's visit to the prison on March 5th, the appellant said that RC indicated to him that morning that TC might come. He said that TC had indicated to RC prior to that that she might go to the prison, which RC had told him about a few days prior to the visit. The appellant was asked about TC's visit to the prison. He described that there was "*general father and daughter talk*" between him and TC. He accepted that there had been communication between him and TC via Facebook messenger; he said that TC had initiated contact with him on the 12th of November 2012. He said that the purpose of the meeting was his concern for her welfare, and that she came to see him because of her "*remorse and guilt*", not because she was under the impression that he was dying. He said that during their meeting he told her that he "*forgave*" her and that she kept telling him that she was sorry. He said that the visit lasted approximately 35 minutes. It was put to him that he told TC that "it was now time to join forces" and "sue the State", which the appellant denied. The appellant confirmed that RC was present throughout the meeting. The appellant said that TC inquired as to how she could get him out of prison. It was put to him that that was the purpose of getting TC to the prison, which the appellant denied. The appellant said that there was a three-way phone conversation between him, RC, and TC two or three days after the visit. He said that TC was not in RC's company during the phone call. He knew at this stage that there was a proposal for TC go to a solicitor.

127. The appellant was re-examined by his own counsel, who asked him about TC's visit to the prison. The appellant said that TC was fearful of the attitude a Garda may take with her because of the work put into the prosecution case. He said she was also concerned about how her wider family would react. Counsel moved on to the three-way phone conversation between him, RC and TC. He described TC saying that she was going to get him "*justice*" and to "*be strong*". Counsel made the point that the phone call was not made in the same time line as other messages where TM had written to KD: "that man is a rapist".

Cross-examination of TC

128. TC was cross-examined in the Court of Appeal on the 11th of January 2019 by counsel for the appellant. This was conducted via a video link to the courtroom from the vulnerable witness's suite within the CCJ building where TC was located. He put it to her that in her statement, she had said that the only people she told about contacting the appellant was her sister SC, her boyfriend RK, and MS, and he asked why she did not disclose to the

Gardaí that she had also told KD and AD. TC said that they were not on her mind; that they are her father's relations. TC confirmed that she would sometimes speak to AD on the phone, but not with KD. Counsel questioned TC over communications between her and KD, where KD wrote "*to live that untruth would destroy you*". He asked why she didn't refute that. He also asked whether terms of affection ad been used in the communications between her and KD, suggesting that they were on good terms. TC answered that the first message that she received from KD after the sentencing was as follows: "*Hey Darling, I want you to know how important you are to us…We can get through this [TC]. You, my darling deserve a life that has no regrets. As you know, life is so short…We can get through that together, you can rely on us here to help you.*" TC said that she was made feel like the appellant's life was her responsibility and that he was going to die in a matter of days. TC did not accept KD's assertion that she had said that her father did not belong in prison.

129. TC said that she was expecting a phone call from a person on the legal defence team, as RC informed her to expect a call. She said that RC had told her that Mr Collier would be ringing her. She said he rang her at approx. 7.30p.m. and she informed RC after that Mr Collier had telephoned her. She said that it was "wrong" for someone from the defence team to contact her. She said she never requested a call, but that she accepted the call. TC denied ever saying to Mr Collier that the appellant should not be in prison or that she lied during the trial. She said their discussion was to the effect that he could only direct her and he referred her to solicitor Ms Shalom Binchy. TC said she received a phone call form Ms Binchy the next morning. It was put to her that Mr Collier's account was correct, that the reason he referred her to a legal advisor was that she had told lies during the trial and now faced the possibility of prosecution. TC denied this. She said she agreed to meet Ms Binchy over the phone but did not contact her again. She said she did not go to meet her. TC denied expressing concerns about her wider family or the Garda who dealt with her case. She said her only family of concern are the [M]'s.

130. Counsel pointed to a message on the 7th of March between AD and 'TM', which he suggested to be TC, whereby TM said "*Yes, I'm meeting the solicitor tomorrow to cancel all charges. Nervous…*" TC answered that that was what the appellant asked her to do but the charges were never lifted. Counsel then referred to a message from TC to '*Scroista Athair*' , which he suggested was RC, which said, "*Tony rang and said it would be a long process basically.*"

131. TC said that when she went to visit the appellant in prison, the only person that was aware of it was RC, and then her boyfriend R. She said that the appellant came over to her and hugged her and was rubbing her head. She said she was crying throughout, that she could not believe she was there. She did not accept that she had been affectionate towards her father while she was there. She accepted that she told him she would lift the charges as he requested and sue the State with him. She said that information concerning her life that the appellant had alluded to in their conversation was information that he would heard at the trial, such as details of her job and her boyfriend. She said she did not recall speaking to him about these matters herself or saying to him that it was her

intention to leave where she was living. TC said she could see that the appellant was fine, not unwell or dying. She asserted that she was pressurised to visit the prison on the basis that he was unwell, that he was dying.

132. TC said that she had no recollection of a three-way phone call. It was put to TC that when it dawned on her that she could face a criminal prosecution that she "decided to recant your decision to recant". TC replied that she had been manipulated by the appellant, RC and KD. TC said nobody had influenced her decision not to see Ms Binchy, and that she had chosen not to participate in the sentencing by giving a victim impact statement to the Gardaí.

133. TC was then re-examined by counsel for the prosecution. TC told the Court that her visit with the appellant at the prison lasted approximately 30 to 40 minutes. Counsel asked her whether anybody knew anything about what had been going on between herself and the [D]'s up to the time of the prison visit. TC said nobody was aware until she told the Garda who she liaised with, the day after the visit. She recalled a message from AD which said "*He's dying in there, hun, he's killing himself*". TC said the purpose of the visit for her was closure, which did not happen. In relation to KD and AD, TC said that the last time she had seen them was in 2009 in New Zealand. She said they would only have had contact through social media, Facebook messenger. TC said that after the trial, RC had persuaded AD and KD to get in contact with her, and then RC got in contact. There was a message from the 27th of February 2018, appearing to be from AD, which said: "*I'm telling you this because it's so upsetting. He's broken. He's starving himself to death. He hasn't eaten since last Thursday and gotten really sick*". TC said she believed this to be completely true at the time. TC recalled other messages: form the 1st of March: "*…your dad is going to die and you're the only person who can stop that from what's happening*" and, "*He hadn't eaten in over a week. They're already letting him die.*" TC said she never contacted RC or anybody else, but that they contacted her. Another message said: "*Darling, please make it soon*".. "*I'm worried about your dad, there's not much time left. Would it help for you to talk to him?*". TC again asserted that the reason that she went to see the appellant was that she was led to believe that the appellant was on his death bed, and that she regrets visiting him. She confirmed sending a message to AD which said: "*I don't want him to die and if I have control over that of course I'm not going to let that happen.*" TC said her view on this was that she felt some responsibility over the appellant's life, and that she was being told that his life was effectively in her hands. AD wrote to TC: "*He's going to die in there. He deserves to be punished, I mean he did some haunting things to you*" which TC confirmed receiving. AD also wrote to her: "*It's not your fault he's in there, that's on him. You're just the only way he can live and that's put you in such an awful position*", which TC confirmed receiving. Another message from AD said: "*Did they by any chance manipulate you into thinking your Dad did some things that maybe he didn't do?*" TC said that there was nothing in her conversations with AD before that which may have inspired AD to ask that. TC confirmed that the appellant had asked her to join with him to sue the State. She said that the appellant believes that his children were abducted from him for no reason and that they were given drugs by Social Services. TC said she told him she would lift the charges but did not do so. She said she was only

contacted by RC after the visit about withdrawing her statement, and told that she should expect a call from Mr Collier, solicitor. TC said that at the time Mr Collier spoke to her, she had no intention of withdrawing her statement. She said that her liaison officer was not aware until after the visit had taken place. She had given her mobile phone to the Gardaí no more than a week after the visit.

The law in relation to the admission of fresh evidence

134. The law on this topic is reasonably well settled. The principal authorities are those of *The People (Director of Public Prosecutions) v Willoughby* [2005] IECCA 4, a decision of the former Court of Criminal Appeal which set out four essential principles (the so-called Willoughby principles) to be adhered to in addressing an application to adduce fresh evidence on the hearing of a criminal appeal; and the decision of the Supreme Court in *The People (Director of Public Prosecutions) v O'Regan* [2007] 3 I.R. 805 which expressly approved of the Willoughby principles while making some additional observations some of which are not particularly material in the context of the present application. The Supreme Court had previously laid down a test for the admission of new evidence in civil cases in *Murphy v Minister for Defence* [1991] 2 I.R.161, but it had not previously laid down rules governing the admission of new evidence on appeal in criminal cases.

135. The *Willoughby* principles, as approved by the Supreme Court in *O'Regan*, 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 required 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.

136. It was not in any way controversial at the hearing of the appeal that these are the applicable principles. However, one of the additional observations made by Fennelly J. in the Supreme Court in *O'Regan's* case, which is material, and on which counsel for the appellant places much reliance, was that:

> "In criminal cases, the courts will not, for the reasons given by Kearns J, close their eyes to available new evidence which might correct an injustice."

137. Kearns J, who gave the leading judgment in *O'Regan*, with which Murray C.J., Geoghegan, Fennelly, and Macken JJ. had agreed, had remarked on this topic that:

> "The application of these principles should not be seen as displacing or negativing in any way the overarching requirement that justice be seen to be done having regard to all the circumstances and facts of the particular case. In this regard, the court is again satisfied that the "saver" contained in the first of the stated principles is adequate to safeguard that particular requirement. No statement of principle in *People (Director of Public Prosecutions) v Willoughby* is to be seen or understood as abrogating that requirement."

138. The Court was referred to T*he People (Director of Public Prosecutions) v Feichín Hannon* [2009] 4 IR 147, as representing a practical illustration of the application of the so-called overarching requirement that justice be seen to be done. In our view, however, the Feichín Hannon case is readily distinguishable from the present case.

139. In that case Mr Hannon had been convicted of sexual assault and common assault based on a complaint made by a ten-year-old girl. It was her word against his. After he was convicted the complainant and her family moved to the United States. Ten years later the complainant returned to Ireland and confessed to various people that she had made the whole thing up, and that Mr Hannon was innocent. She further went to the Gardai and made a statement to that effect. Unlike in the present case, the complainant in the Hannon case made an explicit assertion to the Gardai that she had lied during her evidence at the trial. No such claim was made in this case. The high-water mark in the applicant's case in the present case is TC admitted to having lied, either expressly or in substance, to the appellant (in the presence of RC), to Mr Collier and to KD. However, TC disputes these assertions. There is no suggestion that she ever made a statement to Gardai suggesting that she had lied about being raped and sexually assaulted by the appellant. Moreover, and again unlike in the present case, the complainant in the *Hannon* case did not seek to later disown the claim that she had admitted to lying.

140. In the circumstances of the *Hannon* case the DPP did not oppose an application for late leave to appeal and on the hearing of the appeal it was stated by counsel for the applicant, and accepted by counsel for the DPP, and this is a crucial difference between that case and this, that Mr Hannon was innocent of the charges of which he had been convicted. There is no such acceptance here.

141. A final basis on which the Hannon case may be distinguished is that it concerned a miscarriage application pursuant to s. 9 of the Criminal Procedure Act 1993, and not an application to adduce fresh evidence which is the application presently under consideration.

142. It is true that in the third last paragraph of his judgment in *Hannon,* Hardiman J. stated:

> "The court accordingly considers that the applicant is entitled to a certificate since a fact which is both new and newly discovered – the complainant's confession of having fabricated the allegation – shows that his conviction was a miscarriage of justice"

143. Be that as it may, there is a fundamental difference between that case and this in that the confession to having fabricated the allegation was accepted as a fact by all concerned in the Hannon case and there was no controversy about it. In the present case, however, TC's alleged confessions to DC, to Mr Collier, and to KD, either that she had lied, or in the case of KD that DC "did not do those things to me", are hotly disputed with the complainant strenuously denying that she made any such confessions. Moreover, she has made positive statements to An Garda Siochána, and has since confirmed in an affidavit and in oral evidence before this Court, that her evidence to the court below was true.

144. In those circumstances the third and fourth of the *Willoughby* principles are engaged, namely that the new or fresh evidence to be adduced must be evidence that is credible, and which might have a material and important influence on the result of the case; and moreover, the assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation. In so far as the first two *Willoughby* principles are concerned these are prima facie satisfied. It cannot be gainsaid that the alleged confessions, if they are credible, would qualify as fresh evidence that ought to be admitted. Such evidence was not available and could not have been available at the trial. If it had been available, it might have had a material bearing on the outcome. However, as already stated, the key issue is whether the evidence that the appellant now desires to adduce is credible.

145. This Court has weighed carefully all the evidence both in support of the application to adduce fresh evidence, and the evidence adduced by the respondent in opposition to it, including all of the relevant affidavits and the documents exhibited therewith. Further, although this Court does not often have the opportunity to hear live evidence, in circumstances where, for the most part, it determines appeals on the basis of transcripts of the evidence in the court below, and/or affidavit evidence filed in support of procedural motions, the opportunity to hear live evidence has been afforded to us in this case by virtue of each of the deponents who filed affidavits either in support of, or against, the motion being cross examined as to their affidavits. In considering and weighing the evidence adduced at the hearing of the motion we have also considered and have taken account of all the evidence at the trial. It was for this reason that we felt it necessary to review that evidence in the detail that we have during this judgment.

Conclusions of the Court:

146. Following our review, we have concluded that the evidence of the confessions allegedly made to DC, and to KD, is not credible. We found that neither DC nor KD impressed us as witnesses. DC's evidence must be regarded with appropriate scepticism and recognition of the possibility; indeed we believe likelihood, that it is entirely self-serving. KD's evidence exhibited bias to our minds and lack of independence. In our judgment, DC is a highly manipulative and controlling person, aided in that regard by RC; while the complainant TC is a vulnerable person who is racked by conflicting emotions. On the one hand she yearns for a normal family relationship, including with her father, notwithstanding his abuse of her. This is evident from the Facebook Messenger App conversations and her willingness to maintain contact with him for much of the periods we have reviewed. On the other

hand, she wants to see him brought to account for those abuses and punished. Despite her conflicting emotions, she has presented both at the court of trial and before this court as adamant that she was sexually assaulted and raped by her father and as being determined, notwithstanding her conflicting emotions, to stand over her claims.

147. In the circumstances, and having applied the Willoughby principles, we are not satisfied to grant the relief sought in so far as it is proposed to lead evidence from DC and KD that TC confessed to them that she had in effect lied at the appellant's trial and had given false evidence against him.

148. Turning then to TC's alleged confession to Mr Collier. We consider his evidence to be in a different category to that of DC and KD. Mr Collier is a solicitor and officer of the court and he was acting in a professional capacity. It cannot be said that he was independent and disinterested because he was the lawyer acting for the appellant and would naturally have been concerned to promote his client's interests. He appears to have recognised the conflict from the outset as he was at pains in the course of his cross-examination to repeatedly emphasise he saw the indication that TC wished him to call her in connection with wanting to recant as being "*a very dangerous situation*" "*a very serious situation*" and one that required "*caution*". Because of this he determined that he could not offer TC advice, and he made arrangements for TC to be independently legally advised by Ms Shalom Binchy.

149. There were unsatisfactory aspects to his evidence, however. He was pressed in cross-examination as to why, in circumstances where he knew from the account given to him of a telephone conversation between his assistant Ms Sherry, and RC, that it was being suggested by RC that TC wished to recant, he did not tell RC when he spoke to her on the telephone for twenty minutes commencing at 19.35 on the 5th of March 2018 that TC should contact Ms Binchy directly. He provided two reasons for not doing so: (i) that he felt it would be unfair to Ms Binchy to directly refer TC to her "*without having some structure on it*". He said "*I didn't want to dump this situation on to another solicitor*"; and (ii) he wanted to verify for himself that TC did in fact want to recant.

150. There are several difficulties with this. The first is that he had already enough information, albeit hearsay, to have adequately briefed Ms Binchy concerning why it was thought necessary to refer TC to her for advice. It was not necessary for him to talk directly to TC. Ms Binchy would, or certainly should, have been able to immediately appreciate the delicacy of the situation, and the potential conflict of interest faced by Mr Collier, and to have been able to take it from there without any need for Mr Collier to have spoken directly with TC. Without putting it any higher, he was very unwise to do so.

151. Secondly, there was no obvious need for him to speak directly with TC, to verify the information that he had received from Ms Sherry, namely that RC had stated that TC wished to recant, and further that TC wished to speak to someone on the defence legal team. TC was not the informant, it was RC. The appropriate person to talk to in the first instance to verify what had been relayed to him was the informant. Mr Collier did speak to RC by telephone for twenty minutes, commencing at 19.35 on the 5th of March 2019. It is

unclear why after that he would feel the need to seek direct confirmation from TC as to what it was she wanted before contacting Ms Binchy. Yet he asserts that he did. It was, however, for Ms Binchy to do that in due course.

152. In fairness to Mr Collier, in his main affidavit he says that "having made specific enquiries with the wife of the applicant, it was confirmed in no uncertain terms to me that the complainant wished me to ring her directly. I say that I took advice from senior and junior counsel and, on foot of that advice, I decided that I should at least ring the complainant." Further, at one point in his cross-examination he offers as a further reason for deciding to speak to her that he had been told that TC wanted to speak to him in order to recant, or withdraw her statement "and that was the purpose of the call and that's why I formed the view, having spoken to counsel and having considered the matter very carefully, that it was a call that should be made."

153. With respect to him, while this establishes that he believed that it was necessary to make the controversial call to TC, it doesn't at all explain why it was he felt he had to make that call. It also bears commenting upon that despite Mr Collier's asserted appreciation of the seriousness of information conveyed to him by Ms Sherry, and of the need to proceed with caution, he acknowledges that he neither made a contemporaneous record, nor subsequently prepared any attendance note, of his twenty-minute conversation with RC commencing at 19.35 that evening.

154. A third unsatisfactory dimension to his evidence is that despite his asserted belief that he needed to directly verify what TC wanted, before it would be appropriate to brief Shalom Binchy, he did in fact contact Ms Binchy about the matter at about 10.00am on the following morning, hours before he spoke with TC. There is no explanation of why, having spoken with Ms Binchy and presumably briefing her based on the information that he had at that point, he still felt it necessary to speak directly with TC.

155. His evidence was that later, on the evening of the 6th of March, he did telephone TC using a telephone number that had been provided by RC. In his main affidavit he asserts, inter alia, in describing what transpired during that conversation, that "*the complainant stated that she had lied during the trial but did not elaborate.*" This taken at face value amounts to a confession by TC to Mr Collier that she had given false evidence at the trial. This wording is reflected verbatim in several passages in bold typeface that appear in two emails sent by Mr Collier later that evening to Shalom Binchy and to the appellant's counsel and described by him "*as my attendance note of a telephone conversation today with TC*". At no point, however, has any separate document constituting an attendance note in those terms ever been produced. Be that as it may, we acknowledge the possibility that Mr Collier may have intended the e-mails to also serve as his attendance note. If his evidence in regard to the sentence we have highlighted is credible, then this would constitute fresh evidence that, in the interests of justice ought to be admitted at the hearing of this appeal. But is it credible?

156. As already alluded to, Mr Collier later swore a supplemental affidavit in which he exhibits both a contemporaneous handwritten note of the conversation, and the aforementioned

emails. Significantly the contemporaneous note does not record the complainant as stating that she had lied during the trial. The closest it comes to that is the notation therein: "*will swear an affidavit that she told lies during the trial"*. Mr Collier was subjected to a detailed cross-examination on what had in fact been said during this conversation. Mr Collier said that:

> *"The memo isn't a verbatim note of the conversation to and fro. So actually I didn't write on this note things I may have said, so this is listening".*

Counsel then put it to him:

> *"You're writing essentially what she said?*

Mr Collier agreed, stating: "*Yes, as I'm listening, yes*". It was subsequently put to him:

> *"Q: So when you say in your affidavit in relation to lies that she admitted that she told lies at the trial or referred to it, is really the point of it there your piece in the memo that she indicated or agreed to swear an affidavit that she had told lies during the trial?*
>
> *A: Yes. She confirmed that that is what she wanted to do, yes*
>
> *Q: In other words that she wanted to recant her testimony?*
>
> *A: Yes".*

157. It is our assessment that while there is clear and credible evidence that TC told Mr Collier that she would swear an affidavit indicating that she had told lies during the appellant's trial, that is not the same thing as evidence of a confession by TC to Mr Collier that she had told lies at the trial. Mr Collier's statement to the latter effect in the two emails referred to, and later in his main affidavit, appears to represent an assumption on his part that she was confessing to having lied, based on the appellant's asserted willingness at that point to depose on affidavit that she had told lies at the trial. However, there is no credible evidence that she confessed to him that she had lied. He has no note of it, and he specifically did not assert, either during his cross-examination or his subsequent re-examination, that in addition to saying she would sign an affidavit stating that she had told lies at the trial that she had separately positively confessed to him to having done so.

158. We were required to conduct our credibility assessment in the light of all the evidence including the evidence at the trial. There was evidence in the trial of earlier instances where TC had committed under pressure from others to executing a document asserting a position only to subsequently not to follow through, or to disown it; alternatively, to disown a complaint previously made or recant from a position previously taken.

159. The letter to Emily Logan which was never sent is a clear example. The occasion where she told her social worker that she wanted "*to break the statements*" is another example.

160. We consider that there is abundant evidence as to TC's vulnerability, and of her malleability when under immediate pressure. The immediate background to the phone call that led to her visit to the Midlands Prison was an understanding on her part that he father was imminently going to die either from, self-starvation or by suicide. It is therefore entirely understandable that under pressure from RC and DC she would visit the prison and might agree, and/or later volunteer to Mr Collier, to execute an affidavit saying that she had lied. In that regard, she explicitly said in evidence by way of explanation that she didn't want another life on her hands. That is not, however, the same thing as confessing to having lied. We are not persuaded that Mr Collier's evidence, although credible and reliable in so far as it goes, and offered in good faith, represents credible testimony of a positive confession by TC that she had given false evidence against the appellant.

161. In the circumstances, and applying the Willoughby principles, we are also not satisfied to grant the relief sought in so far as it is proposed to lead evidence from Mr Collier that TC confessed to him that she had lied at the appellant's trial, implying that she had given false evidence against him. The available evidence does not go that far. Specifically, the alleged evidence that there was a confession fails the credibility test.

Alleged wrongful admission of evidence of other misconduct

162. The first mention of the Facebook Messenger App conversations occurs during the latter part of TC's evidence in chief on day 3 of the trial. Prosecuting counsel is leading evidence from TC that she had been in contact from time to time with her father over a lengthy period via the *William Molyneux* account. A 19-page printout, covering the period between Sunday April 6, 2014 at 9.01 am and Saturday January 27, 2018 at 10.55am was produced to the witness, and counsel flagged that he wished to direct the witness to various parts of it and to ask her some questions about it. However, before proceeding to do so, prosecuting counsel sought to enter this document as an exhibit, namely prosecution exhibit no 3. There was no objection to him doing so by defence counsel.

163. Although the contemporaneous transcript record is silent on it, it is understood from other references later in the transcript that the jury received copies of the document at this point so that they would be able to better follow the evidence. There was a brief delay at this point as a juror had requested a bathroom break. When the juror had returned, prosecuting counsel continued leading evidence in chief from TC by reference to various parts of the printout.

164. After some time, a printout from the Scriosta Athair account was also introduced, consisting of eight pages covering the period between Sunday November 9, 2014 at 10.06am and Monday December 19, 2016 at 11:38am. This does not appear to have been given a separate exhibit number, and it appears to have been treated as a second tranche of documents cumulatively comprising exhibit 3. However, it is not disputed that it was introduced as an exhibit, and that copies of this second document were also distributed to the jury. Again, there was no objection by defence counsel.

165. Following the introduction of this document the examination in chief of TC continued for some further short time and then concluded. The transcript records TC's evidence in chief as concluding at a quarter to four, i.e., 3.45pm. As it was a Friday evening, the jury was sent away until 11.00am on the following Monday.

166. As soon as the jury had retired defence counsel raised the following issues with the trial judge:

> *"MR O'HIGGINS: Judge, I have a difficulty … [a]nd there's two aspects to it. It's a complaint of the defence … that the materials that the witness has gone through over the last while are materials that arose on foot of a step we acknowledge taken by the defence, that is to say the defence took the unusual step of sharing with the prosecution materials which the defence had but as far as we can see, and it seems clear, the prosecution did not have, by prosecution I mean legal team for the prosecution and they were the Facebook messages between father and daughter.*
>
> *JUDGE: For the purpose of contextualising presumably?*
>
> *MR O'HIGGINS: Yes. It was done in the context where, and I put it bluntly, it was self-serving in one respect in that it was with a view to inviting the Director of Public Prosecutions to reconsider the question of proceeding with the matter No. 1 and No. 2 also if there was to be -- if the matter was to be pressing ahead, as was the determination of the Director, to request that An Garda Síochána at least take from the complainant her reaction to these matters. That was done and a statement was served which gives the complainant's version as to --*
>
> *[INTERRUPTION]*
>
> *MR O'HIGGINS: So, a statement was taken by An Garda Síochána and in fairness provided to the defence in which the complainant put forward her --*
>
> *[INTERRUPTION]*
>
> *JUDGE: Now, I don't think you'll have any more interruptions, Mr O'Higgins. Very good.*
>
> *MR O'HIGGINS: In any event, Judge, I shared with Mr Owens my concern that this would be -- that this would be used by the prosecution with the witness No. 1 and in fairness there wasn't agreement to not doing that and the prosecution pressed ahead and, as the Court has seen*
>
> *JUDGE: Well, the jury have it now.*
>
> *MR O'HIGGINS: I certainly had misgivings and expressed it before it went to the jury. I didn't anticipate it to be used as an exhibit. It was, in fairness, quite clearly indicated to me it would be canvassed with the witness, bluntly, if I may say, with a view to the prosecution diffusing what was defence ammunition, so to speak*

JUDGE: Well, I presume there's plenty more defence ammunition, Mr O'Higgins. I have just been glancing through

MR O'HIGGINS: So, it was a prosecution tactic and I don't say that's illegitimate. It was sought to diffuse what was, in one sense, material for the defence and that's litigation and that's fine. However, Judge, I did not anticipate, and I indicated I would have a concern, just when I saw they were going into the -- it was proposed to hand them out, that they would be provided to the jury and I say that is a step that ought not have taken place in my respectful submission.

JUDGE: Then you should have objected at the time, Mr O'Higgins.

MR OWENS: Yes, exactly.

MR O'HIGGINS: Well, sorry, I did. I did.

JUDGE: You didn't. I didn't hear objection or judge there's an issue.

MR O'HIGGINS: Well, I made it clear to my colleague that I didn't think this should happen and they should not be going across and with respect --

JUDGE: Well, I think you're a bit late, Mr O'Higgins. I mean if you had -- when it was clear they were being produced, the simplest thing to say to me was there's an issue, Judge, in the absence of the jury, I would have sent them away and we'd all argue this but you didn't and they've now gone into the jury.

MR O'HIGGINS: Well, Judge, it's in the context where there was an indication and the concern expressed that this shouldn't be done at all and the prosecution --

JUDGE: Well, that's between you, not to me.

MR O'HIGGINS: Oh I accept that, I accept that. But in other words the same result would follow if I press ahead from the prosecution but I take your lordship's point, there wasn't an application made to you. I acknowledge that.

JUDGE: No, no.

MR O'HIGGINS: But nonetheless this has gone into the case now and two difficulties arise from this. First of all one of my concerns was that there would be an attempt to rely upon this by the prosecution as somehow being corroborative of the complainant's account and in that connection the complainant herself read out, and in fairness I don't say Mr Owens did this, but the complainant read out material where she -- which basically breached the rule against narrative in my respectful submission. She read out a portion of an extract she had sent, a communication she had sent

JUDGE: It's a document. It's an exhibit in the case.

MR O'HIGGINS: … it breaches principles of law which ought not be breached and that's the first matter.

The second matter is this, Judge, and it's perhaps more serious again and that is that in one of the communications that in fact was treated of and a light, as it were, was shone on, there's reference to the accusations of [MC] which has been kept out of the case with some considerable care and indeed a fresh indictment was -- an amended indictment was served to strip from the case so the jury would not see it with their eyes the fact there was a[n MC] allegation at all and that is something that the jury will now be aware of and I say that is more than problematic and the Court will recall that page 13 where certainly there's one reference to that, I don't know if it appears elsewhere in the document because there a lot of material and it's very dense and it's very small type in fairness to everybody, there's reference -- I think it's a communication from my client or under the name William Molyneux, top of page 13, seven or eight lines down, "I remember a girl who accused her dad of the same sex acts you and [MC have accused me of. The dad went to prison for almost 10 years before she finally told the truth and he was released. She went on to write a book" and goes on. And that page and excerpts from that page before and after were gone through by the complainant before the jury and I say this is material which the jury should not be reading or hearing or hearing anything about and it's a problem.

JUDGE: Well, you have created the problem, Mr O'Higgins, if problem there is but anyway I'll hear Mr Owens first.

MR O'HIGGINS: Well, Judge, with respect, I do not accept that with respect. I accept of course the Court's ruling, excuse me, I don't mean to be impertinent.

JUDGE: Yes.

MR O'HIGGINS: But I don't think it's fair to say the defence has created this. We indicated a misgiving more than once. We asked for it not to be done

JUDGE: But the way you do that is then you seek a ruling from the Court. I mean that's -- and I would have been quite happy to tease the matter out, Mr O'Higgins, but it's now gone to the jury. Now, it in fact presumably they're all in the jury room, the copies are all in the jury room, and they certainly won't have had an opportunity to consider them in any detail but they're exhibits in the case now and you knew what was in this.

MR O'HIGGINS: The difficulty was it was not anticipated they would be put into the jury as exhibits, that was a new position. That was not indicated would be occurring."

167. Prosecuting counsel then submitted that it was always perfectly clear that the material at issue was going to be introduced to the jury as an exhibit. There was a statement of the

complainant which referenced various parts of it and it was served as an exhibit with the statement. He submitted it would be a complete nonsense if it didn't go into the jury. Counsel stated that he had made perfectly plain to defence counsel that he was going to canvas the contents of the printouts and there could have been no reasonable expectation by the defence that he would not do so. He stated:

> *"The first I really heard about it was really when he began discussing it sotto voce with me before -- just as I was doing it but there wasn't -- you're quite right -- there wasn't an objection in relation to it."*

168. The trial judge then enquired as to when the additional evidence was served, and prosecuting counsel stated that it had been served, including all of the exhibits in controversy, the previous Monday.

169. Prosecuting counsel then added:

> *"What happened was that after the material was vouchsafed to the defence by me you'll recall that I indicated, as I was going to anyway, that I intended to get a statement taken to find out what the full facts of the matter was because obviously it was relevant to get the whole context to it and as a result of that the statement was taken over last weekend and [TC] produced the phone and, as it turned out, all of these messages were on the phone. I presume the defence have the messages in any event because they must be fully aware of what's in the messages. They have a big folder of them. I only saw extracts, let's face it, last Friday. So, they must know what was in it and the statement was prepared and the statement really deals with what's in it and these various aliases and the messages that were passing and indeed the circumstances of this Emily Logan thing and all the rest of it. So, with respect, I think it's too late to object I have to say and the jury will make of it what they will. It can be explained the purpose for which it is put in. It's put in in relation to -- so that the jury understand the nature of the dynamic between the two people involved in this particular case and the circumstances in which something which is undoubtedly material to their assessment of the witness took place."*

170. Defence counsel then responded making several points. First, he suggested, it was made clear to the prosecution '*don't put this into the jury'*, but the prosecution pressed ahead. Secondly, it was not anticipated by the defence that the material in controversy would be used as an exhibit. He acknowledged that "*it was indicated it would be used as material through which to bring the complainant through her evidence which is just akin to a statement. The jury do not see statements. They should not see material such as this.*" He further suggested that the error was akin to interview notes going in before the jury but without redactions having been made that had previously been agreed. He said that it was always his understanding that if the materials at issue were going to be gone into before a jury there would be some sort of editorial process and some sort of agreement on redactions. That was completely bypassed by the decision to put it before the jury in the way in which it was done.

171. On this point, defence counsel also said:

> *"… of course we were given the statement of additional evidence with these matters served. We acknowledge that. It's very dense material but that is not an indication that they can be used as an exhibit, just as the situation with serving a statement of evidence. It's not an indication that the statement is going to be used as an exhibit. … we cannot be blamed or it cannot be laid at our door … it is difficult to see how this can safely be remedied but that's a matter for the Court."*

172. Although defence counsel appeared to be suggesting that the situation was irremediable, he did not proceed to make any actual application to the trial judge. He simply registered his objection to what had occurred. However, he did not ask in terms for a discharge of the jury.

173. Neither did he ask that the material that was being objected to should be retrieved from the jury in early course, so as to limit the potential for further damage. In circumstances where the jury had been sent home at the first break following the introduction of the exhibit it was inherently unlikely they would have had an opportunity up to that point to peruse what was a substantial document in any detailed way. The exhibit would in normal circumstances have remained undisturbed in the jury room for the weekend and would not be engaged with again until the jury next reassembled there, i.e., on the following Monday morning. It seems to us that retrieving the exhibit at that point would have been a potentially viable option to at least partially address the problem. We would accept that it would possibly not have been the complete solution because, as defence counsel has rightly pointed out at the hearing of this appeal, one reference in respect of which complaint is made had been on a page to which prosecuting counsel had directed TC when examining her in chief, and with the jury following the cross-examination with the aid of the copy exhibit provided to them.

174. Nor did defence counsel ask the trial judge, if she was not prepared to direct that the exhibit be retrieved, to give the jury specific instructions as to how they should treat those aspects of the material that was now being objected to.

175. The trial judge, having listened to the submissions from both sides, then asked to see, and was provided with, a copy of the relevant Notice of Additional Evidence. Having perused this, she then ruled as follows:

> *"JUDGE: Right. It clearly states that, "The attached hereto and served herewith is a list of additional witnesses and take notice that attached hereto and served herewith is a list of additional exhibits" and in the schedule of additional exhibits there are the messages from messenger app between Scriosta Athair and [T C], messages from messenger app between John O'Cruise and [T C], messages from messenger app between William Molyneux and [T C] and attached to the notice are all of the messages which have now, on the application of the prosecution, and without objection to the Court from the defence, been made exhibits in the case and have been given to the jury.*

It appears to me that this is not certainly evidence, it's not new evidence, it's not evidence of which the defence were unaware since the messages were either sent or received by the accused and it was this matter arose in the context of the defence furnishing, at the beginning of the trial, furnishing an excerpt from the series of messages to the prosecution and I'm told and accept that following that all of the messages were downloaded and served as an exhibit on the defence. Mr O'Higgins is a very experienced counsel, if he didn't want the jury to have this material he had ample opportunity to object to the matter being given to the jury or being made an exhibit in the case and he made no such objection but now, that having been done, he is now objecting and I really think it's too late. I also note from a brief look at the material there may be other matters of assistance to his client in it as well but if one is objecting to the admissibility of evidence then that objection has to be made to the Court before the evidence is admitted and it wasn't. So, I am afraid it's too late."

176. The complaint about breach of the Rule Against Narrative is not being pursued on this appeal. What is being pursued, however, is the complaint that the jury received printouts of the Facebook Messenger App conversations which contained references to MC also having made allegations (of sexual molestation) against her father, DC, and that the trial judge did not deal with that appropriately in the interests of the accused receiving a fair trial.

177. The references involving MC to which the objection related were identified for us with specificity at the appeal hearing, as being the following:

Facebook Messenger App references to allegations by MC in prosecution exhibit 3

"Scriosta Athair" account, page 6 of 8:

- Sunday June 19, 2016 at 1.38am
- Message from RC to TC
- Referencing MC: "Both of you told vile lies"

"Scriosta Athair" account, page 6 of 8:

- Sunday June 19, 2016 at 12.42am
- Message from DC to TC
- Referencing MC: "You and your wannabe social worker sister chose strangers over your dad, that's what you must live with, you made disgusting allegations about me that is torn [me] part and caused my mother a great deal of pain, I wash my hands of both of you now."

“Scriosta Athair” account, page 7 of 8:

- Thursday March 5, 2015 at 4.42pm
- Message from DC to TC
- Referencing MC: "someday both of you will ask for forgiveness"

“William Molyneux” account, page 10 of 19

- Friday November 7, 2014 at 2.21 pm
- Within the draft Emily Logan letter authored by TC and being quoted by TC to DC in the message.
- "So my social workers decided to get an appointment with the guards in [named town] to try and get me to make statements about him, so everything I was told by the social services or my Morrell side of the family I had said. So did my sister, but I was getting my dad into serious trouble due to false accusations that he didn't deserve I've told my social worker Niamh Griffin to cancel my statements...."

“William Molyneux” account, page 13 of 19

- Tuesday November 4, 2014 at 11.54pm
- DC to TC
- "I read of a girl who accused her dad of the same sick acts you and MC have accused me of... "
- Commentary: this is the reference that was on the page, alluded to earlier, to which TC was directed by counsel for the prosecution during her examination in chief.

“William Molyneux” account, page 14 of 19

- Monday October 20, 2014 at 1.16pm
- DC to TC
- "Like your sister I'll see you in court and I will insist you both see jail…."

"William Molyneux" account, page 16/19

- Monday July 7, 2014 at 5.38am
- DC to TC
- "I will not allow myself to be hurt by you or your sisters hateful actions anymore xx"

178. At the oral hearing of this appeal, counsel for the appellant was confronted by a member of our bench with why, if he felt the situation was irremediable, he had not sought a discharge of the jury. He responded that he had not done so because in his view there was no question of the judge stopping the trial. She had taken the position: '*This is the defence's problem. You've created it and you live with the consequences*', and he went on to say: "*…simply that this is a trial judge focusing on who is to blame not what are the effects of this development. And that's my core point on that.*"

179. There is no doubt but that the trial judge was very much inclined to place the blame for what had happened squarely on the shoulders of defence counsel. On day 4 of the trial, the following Monday morning, in the absence of the jury, the trial judge commenced by stating that she had reflected over the weekend on what had transpired on the previous Friday. Addressing defence counsel, she stated that the exhibit objected to "*took some time to distribute to the jury, there were three separate exhibits. You took no objection, you stood mute while they were being exhibited*". She further pointed out that prosecuting counsel had then proceeded to examine the witness in relation to the exhibit and that defence counsel had offered no objection until the whole process was completed. The trial judge considered that "*that verges on the improper and should this matter go elsewhere I wish to have that on the record*".

180. The substantive basis for the underlying complaint is that these references were evidence of bad character, suggesting misconduct by the accused on an occasion other than one which was the subject matter of any count on the indictment, and involving a different complainant, the prejudicial effect of which outweighed their probative value.

181. Indeed, it is suggested that far from this material having any probative value with respect to the matters on the indictment there was a real risk that the jury would regard it as evidence of propensity on the part of the accused and that they would proceed to draw, what Lord Herschell described in *Makin v Attorney General for New South Wales* [1894] AC 57 as, "*the forbidden type of inference*". This was a reference to what O'Donnell J, in his judgment in the Supreme Court case of *Director of Public Prosecution v McNeill* [2011] 2 IR 669, characterised as "*the impermissibility of the deciding on the guilt or innocence of the accused by a reasoning process that gives credence to the adage of giving a dog a bad name.*"

182. As the trial proceeded, counsel for the defence cross-examined TC at length, including some of the six specific matters complained of, or passages in which matters complained

of were included. For example, there is a lengthy passage in the *William Molyneux* printout for Tuesday November 4, 2014 at 11.54pm in which DC says to TC: "I read of a girl who accused her dad of the same sick acts you and MC have accused me of... During the cross examination of TC, on day 4, TC is asked to read out further portions of the passage in question including where DC says that: *"…I don't deserve what you both have put me through over the past few weeks and I will fight tooth and nail until my dying breath to have my name cleared and those accused me shamed*". And "*I mentioned in a previous message that I wanted you both to go to prison for false accusations…"*.

183. Counsel for the appellant contended in argument at the hearing of the appeal that in the light of the trial judge's ruling, he felt he had no choice but to cross-examine on these matters. Be that as it may, although the prosecution, and indeed the trial judge, had objected to some of his questioning and there had been argument about it in the absence of the jury, particularly on day 7, he accepts that he did not ask at any point to have the jury discharged on the basis that they had impermissibly received evidence suggesting that the accused had engaged in misconduct not covered by the indictment and that he was therefore of bad character.

184. It is important to make the point that there are references to MC all over the transcript. She clearly had a significant place in the narrative that is recorded in the Facebook Messenger App conversations. She was a part of the family at the centre of this case, the dynamics of which the jury were being invited to consider. She played a role in those family dynamics, being frequently aligned both in circumstances and in sympathy with TC., e.g., they had been taken into care together, they were close, and they both blamed their father for having contributed to their mother's death.

185. To give a flavour of how frequently MC features in the transcript she is referred to many times by TC in her evidence in chief:

- TC recounts an incident that happened when she was three, where MC, upon checking on their mother after she had been struck by DC and had hit her head against a mantlepiece, was repeatedly hit in the face by him. (Day 2 Page 4)

- TC stated that every time she and MC would go to their father's house after their parents had separated, he would have presents waiting for them; commenting that she realised when she was older that he was effectively trying to buy their love. (Day 2 Page 5)

- In relation to the night after their mother had died, TC states that MC was sent downstairs, whereupon DC committed the first offence against TC upstairs in the house [at a specified address]. (Day 2 Page 13)

- In relation to the anal rape in the sitting room, TC states that an argument had broken out when DC told TC and MC that he was getting married to RC and that RC and MC had been kicked out of the house when the offence occurred. Afterwards, TC met RC and MC in the park (Day 16 page 14).

- In relation to the offence in the aftermath of the fifth class school photograph incident that occurred in the sitting room, TC states that MC would have been in first year in [named school] and so she would have had different school time hours to her and would have still been in school and not at home during the incident. (Day 2 page 29).

- TC states that she and MC would be locked in MC's room by DC around twice a week and that they wouldn't be allowed to go to school. Sometimes they would be put behind the counter of the head shop that DC and RC ran at the time and would only be given Nutella, a few slices of bread and milk. (Day 3 page 4)

- TC states that she and MC did girl guides on Wednesday evenings and that on the day before they were taken into care, MC had collected her from the girl guides and told her that DC had kicked her out and that they couldn't go home. They then went to stay at a friend of MC's and MC went out drinking before they both stayed in their maternal grandparent's house that night. TC and MC then stayed with the [a named foster family] in [a named place], with MC remaining there for the rest of her time in care. (Day 3 Page 8-9)

- TC states that DC would never call MC "J", only her. She thought this is because she looks more like her (Day 16 page 14)

186. Amongst the references to MC during the cross-examination of TC by defence counsel were the following:

- TC stated that DC was contacting her and MC from the day they went into care. (Day 4 page 4)

- In the course of cross examination, TC was asked by Mr. O'Higgins to read out passages of the messages sent between her and DC. She reads out the paragraph where DC refers to herself and MC, where he says that: *"…I don't deserve what you both have put me through over the past few weeks and I will fight tooth and nail until my dying breath to have my name cleared and those accused me shamed*". She continues reading the messages, where DC states: "*I mentioned in a previous message that I wanted you both to go to prison for false accusations…*" (Day 4, Page 12)

- TC initiates contact with DC's Facebook account under the alias of '*William Molyneux*' on the 30th of November 2012, writing "*You wrote to MC saying it's dad*'" and asks him to reply to her. (Day 4 Page 27)

- TC is questioned about a message from the *William Molyneux* account that was sent to her on the 3rd December 2012 in which DC comments that he misses both TC and MC and talks about TC's school tests, her grandad's anniversary and asks her to tell MC that he loves her and misses her. (Day 4 Page 30)

- A message on the 3rd of December 2012 from TC to the *Molyneux* account discusses her missing New Zealand, depression and self-harming. TC also discusses the loss of MC's best friend RH, stating she was coping well and comments on the fact that MC has passed her junior cert. TC expresses she is scared to tell MC about the self-harm. (Day 4 page 31)

- On the 10th of December 2012, DC, through the *William Molyneux* account, messages TC that MC loves her and "*can't understand why you are cutting, and it upsets her*". (Day 4 Page 33)

- MC is mentioned in TC's draft letter to Emily Logan as at first hating foster care because they were outside [a named town] and she 'loved the town and her freedom'. (Day 5 page 24)

- TC states that DC used to psychologically torture her mother, attempting to make her think that she was crazy while she and MC were in the house. (Day 5 page 54)

- A message from RC through a Facebook account under the name of *Tir Na nÓg* on the 19th of June 2016 states that all the problems started because MC, more so than TC, did not want to return to New Zealand. She says that the label of "bitch" fits TC and MC much better than her. (Day 5 Page 55)

- In relation to the offence involving the washing machine, TC states that she thinks that MC and RC were possibly still eating in the dining room during this incident. (Day 5 page 65)

- In an interview with social workers Helen McGeogh and Marie Richardson on the 19th of January 2010 TC stated that MC didn't like RC and that when DC was drinking he brought her and MC to their grandmother, DC's mother. (Day 8 page 5)

- A case reporting summary from June 2013 relating to MC contains the information that TC had reported hearing voices. She had texted MC that these voices were going to kill her and that her foster parents feared she would harm MC. (Day 8 page 26)

- TC made reference to DC and RC walking around naked and masturbating in front of her and MC and also RC having masturbated TC and MC in front of DC. (Day 8 page 33)

187. Another witness for the prosecution was a School Principal who testified that:

- MC was a pupil in [a named National School] with TC from 2001 – 2008 (Day 9 Page 1)

- MC's attendance was "quite good", being in relevant years 149 days, 161 days, 155 days, 161 days, 155 days and then a short year because they she only came in at Christmas in sixth class and that was 107 days. (Day 9 page 3).

188. One of the principal Garda witnesses who have evidence for the prosecution was Detective Garda Aidan Brennan, who had been involved in interviewing DC following his arrest and detention. He gave evidence, inter alia, that:

- MC was born on [a specified date] in 1997 and lived with her mother JM and DC and TC in [a certain place] until March 2004; her half-sisters lived there until 2002. (Day 9 page 12).

- After the relationship ended between DC and JM, MC and TC resided in [a certain place] one week and then stayed with DC the other week in a house he was renting in [a certain other place]. (Day 9 page 12)

- When JM died of brain haemorrhage on the 11th of March 2006, MC and TC went to live at [a named place] with DC and RC. They lived there until August 2006 after which point they went to New Zealand. (Day 9 page 13)

- After their mother died, MC and TC slept shared a bunk bed in a room in the house from March 2006 to August 2006. They did not have separate rooms at this point. DC had created a doorway in a stud wall and patched it up before they went to New Zealand. (Day 9 page 18).

- MC, along with TC, was a grooms maid in DC's wedding to RC in September 2007 in New Zealand. (Day 9 page 13)

- DC confirmed that they were contacted by social workers while living in New Zealand. "S", a friend of MC's, had noticed towels which MC had used to clean herself with after having her first period and told her mother. Social workers visited the house and asked DC about drinking; he explained why there was blood on the towel (Day 9 page 35).

- MC, TC, DC and RC moved back to Ireland in December 2008 – the girls enrolled in [a named] National school again. (Day 9 page 14)

- DC confirmed that he would on occasion drink in front of MC and TC. (Day 9 page 18)

- DC stated that his daughters did not like his drinking and that MC had written him a letter commenting on this. (Day 9 page 24)

- DC said that he had contacted MC and TC by telephone after the 28th of March 2010. He also said that MC had written him a letter around June 2010. (Day 9 page 20)

- DC said he had contacted MC initially though Facebook a couple of months prior to January/February 2013 and that MC had given him her email address; he had in turn given her his phone number. (Day 9 page 21)

- When asked of his view of the girls, DC stated that MC had a '*hobby of stretching the truth, like her mother'*. (Day 9 page 25)

- DC stated that he once hit MC on the thigh when she refused to clean up her room. (Day 9 page 26)

- In relation to count 17, which occurred between January and March 2010 and which concerned the vaginal rape of TC on the couch in the sitting room after she was grounded for running up a large mobile phone bill, DC states the during the night in question MC was allowed out but had to home by 8pm and says that she may have been at youth club and that they would walk from the house to her grandmother's at [a named location]. (Day 9 page 32)

- DC stated that it was MC who resembled her mother more than TC and that TC looked more like a 'C'. (Day 9 page 34)

- DC denied ever locking TC and MC in MC's room and disputed TC's claim that they were locked in two days before being taken into care on the 29th of March 2010; he stated that on this day, the girls were in their grandmother's house. (Day 9 page 33)

- DC stated that he had blocked MC on Facebook a few months prior to September 2014 saying she was 17, a grown woman and had his email address if she wanted to contact him. He confirmed he had blocked her because she would not reply to his messages; he had sent her a song by Nina Simone entitled 'Sinner Man'. (Day 9 page 36)

189. Moving then to the defence case, in the direct examination of RC by defence counsel there are the following references to MC:

    - RC states that she had a good relationship with TC and MC until 6 months before their removal when it worsened, more so with MC. (Day 11 Page 57)

    - RC says that the girls were never locked into MC's room or deprived of food and that MC's room did not have a lock. (Day 11 pages 64-65)

190. RC was then cross-examined by counsel for the prosecution, during which there were the following further references to MC:

    - She was asked about a letter signed by MC and TC and addressed to DC before they went into care, that read "and we know that we have written this letter 100 times but when you're angry at us it's really the only way we can talk to you and we hate not being able to talk to you". (Day 12 page 25)

    - She was asked about another letter written by MC and addressed to DC which read "*I really miss the dad I could talk to without him growling at me. I want to see a smile on your face again*". (Day 12 pages 25-26)

- RC states that the letters were based on normal teenager-parent conflicts between MC and DC (page 25).

- RC stated that neither she nor MC were ever kicked out of the house by DC. (Day 12 page 36)

- A reference is made to an incident with MC's phone being taken by her school (which is named) and DC being aggressive to the staff at the school in the process of trying to retrieve it. (Day 12 page 37)

191. It is also of note that counsel for the defence in his closing speech to the jury referred to the fact that the DPP had not proceeded against DC in respect of MC's allegation. He said: *"…the DPP decided that [MC]'s allegation should not proceed. Interesting."*.

The law on evidence of bad character/previous misconduct

192. Counsel for the appellant referred us to The People (Director of Public Prosecutions) v JG (No 2) [2018] IECA 43; which had in turn reviewed a number of authorities including The People (Director of Public Prosecutions) v BK [2000] 2 IR 199; B v The Director of Public Prosecutions [1997] 3 IR 140 and The People (Director of Public Prosecutions) v CC (No 2) [2012] IECCA 86. We have not been referred to any authorities in the respondent's written legal submissions. However, in his oral submissions to this Court on the 7th of November 2018, counsel for the respondent referenced the Supreme Court case of The Director of Public Prosecutions v McNeill [2011] 2 IR 669

193. The case of *JG (No 2)* was concerned with the introduction of evidence before the jury, in the case of a defendant charged with sexual offences of a male complainant, that the complainant had also sexually abused the complainant's sisters. The appellant had in fact pleaded guilty before another court to various charges arising out of that abuse and had received a prison sentence. The prosecution claimed that its purpose in leading this evidence was to demonstrate a system, based on similarities between how the complainant had been subjected to abuse and how his sisters had been subjected to abuse. Having reviewed the authorities, Mahon J., giving judgment for the Court of Appeal observed:

> "10. With specific exceptions evidence of previous convictions is inadmissible in the course of a trial. While similar fact evidence can represent evidence of system, it ought not to be inappropriately deployed merely as evidence of propensity and of misconduct. A distinction needs to be drawn concerning its use towards these very different ends. While it may be lead for the purposes of legitimately demonstrating system, because evidence of system will in most cases be significantly prohibitive and therefore relevant, or for some other manifestly relevant and significantly probative purpose, similar fact evidence must not be led merely to demonstrate propensity or a record of previous misconduct. If it is indeed to lead it, the legitimacy of the other purpose has to be demonstrated i.e. the evidence must be shown to be relevant and probative in some other way or ways apart from merely showing propensity of previous misconduct e.g. on the basis that it establishes

system, or that it points up the inherently unlikelihood that the accused would be falsely accused by multiple accusers acting independently, or to rebut accident or innocent explanation."

194. The Court of Appeal cited with approval the comments of Professor O'Malley in his book *Sexual Offences* (2nd ed, 2013) where he suggested that the following three important legal principles need to be weighed in the balance in order to determine whether it is appropriate to admit such evidence:-

    (i) All logically probative evidence should be prima facie admissible to facilitate the tribunal of fact in discovering the truth;

    (ii) evidence showing the propensity towards criminality or other misconduct, and showing nothing more, should be excluded because of its prejudicial effect or impact, and

    (iii) it would be wrong to deprive a tribunal of fact of logically probative evidence which may be of substantial assistance in determining whether the accused is guilty of the offence charged, even though the evidence reveals other misconduct for shows propensity and therefore has some prejudicial effect.

195. Mahon J. observed:

    "22. Clearly there is a very fine line between what is admissible and what is inadmissible where evidence of previous or concurrent wrongdoing against others by an accused is admitted into evidence in the course of a trial. The danger in admitting such evidence is obvious. A jury may be inclined to believe that evidence of other wrongdoing is in itself suggestive of guilt. Arguably, that risk may even be greater where the evidence sought to be admitted is that of broadly similar and historical conduct by the accused in respect of which he, many years previously, pleaded guilty and was sent to prison."

196. The Court regarded it as "an unusual feature of this case" that at the time that the complainant's sisters had disclosed their abuse, and had done so without any reprisal and in circumstances where they had received strong parental support, the complainant not only did not disclose that he had been abused, but in fact had positively denied it when enquiries were made of him to ascertain if that was the case. Moreover, while the appellant had been willing to plead guilty at an early stage in respect his abuse of the complainant's sisters, he was adamant that he had not abused the complainant, had fought the trial on that basis, and was maintaining that position on the appeal.

197. Ultimately, the Court of Appeal was not satisfied, on the evidence before it as to alleged similarities said to constitute a system, that the stated purpose for which the evidence was introduced justified its introduction. The Court held:

    "30. In the Court's view, and in the particular circumstances of this case, evidence of the abuse by the appellant of the complainant's sisters and his conviction for those

offences ought not to have been admitted because of their overwhelming prejudicial effect before the appellant. While the learned trial judge very effectively and comprehensively charged the jury in relation to the manner in which the evidence relating to the sister's abuse ought to be approached and considered by them in the course of their deliberations it was, in the Court's view, a very considerable risk that the jury would convince themselves of the appellant's guilt because of that information alone. This ground of appeal must therefore succeed."

198. The *JG (No 2)* decision must therefore be considered in the context of its own peculiar facts, and it is distinguishable in our judgment not least because it was not concerned with the admission of evidence of previous misconduct to provide context, which is the basis on which the prosecution in the present case sought to introduce the material in controversy.

199. It will be recalled that when the issue arose on day 3 of the instant case counsel for the prosecution stated:

> *"It can be explained the purpose for which it is put in. It's put in in relation to -- so that the jury understand the nature of the dynamic between the two people involved in this particular case and the circumstances in which something which is undoubtedly material to their assessment of the witness took place."*

200. We consider that the Supreme Court's decision in the McNeill case is much more in point than the *J.G.(No 2)* case, because McNeill was concerned with the introduction of material that suggested bad character to provide necessary background or context. The decision in McNeill represented a 4:1 majority decision of the Supreme Court, with Denham J., Macken , Finnegan , and O'Donnell JJ. in the majority, and Fennelly J. dissenting. The leading judgment for the majority was that of the Chief Justice, with which Macken J, Finnegan J and O'Donnell J also agreed. There was also a separate judgment by O'Donnell J. in which he added his thoughts on some of the issues in the case.

201. The case involved an appeal on a certificate pursuant to s.29 of the Courts of Justice Act, 1924, where the Court of Criminal Appeal had certified the following point of law:

> "Is evidence of connected background history, which might disclose matters not laid down in the indictment and, possibly prejudicial to the accused, but which is essential or helpful to the jury understanding the charges actually laid in the indictment, admissible in a criminal prosecution?"

202. The context in which this point was certified was that the appellant had been convicted at first instance of four counts of sexual assault charged as such, two counts of sexual assault as an alternative verdict to rape, and one count of oral rape, and had unsuccessfully appealed against those convictions to the Court of Criminal Appeal. An issue of controversy at the trial, and again on appeal, had been the introduction of evidence of a long standing sexual relationship between the complainant and the

appellant which included actions which could amount to offences not included on the indictment.

203. DenhamJ. in her judgment on the certified issue, having reviewed relevant jurisprudence both from this jurisdiction, and from other common law jurisdictions, to which the Supreme Court had been referred, stated:

> "48. "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.
>
> 49. 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.

The Test

50. 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 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."

204. Denham J. had earlier observed that:

> "It would be best practice for a trial judge, in most circumstances, to exercise his or her discretion, if admitting background evidence, to give a special warning to the jury as to the nature of background evidence, and of the issue to which it was relevant in the particular case. This would include a warning that such evidence is not admitted to prove, and may not be used to hold, that an accused is likely, by reason of his criminal conduct or character, to have committed the offences upon which he is charged. Rather, that such evidence is relevant to some specified issue of fact upon which the jury is required to determine. This should be particularised to the facts of a case, and may relate to issues such as consent or a relationship. The advice as to the charge to the jury set out in *R. v. W.* [2003] E.W.C.A. Crim. 3024 at para. 15 is helpful."

205. On the facts of the case before them, Denham J. determined:

> "51. In this case the background evidence of the appellant's actions to the complainant over the years explains her reaction to his abusive offences. The evidence of his "grooming" of the complainant, the classic relationship that developed, his warning of their "little secret", his abusive demands of her, are all relevant to understanding the relationship between the complainant and the appellant when the offences charged were committed. The abuse of the complainant, over and above the counts charged, is part of the relevant picture. Without background evidence the account is incomplete. The picture described in the book of evidence, and then in the trial, is typical of long running sexual abuse of a minor by an adult, where a special relationship is developed by the abuser of the abused. This relationship between the appellant and the complainant, which was developed over the years, is a key part of the evidence to render the actions of the appellant and the reactions of the complainant comprehensible, and may be relevant to issues of consent and/or the absence of complaints over the years."

206. She went on state:

> "55. The general rule is that evidence that an accused has committed offences other than those charged on the indictment is not admissible for the purpose of leading a jury to hold that an accused is likely, by reason of his criminal conduct or character, to have committed the crime/s with which he is charged. However, the mere fact that the evidence adduced tends to show the commission of other alleged offences

does not render it inadmissible if it is relevant and necessary to some issue of fact upon which the jury is required to determine.

56. It is for a trial judge to decide whether or not to allow the admission of background evidence. In making that decision the trial judge has to determine whether such evidence is relevant and necessary to a fact upon which the jury is required to determine. For example, it may relate to the relationship of a complainant and an accused at the time of the commission of the crime/s as charged on the indictment. It may be relevant and necessary to explain the action or inaction of a complainant in the circumstances.

Answer

57. I would answer the question of law posed and the grounds of appeal (a) to (f) as follows. Background evidence, which might disclose matters not laid down in the indictment, but which may have been in the book of evidence, and which would be prejudicial to an accused, is admissible if it is so relevant to facts to be proved by the prosecution or defence and to be determined by the jury that it is necessary to render comprehensible such fact or facts. It is admissible if without such background evidence the facts would be incomplete or incomprehensible for a jury. The test is one of relevance and necessity, as described earlier in the judgment. I am satisfied that paragraphs (a) to (f) of the grounds of appeal do not raise any issue so as to bar the admission of background evidence in accordance with the legal principles described in this judgment. The test to be applied is one of relevance and necessity. In this case the evidence was not wrongly admitted as it was relevant and necessary to explain the relationship between the complainant and the appellant, and rendered comprehensible the actions of the complainant. There was no breach of the rights of the appellant in the application of this principle."

207. On the issue of the recommended warning to the jury, or the absence thereof in that case, Denham J. added:

"60. While a warning is a matter for the discretion of the trial judge, in general it would be wise for a trial judge to give the jury a warning as to the nature of background evidence, as to why it is admitted, and for what it may or may not be used, as discussed earlier in this judgment.

61. In this case the trial judge gave no direction to the jury on the nature of background evidence. To determine whether the failure to give such a direction rendered the trial unsafe, it is necessary to look at the run of the trial. On careful consideration of the transcripts it is clear that the background evidence was treated in a restrained fashion. While counsel for the appellant sought to have it omitted, no requisitions were raised. Further, in considering the verdict of the jury, the fact that each of the eight counts was clearly considered separately and acquittals entered on some counts, with some alternative verdicts given, illustrates that the

jury approached their verdict carefully in relation to each count. In all the particular circumstances of this case I would not intervene in the jury's decision."

208. The appeal was dismissed in the circumstances.

209. In his judgment in *McNeill,* O'Donnell J. cites with approval what he characterises as Lord Herschell's Rule, being the following statement of principle from Lord Herschell's judgment in *Makin v Attorney General from New South Wales* [1894] AC 57:

> ""It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, *for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence upon which he is being tried*. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." [Emphasis added]

He further points out that Lord Herschell went on to observe somewhat prophetically that:

> "The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

210. Amongst the further thoughts on the issue offered by O'Donnell J., were the observations that:

> "11. … In this case I have found it useful to consider whether the evidence sought to be excluded is being adduced for the purpose forbidden by the first limb of Lord Herschell's rule.
>
> 12 It is easy to see that evidence of previous convictions by a court could be highly prejudicial in a subsequent trial. The jury would be tempted to find support for conviction in the fact that a previous court had itself been satisfied of the guilt of the accused. Where the evidence sought to be adduced is not of a conviction but rather an allegation made perhaps by another complainant (but which is itself not admissible as similar fact evidence), then such evidence is prejudicial because it may lead the jury to conclude that it would be beyond a coincidence that the accused should be charged with wrongdoing by two separate individuals. Furthermore, since the issue in such a case would be truly collateral, the Court would not be in a position to determine whether the second allegation was correct or false. If so, the allegation would remain in the case contaminating the reasoning and adjudication process of the jury. It is easy to see therefore why such evidence should be treated as prejudicial and inadmissible.

13 In my view it is clear that the evidence here is not being sought to be adduced for the purposes of inviting a jury to consider that the accused was guilty of the offences charged because of a predisposition to commit such offences alleged to be shown by the evidence of other acts of indecent assault in respect of the complainant. Indeed it is hard to see how the jury could come to such a conclusion. If the jury believes the complainant when she says that she was abused on the subsequent occasions, then it is likely they will convict the accused. But that is because they believe her in general, and therefore believe her when she says she was assaulted on the occasion charged. There is no sense in which the subsequent incidents become an illegitimate launching pad for a conclusion about the first. The evidence of further incidents is not being admitted for the purpose forbidden in the first limb of Lord Herschell's speech: rather it is being admitted because it is an intrinsic part of the story necessary to understand the circumstances in which the complainant says she was abused over a protracted period by the accused."

211. O'Donnell J. concluded that: "…if the evidence is to be admitted, it must not only fail the negative test in the first limb of Lord Herschell's rule, but it must also satisfy the positive test of being relevant to the trial, as set out in the second limb of the rule." In his determination the evidence at issue in Mr McNeill's case did both of those things.

212. That being said, however, it is important to take note of a further observation by O'Donnell J., as it is potentially relevant to the present case. He stated:

"14. It is of some relevance that in my view the evidence is of a somewhat different character to the evidence which is properly treated as prejudicial and precluded by the rule in *Makin's* case. I must admit I have some difficulty in seeing how the evidence caused real problems for the defence, other than it was alleged to offend against a mischaracterised rule against the admission of evidence of bad character. Here, the essential issue was the credibility of the complainant. The evidence of acts of indecent assault/sexual assault on occasions other than those contained in the indictment is no better or worse than the evidence related, somewhat artificially, to the specific counts. The evidence of other incidents does not supply something lacking in the evidence in relation to the index offence. On the contrary, it has the same strength and, just as importantly, weakness. It is dependent almost entirely on the credibility of the complainant. Accordingly, if the admission of this evidence causes any prejudice to the plaintiff it is of a different order to the type of prejudice contemplated by Lord Herschell's rule, for example where evidence of previous convictions is given, or evidence of separate allegations made by a different complainant.

213. In the present case, unlike in *McNeill's* case, we are dealing with evidence of separate allegations made by a different complainant. Therefore, in assessing probative value versus prejudicial value, appropriate regard must be had to what we accept and acknowledge is an increased risk of unfairness to an accused associated with the admission of evidence of separate allegations made by a different complainant, regardless

of the purpose for which it is done. Does that mean it can never be done? We think not, but that the existence of such circumstances should mandate heightened vigilance on the issue of potential unfairness.

The Judge's Charge in so far as it was relevant to this issue

214. It is complained that the trial judge never addressed the issue of how the jury should treat of MC's allegations in her charge to the jury, save to this extent. It will be recalled that in his closing, defence counsel had commented *"…the DPP decided that [MC]'s allegation should not proceed. Interesting."*. This prompted the trial judge to say during her subsequent charge *"… the DPP didn't proceed with [MC]'s allegation. That I'm not sure is much help to you, ladies and gentlemen. The DPP doesn't proceed with cases for all sorts of reasons. The DPP has decided to proceed with this case and you're going to have to judge it on the basis of the evidence."*

Application of legal principles to the present case

215. We have no doubt but that all references to MC could not be excised from the case. It would be impossible to understand the family dynamics within the "C" family without an appreciation of where MC fits in the picture and her relationship with TC, with DC, and with RC. In the circumstances, the desire of the prosecution to exhibit in full the printouts of the Facebook Messenger App conversations is understandable.

216. One might ask rhetorically, would it have been possible to retain most of the references to MC in the printouts of the Facebook Messenger App conversations with just a few strategic redactions to remove the six references most particularly complained about? Undoubtedly, that would have been technically possible, but it is of significance that no such redactions were requested by the defence. They were neither requested informally in discussions between counsel, nor formally through an application to the trial judge in the absence of the jury, for a direction that there should be such editing in the interests of fairness.

217. It is also of significance that the existence of the record of the Facebook Messenger App conversations was first brought to the attention of the prosecution by the defence who had selectively used some of the material to make a case to the DPP that the prosecution should be withdrawn. It was entirely reasonable in the circumstances for the prosecution to have proceeded on the assumption that the defence were fully aware of the contents of all such material, which was within their client's possession or at least procurement; and furthermore it was entirely foreseeable that if the DPP was not prepared to drop the case that the prosecution would seek to obtain all such material for use at the trial. That is what happened, and if the defence did not want it to be used, it was incumbent on them to object. They did not do so.

218. Equally if it was not intended to object in principle to the introduction of most of the material but it was nonetheless thought desirable that some portions of it should be redacted, it was incumbent on the defence to identify those portions and if agreement could not be secured through informal discussions between counsel then to raise it with the court in the absence of the jury. Again, the defence did not do so.

219. There is no question of the defence having been taken by surprise or ambushed. They were put on proper notice by means of a Notice of Additional Evidence that the material would potentially be exhibited. It was their responsibility, having been formally served with the material in that way, to have thoroughly read it, to have identified potentially objectionable material, and to take whatever steps were necessary to protect their client's interests.

220. What in fact occurred was that there was, metaphorically speaking, an attempt to close the stable door after the horse had bolted. The material was already before the jury when the issue was first raised with the trial judge. Counsel for the appellant suggested that the situation was irremediable but, quite extraordinarily, made no application either that there should be a discharge of the jury or that any other step should be taken. The Notice of Appeal complains, *inter alia*, that the trial judge did not discharge the jury. The view might be taken that defence counsel considered that it was implicit in the objection raised by him that that was what he wanted. But again, he never made that request in terms. The trial judge adopted a censorious attitude to how the defence legal team had behaved and ruled, in effect, that the objection was raised too late in the day, and that there was nothing to be done at that point. However, it seems to us that it would have been open even at that stage, in circumstances where no discharge had been expressly asked for up to that point, for defence counsel to suggest in terms that the jury should be discharged. Again, this was not done. While it would have been open to the trial judge to discharge the jury of her own motion, and notwithstanding the absence of an express application to do so, it is clearly to be inferred that she did not consider that it was merited. While counsel for the appellant made much of his assessment that the judge was angry, and hostile in her disposition and ruling, and that there was therefore no point in seeking to press the matter, or indeed revisit it at a later stage in the trial, we are not impressed with his submission in that regard. Every barrister knows, or should know, of the importance of making a necessary application, even if it is adjudged to have little prospect of success before the immediate forum, to preserve the possibility of ventilating and relying upon the same point on appeal. In this instance, counsel for the respondent makes the valid and legitimate point that since a discharge of the jury was not sought in the court below, this court should be slow to allow a case to be now made that the judge's failure to discharge the jury, either on the basis that it would have been implicitly understood by the trial judge that that application was in fact being made, albeit not articulated in terms, alternatively of her own motion, somehow rendered the trial unsafe and the verdict unsatisfactory.

221. In making these observations we are not to be taken as implying that, had an application for a discharge of the jury been made in terms, alternatively understood as having been made implicitly, the trial judge would necessarily have been obliged to do so; or that she was necessarily obliged to discharge the jury of her own motion.

222. Counsel for the appellant makes the case that the trial judge focussed unduly on who was to blame and not on the consequences of what had occurred. He describes this as his "core point". His case is that even if the ire directed at the defence by the trial judge was

justified, and he does not accept that it was, she had an overriding duty to ensure fairness in the trial and it was incumbent on her to act to address the unfairness that would potentially result from the admission before the jury of an exhibit that suggested that MC had also made an allegation or allegations against the accused in similar terms to those made by TC.

223. In assessing the contention that the decision to allow the trial to continue was unfair to the appellant, by reason of the admission of the material complained of, it is necessary to carefully consider the entirety of the evidence and the "run" of the trial. It is clear from the evidence that the alleged offences were said to have occurred within a highly dysfunctional family. DC was a self-admitted alcoholic who regularly caused strife and grief in the household by reason of his drunkenness. There were allegations of domestic violence directed at his late wife JC, the mother of TC and MC, including banging her head off a mantlepiece in one incident. JC died of a brain haemorrhage, having previously survived similar cerebral insults, but there is a subtext in the evidence that TC and MC attribute a degree of blame to their father for how their mother died. They appear to have been not alone in that. The suggestion is that at least some of his late wife's family, the M's, also attributed such blame to him, and may have influenced TC and or MC in that regard. There was evidence was of a poisonous relationship between DC and the M's. Also in the mix was a separation involving DC and JC, who although not legally married had been living together in a relationship effectively as man and wife, and the development of a relationship between DC and RC, with DC later marrying RC following the death of JC. There was evidence of child bereavement with a suggestion of unresolved grief, of lack of parental support, of allegations of non-sexual child abuse (e.g. locking TC and MC in a room) and neglect (e.g., leaving them with only Nutella, a few slices of bread and some milk for nourishment). Importantly, there was also evidence of significant psychological vulnerability on the part of both TC and MC, with TC suffering depression and self-harming. There was evidence that while TC and MC were close, both girls, but TC in particular, longed for parental affection and a positive parent-child relationship with DC, particularly in the aftermath of JC's death. The alleged rapes and sexual assaults are said to have taken place in the midst of all of this, while both girls were still very young, and leaving TC at least emotionally confused in her thinking and conflicted in her feelings towards DC. There were then the circumstances in which TC and MC went into care, the nature and tenor of the communications between TC and DC following her going into care, DC's continuing interest in also re-establishing contact with MC, DC's reaction to learning that complaints had been made to the Gardaí by both girls, and the ongoing parent/child relationship between TC and DC and the wider family dynamics.

224. In order for the jury to have the fullest possible picture for the purpose of assessing whether the charges against DC were proven beyond reasonable doubt, we do not consider that it would have been appropriate to redact exhibit 3 to excise the particular passages complained of. It was a fact that it was not just TC who had made allegations of sexual abuse against her father. MC had also done so. This information was certainly prejudicial, but it was also both relevant and potentially probative in our view in respect

of an issue that the jury were required to assess, namely the credibility and reliability, or indeed otherwise, of the complainant TC in respect of her allegations against DC.

225. Moreover, the reason the fact that an allegation of sexual abuse had been made by MC against DC was relevant, and potentially probative, even though a count relating to it was not before the jury, was because having knowledge of its existence and its general nature, although not the specific details, allowed the jury to see and assess in full context, DC's reaction to having such allegations made against him by both of his daughters and to evaluate that reaction including what he said to TC about it via the Facebook Messenger App, and his actions and behaviour. To have presented that reaction to the jury on the basis that it was precipitated solely by learning of TC's allegations would have been both untrue and a distortion. It was an important piece of the jigsaw. If the jury were to take account of his reaction in any way, and it was conceivably of potential relevance to both the prosecution and the defence case, they had to know accurately what were the circumstances that had precipitated that reaction. The jury would have been entitled to take that reaction into account, together with TC's actions and behaviour, both at the time and more widely, which they would also have had the benefit of considering in context, in determining the credibility and reliability of the account given by TC in her evidence. In addition, in circumstances where DC had put forward the positive defence that TC's allegations (and indeed the allegations of both girls), were fabricated, that they represented "vile lies", and that TC (and implicitly her sister) must have been brainwashed/manipulated by representatives of the social services and/or the "M" family, to make false allegations against him in order to do him down, the reaction of TC on learning of the allegations, and his subsequent actions and behaviour, would have assisted the jury in assessing his defence, and whether having regard to it, they could be satisfied beyond reasonable doubt of his guilt with respect to the charges before them relating to TC. We consider that it would not have been appropriate to have expected the jury to do so based on redacted background information in the circumstances of this case.

226. We have already stated that in our assessment the misconduct evidence complained of was both relevant and potentially significantly probative. However, it is still necessary to consider the potentially prejudicial effect of it and whether the risk associated with that would have justified stopping the trial notwithstanding its relevance and probative value. Counsel for the respondent in submissions before us made the point that the Facebook Messenger App references to MC, about which complaint is now made, played relatively little role in the trial as a whole. The effect of his submission was to suggest that the actual additional prejudice to the accused was modest indeed. We think there is some substance to this. Bearing in mind O'Donnell J.'s caveat in *McNeill* that allegations suggesting offending against another complainant or other complainants may represent a greater potential prejudice than the suggestion of additional incidents involving the same victim, giving rise to a consequent need for heightened vigilance concerning possible unfairness in the trial process, we nevertheless think that in this particular case, having regard to the family dynamics, and the large variety of other alleged misconduct referred to before the jury without objection, and which was not the subject of any count on the

indictment (such as non-sexual child abuse and neglect, domestic violence and assaults, oppressive alcoholic behaviour in the home, to mention but some), the additional prejudice to this accused of the jury learning that MC had also made an allegation against him, would have been far from dramatic news and unlikely to have added greatly to the prejudicial effect of the other misconduct material that the jury had already heard, or were going to hear about, without objection. We think that the suggestion that the additional prejudice to the appellant of the jury having learnt in a very general way that MC had also made an allegation involving some unspecified sexual misconduct against the appellant would likely have been modest, is a point well made. It bears commenting on that, in the objected to material, the only suggestion that it was something sexual, as opposed to one of the many other forms of misconduct also featuring in the case, comes from was DC's reference to "*the same sick acts you and MC have accused me of...*". It was arising from this reference that it was decided that the jury should receive evidence from Detective Garda Brennan, using the previously mentioned agreed formula, that the DPP was not proceeding with a charge relating to abuse of MC.

227. It is necessary at this point to consider the absence of any special instructions from the judge in the course of her charge concerning how they should treat the evidence that MC had also made allegations against the appellant. In the course of her judgment in the *McNeill* case, Denham J. said the following (at paras 60 & 61):

> "60. While a warning is a matter for the discretion of the trial judge, in general it would be wise for a trial judge to give the jury a warning as to the nature of background evidence, as to why it is admitted, and for what it may or may not be used, as discussed earlier in this judgment.
>
> 61. In this case the trial judge gave no direction to the jury on the nature of background evidence. To determine whether the failure to give such a direction rendered the trial unsafe, it is necessary to look at the run of the trial. On careful consideration of the transcripts it is clear that the background evidence was treated in a restrained fashion. While counsel for the appellant sought to have it omitted, no requisitions were raised. Further, in considering the verdict of the jury, the fact that each of the eight counts was clearly considered separately and acquittals entered on some counts, with some alternative verdicts given, illustrates that the jury approached their verdict carefully in relation to each count. In all the particular circumstances of this case I would not intervene in the jury's decision."

228. In the present case the trial judge did not have the opportunity to rule on the controversial evidence. It was admitted without objection at the time, and a complaint about it was then raised after the fact. Importantly, once the complaint was made, it was not suggested to the trial judge by either side that she should give the jury any specific instructions. Moreover, no requisition was raised by either side in relation to the judge's charge seeking that she should do so. Arguably, any detailed treatment in the charge concerning how the jury should approach the controversial background evidence in respect of which there was a late objection, would only have served to shine an

unwelcome spotlight on it in the circumstances of this case. We think that on the run of this case the fact that a jury warning was not given by the trial judge during her charge was not fatal. If a warning was thought to be desirable in the interests of fairness, the defence who were acutely aware that this evidence was before the jury, could have been expected to ask for such a warning. However, the Court can readily appreciate that the defence may well have decided for tactical reasons not to request such a warning. If that be the case, they can hardly complain about it now. If it is not the case, then an explanation should have been put before the Court as to why the point was not raised by way of requisition. We have been furnished with no such explanation. In circumstances where no requisition was raised, and no explanation for that has been provided, we consider that the principles enunciated in *DPP v Cronin (No 2)* [2006] 4 IR 329 must apply.

229. In the circumstances we are not disposed to uphold the grounds of appeal relating to the alleged wrongful admission of evidence of other misconduct.

Alleged unfairness in the conduct of the trial by the trial judge, and rulings contested.

230. There were numerous complaints under this general heading and we will deal with each of them.

Video link issue

231. One such complaint was that the trial judge erred in law in acceding to the prosecution's application to have the complainant give her evidence via video link. It was indicated at the appeal hearing that this ground was being abandoned.

The failure to grant a direction

232. It was also complained that the trial judge erred in refusing the defence application for a direction. An application for a direction of no case to answer was moved on behalf of the appellant following the conclusion of the prosecution case. It was submitted that the trial judge failed to properly address the factors which had been identified in the application on behalf of the appellant and that the evidence, when considered properly, was so infirm that no jury, properly directed, could convict upon it with the consequence that the judge had a duty to intervene; it was conceded that it was insufficient for the appellant to "*simply point to inherent weaknesses, vagueness or significant inconsistencies as justification for the withdrawal of the matter from the jury*" but it was said that in this instance the evidence was so infirm that the threshold for withdrawal had been reached.

233. The application relied upon *R.-v.- Galbraith* 73 Cr.App.R.124, which provides as follows:-

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where

however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge." (per. Lord Lane C.J. at p. 127)."

234. The most recent authority on the topic in this jurisdiction is *The People (Director of Public Prosecutions) v M (J.R.)* [2015] IECA 65. There, giving judgment for this court, Edwards J. explained the manner in which the discretion vested in the trial judge to withdraw a case from the jury should be exercised, notwithstanding the fact that, in principle, evidence existed on a given charge otherwise sufficient to allow a jury to convict. He stated:

"47. At the outset, the court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v. Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague or contains significant inconsistencies. This court wishes to emphasise that it is not authority for that proposition.

48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of the issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict on it. Accordingly, what Galbraith is in fact concerned with is fairness."

235. The principal matters which are supposedly indicative of unreliability, or which are said to constitute infirmities in the complainant's evidence, on which the appellant relies, are as follows:

(i) The complainant had given evidence of a rape while bent over a washing machine, and there was evidence of an engineer that there was no washing machine in that location at the time the house was examined, also there was no evidence that there had been electricity or water supply to that location which would have allowed a washing machine to function there;

(ii) She had given evidence that she and her sister were locked in the bedroom and there did not appear to be locks on the bedrooms in the photos provided;

(iii) She had given evidence of "improbable" claims that she had been barely fed and watered on several different occasions;

(iv) That there was evidence that she had previously lied to Gardaí in respect of another allegation;

(v) That she had told social workers that she wished to retract allegations against her father;

(vi) That she had written a draft letter to the Children's Ombudsman Emily Logan suggesting the allegations were false.

The trial judge ruled on the matter in the following terms: -

> *"Now, Mr O'Higgins has helpfully produced a brief submission for the Court on this issue in which where, again to borrow his own words, there may have been refinements in relation to Galbraith and Leacy (sic) and so on, the core is still the same. We have a system of trial by jury under our Constitution and the issues that Mr O'Higgins now raises and in his submission he said that the prosecution evidence heard in this case is weak, unreliable and inconsistent to the extent that no reasonable jury properly directed could convict on it and he said such weaknesses derive from (a) the sheer improbability of the evidence, the internal inconsistencies in the evidence and the unreliability of the complainant and the manner in which she gave her evidence and (d) the evidence being of a type which the accumulated experience of the courts has shown to be of doubtful value. Now, they're all very general terms. Certainly the question of the sheer improbability of the evidence, Mr O'Higgins has pointed to collateral issues such as the question of locks on doors, the position of washing machines in the downstairs toilet area and the fact that this complainant, at the age of 16 or 17, alleged sexual abuse against an unnamed person which she subsequently withdrew, but in fact there's no inconsistency in her core evidence which is that she was sexually abused over a period of six years or five years by her father from the date of death of her mother until the time she went into care in March 2010.*
>
> *Now, Mr O'Higgins again, and it's a matter that will no doubt be of great interest to the jury, points to the extensive email or Facebook messaging between the parties, it appears from 2012 and it's one of the things the jury is going to have to sort out here is the chronology of these events and the contact by the accused with her over it seems from 2012 right up till 2016, perhaps even 2017. The jury is going to have all of those. They have her explanation for why she was writing or texting or contacting the man whom she describes as her rapist and her monster. They will either be persuaded by that or not persuaded by that but it seems to me that on one reading it could be the ongoing manipulation by an abuser of his vulnerable daughter or it might be the caring outpourings of a wronged man. So, that's a matter, particularly, all of these matters are matters for the jury.*

Mr O'Higgins refers to the unreliability of the complainant. Well, really the question of whether or not she is unreliable is ultimately a matter for the jury. The issue in relation to the absence of medical evidence, the Court has a strong view that in a case like this where the prosecution is putting up a young girl to be cross examined and failing to give her the opportunity to be assessed, validated and medically examined is extremely unfortunate. Nonetheless, we still have, as in many of these cases it's all we have, is her own evidence that her father abused her from 2006 until 2010 when she was taken into care. That in many cases is all the evidence that a court will have frequently in cases of child sex abuse. So, it appears to me that, again applying the Galbraith principles, and I note in the M case in the headnote the Court clarified, "It's for the jury to assess the prosecution's evidence, even if it contained weaknesses or inconsistencies. A conviction would only be set aside if the evidence was so infirm that no jury would be able to convict on it". And I think in making this application for a direction here Mr O'Higgins, on behalf of the accused man, hasn't reached that threshold. It appears to me that, notwithstanding the inconsistencies that can be pointed out, notwithstanding the messages, it is open to the jury, and it's not a beauty contest, it is open to the jury to come to a conclusion on the basis of the evidence of the complainant, because that's where it would rest, that she was sexually abused by her father during the relevant period. So, it seems to me that these are peculiarly jury matters and in a system that guarantees trial by jury it's not for me to impose my view on the facts for that of the jury and I again point out that at the end of the prosecution case the test is the prosecution evidence taken at its highest. It appears to me that on one ground, if only one ground, the complainant has consistently maintained that notwithstanding messages that passed between her and her father, she has always maintained that he had abused her. So, it seems to me this is a quintessentially jury matter. It's a dispute on the facts and I'm not disposed to withdraw the case from the jury."

236. The appellant submits that the characterisation by the trial judge of the matters pointed to by the defence as being "*quintessentially*" a matter for the jury was incorrect and that a trial judge is under an obligation to intervene if the state of the evidence is so infirm that no jury, properly directed, could convict upon it. It was submitted that the evidence in this matter met that threshold, and that the trial judge erred in failing to intervene and in failing to grant a direction.

237. Counsel for the respondent has submitted that none of the matters identified by the appellant could have led to the conclusion that the state of evidence was so infirm that no jury properly directed could convict on it. The jury had had the opportunity of seeing the complainant being cross-examined for five days and were in a position to draw their own conclusion as to the effect of these "inconsistencies and weaknesses" as claimed by the appellant.

238. We agree with the ruling of the trial judge. We think that the trial judge had due respect for the constitutional imperative of trial by jury. As pointed out on behalf of the Director,

the evidence was thoroughly tested (the complainant was cross examined over no less than five days) and jury had what we see as a more than ample opportunity of considering her evidence and the effect of the alleged "inconsistencies and weaknesses". The jury were in a peculiarly advantageous position to consider the witness's reliability and veracity. It might be added that inconsistencies or other factors, which might bear adversely upon credibility – whether superficially or otherwise – are commonplace in cases of the present kind, and their mere existence will not, absent more, impact on the fairness of the trial or give rise to properly grounded applications under the so-called second limb of Galbraith, as explained in this jurisdiction. We consider that the trial judge properly applied the relevant principles and we are not disposed to uphold this complaint.

Suggestion that the trial judge over-protected and "cosseted" the complainant

239. The appellant has submitted that the conduct of the trial judge had the effect of protecting and cosseting the complainant during her evidence and that this impacted in a real sense on the right of the appellant to properly and effectively defend his position in challenging the truthfulness, reliability, credibility and motivations of the complainant.

240. It is not in doubt as a matter of principle on the authorities that there are circumstances in which the nature or extent of interventions by a trial judge whether by way of questions or otherwise could give rise to an impression that the judge was not impartial or had formed a favourable view of the credibility of a witness, or deprived counsel of the opportunity to properly conduct the defence; this was exemplified by the fact that the conviction was quashed in *The People (DPP) v. McGuinness* [1978] IR 189, where Kenny J., for the court said:

> "In our opinion the number of questions put by the judge and the many interventions by him made it impossible for Mr. Daly to conduct a cross-examination on the lines he considered would be most effective and could have had the effect of causing the Jury to believe that the judge had formed a definite opinion as to the credibility of the complainant."

241. The appellant, in the written submissions filed on his behalf, relies upon a schedule or table setting out explicitly the interventions complained of. While it seems to be based on a trawl of the transcript after the trial, and would therefore question its propriety, we feel constrained to set it out in full: -

Day	Page	Line	Description
Examination-in-chief			
2	17	28-30	Judge offers first break to the complainant (during examination in chief)
2	23	11-19	The Judge comments to the complainant: *"I know this is difficult but you are the only one who can tell the jury what happened".* That this was said in front of the jury, giving impression it was true. The Judge saying *"and the case is dependent on your evidence"* both gives jury impression of truth and provides a pep talk that is the role of prosecution. The Judge then breaks for lunch, responding to complainant's expression of gratitude with the reply *"not at all"*.

2	33	6-12	Judge adjourns for 10 minutes at request of the complainant, offering longer if the complainant would like longer.
2	34	10-31	Judge adjourns case on request of complainant who is *"drained"*. The Judge responds *"do you think you could rejoin us in the morning after you have had a rest?".* The Judge then remarks *"these cases are very difficult for an accused as well as for you, [T]".*
2	35	5-11	When MPOHSC questions whether the complainant's claimed distress could be tactical, the Judge replies *"are you serious?"*. This is then followed by a discussion regarding the acceptability of witnesses refreshing their memories from their statements.
			Cross-examination
4	13	1-20	Judge tells MPOHSC a number of times the manner in which he must read document. MPOHSC protests that cross-examination should be run as counsel sees fit.
4	13	21	Judge makes a prejudicial allegation against the appellant of *"cherry picking"* in the cross-examination.
4	13	34	Judge interrupts cross examination mid question to provide an answer for the complainant (i.e. "*Who turned the complainant against accused?"*). The complainant then responds accordingly.
4	22	24-28	Judge accepts the complainant's request for an adjournment.
4	43	8-9	The Judge accepts a complaint from the complainant that she is entitled to see material in advance of it being put to her and before she is cross-examined on it. This necessarily reduced the effectiveness of the cross-examination, as the complainant would be alive to issues in advance and the risk of tailoring or preparing responses was inherent.
4	43-47	22 et seq.	The learned trial Judge formally proposes the idea in *voire dire* which follows the above intervention.
4	75	27-29	Judge adjourns trial due to complainant's upset at evidence of notebook containing handwritten draft letter to Emily Logan being adduced which contradicts her oral evidence.
4	76	8-	The Judge remarks to counsel for the appellant that the production of the notebook as being *"No blow too low."*
5	8	21-34	Judge tries to calm the complainant after once again stating she can give no more evidence.
5	9	15-34	Judge, argues with MPOHSC that draft letter is in fact not a draft letter.
5	10	8-10	Judge then suggests MPOHSC should provide more information as to how notebook acquired to the complainant rather than cross examining her as to contents.
5	11	25-34	Judge speaks to complainant empathising with her upset at the manner of cross-examination and encouraging her to proceed.
6	1	18-31	The Judge indicates that the appellant should submit photos which they intend to cross examination on to the complainant in advance. The Judge states the complainant requires time to look at and consider them.
6	2	1-8	The Judge requests that the complainant be specifically informed that she has a right to look at photos before being questioned on them.
6	13-15	22-22	The Judge spends prolonged and protracted period trying to convince the complainant to continue giving evidence. TC explains she will need one week, until

			the following Wednesday. The Judge encourages the complainant to continue giving evidence. Thereafter, the Judge enquires into support being provided to complainant by Victim Support services.
6	16	26-30	MPOHSC acknowledges that the court is going to great lengths to investigate and insure the well-being of the complainant and highlights the medical difficulties of the accused. Judge responds that she is aware [on p.17] that the medical facilities in Cloverhill are very good.
6	18	7-13	Judge suggests cross examination should come to a speedier conclusion: *"I suppose it is in his interests or his client's interests that he be as focused as possible"*.
6	19	14-18	During cross-examination, a point was put to complainant regarding there being no plumbing under the stairs in bathroom when investigated in 2018, to which the Judge interrupts and answers *"currently?".* The complainant then focuses on this, telling the defence to go investigate and produce a report on plumbing and electrics 10 years ago.
6	19	29-32	It was put to the complainant that an earlier complaint by her would have facilitated this. The Judge interrupts and states that the complainant was six years of age at the time. The complainant then focuses on engineer's examination, analysis and report and that it should have been performed at the time of complaint, 5 years previously.
6	28	24-29	The Judge interrupts when the complainant was being cross-examined on whether there were locks on the door of a bedroom, saying that she has already answered the question.
6	28-29	34-1	When the complainant is cross-examined about the opinion of an engineer and that his belief is that there is no evidence of locks, the Judge exclaims *"Belief? Belief?"* in response to an expert witness's proposed evidence.
6	29	3-15	MPOHSC requests the judge to cease interrupting and interfering with cross-examination with regards to objective expert evidence.
6	31-32	32-1	MPOHSC repeats a question that was asked in examination in chief. The Judge interrupts stating the complainant said she did not know. MPOHSC says that does not preclude the defence from asking again. Judge says she has now said again she does not know.
6	41	9-11	MPOHSC puts to the complainant that she made an allegation of sexual assault against another, she says she did not. MPOHSC says she must recall. Judge intervenes *"she says she didn't".*
6	42-43	30-1	Judge again tries to encourage the complainant to be present next day, and that evidence should be concluded by that time.
7	8	30-33	MPOHSC informs the court that he will have to put matters of the defence case to the complainant who *"is a combative person".* The Judge interrupts and comments *"I wonder why"*. MPOHSC seeks clarification on judicial comment and Judge responds *"go on".*
7	15-16	23-19	With respect to advanced notice of aspects of cross-examination, the Judge suggests that the complainant should receive the entire file she is to be cross examined on in advance. Counsel for the respondent agrees, and suggests this is so that the

			complainant is *"prepared".* The Judge suggests the complainant is stressed and it is required for fairness.
7	34	4-18	Judge intervenes in cross examination about a complaint against a third party to staff member in Tusla stating *"but the evidence suggests she did not make the complaint."* When confirmed that it was made by complainant, the Judge then seeks to reduce its importance indicating *"it's not a complaint to the gardaí."*
7	48	6-16	Judge interrupts question regarding an apology note written by the complainant to the appellant to highlight it suggests the complainant and her sister have *"messed up over and over again and do need to be punished".* When MPOHSC asks the court to clarify the point it is making the Judge remarks *"I am just looking at the letter".*
7	51	13-25	The Judge again engages the complainant on being present the next day and assures her that she will *"get your evidence concluded as promptly as we can"*.
8	8-9	28-5	Judge interrupts cross examination and once again states that MPOHSC is *"cherry-picking".* MPOHSC protests the learned Judge's comments.
8	12-13	33-28	MPOHSC applies to the court for more balance in the way the court is treating complainant who is testy and combative but is being mollycoddled. MPOHSC highlights the complainant's destruction of a defence exhibit without reprimand as an example of this and contrasts with the treatment for the appellant has he done so.
8	14	15-21	Judge acknowledges that the interventions may appear to be unfair to the appellant but explains that the complainant is distressed and damaged.

242. It is obvious to us that many of the items listed do not constitute interventions in any substantial sense but simply record events or perfectly normal and innocuous observations such as arise in every trial and which are certainly are commonplace in cases where sexual offences perpetrated on children are concerned. It will be seen, however, that over the period of six days (during five of which the complainant was under cross-examination), the learned trial judge made what, in the nature of the case, can only be considered as relatively few interventions. These "interventions", as they are characterised, ranged from ruling on questions and procedural issues, ensuring humane treatment of the complainant by offering breaks and giving encouragement to her to give evidence, and on a few occasions observations of no great moment which had may have had an element of acerbity - which will occasionally occur in long trials when procedural points are stressed or extremely lengthy cross- examination takes place without, however, in any way impinging on the rights of an accused.

243. The appellant further submits that a ruling by the trial judge that the complainant was entitled to what is characterised in the appellant's written submissions as "advance notice of the material upon which she was being cross examined" (including, we understand, certain photographs) had adverse effects on the fairness of the cross-examination or its effectiveness and in particular that the complainant was in a position to anticipate what matters might be canvassed. On this premise it is suggested that it was reasonable to

assume that with respect to any material which was inconsistent with her evidence she was "better placed to prepare or revise answers" to make them more favourable to her in the eyes of the jury.

244. The respondent says that a trial judge has an entitlement and a duty to intervene to ensure that a witness has a full and fair opportunity to comment on materials put before that witness in context. This was particularly appropriate in the context of the cross examination relating to the social media messages and it was appropriate that the witness have sight of documents on which she was being asked questions. A witness should not be asked for detailed comment on aspects of a document unless he or she has a full opportunity to read it. The defence had access to a large volume of material from several sources, some of which she was not aware of (e.g., "HSE documentation"). The witness was entitled to have an opportunity to make an informed comment on the content of this material when answering questions.

245. We think that the prosecution submissions under this head are correct. The submissions made on behalf the appellant are fundamentally misconceived. The search for truth in a trial can only be assisted by ensuring that a witness has an adequate opportunity to answer questions in an informed manner. If documents are proffered to a witness for her consideration, she is entitled to an opportunity to peruse and consider them: it is far better, in many instances if the witness is furnished with such materials either before entering the witness box or, if proffered in the witness box, afforded an opportunity to leave the box and consider them. Obviously, the witness box is not the ideal place to consider documents calmly and an insistence that that course be adopted might well engender lengthy and unnecessary delays, be unfair to the witness, and render the evidence elicited less reliable. Having regard to the length of cross-examination this was an obvious case for affording an opportunity to the witness to consider matters otherwise than in the witness box. It is correct to say that a witness, being furnished with documents in advance, will have had the optimum opportunity to consider them. We cannot see how there could be any right vested in an accused in the context of affording him a fair trial to insist on a right, in effect, to deprive a witness of this opportunity; or, in a sense, to ambush a witness and seek immediate answers on a document of complexity or length. Accordingly, we reject this complaint.

The complaint that a number of the trial judge's interventions lacked balance and were objectively unfair including and in particular her interventions regarding the evidence of R. C.

246. RC (the Appellant's wife) gave evidence over two days starting on the eleventh day of the trial. Following the conclusion of her evidence and re-examination on behalf of the appellant, the trial judge intervened. The appellant submits that it can clearly be seen from the transcript that the interventions constituted what is described as *"[n]othing less than a cross-examination of the witness, intended to elicit evidence which was damaging to the defence case."* Counsel for the defence made an objection that the intervention went far beyond mere clarifications in relation to any chronology of events put forward by RC (despite claims to that effect by the trial judge) but were in effect calculated and designed to supplement the cross-examination of the witness already had, and elicit

further evidence to damage the defence case in the eyes of the jury – that it amounted to advocacy in favour of the prosecution. It was submitted that the judge's interventions completely lacked balance and were unwarranted and that, as a consequence, they seriously impacted on the fairness of the trial.

247. The respondent submits that an examination of the transcript does not support the appellant's contention that the judge's questions to RC was a form of cross examination and amounted to advocacy in favour of the prosecution. The trial judge was seeking to clarify the chronology of matters about which the witness had given evidence, which did not amount to cross-examination. A trial judge is permitted to ask questions of a witness to seek that clarification. The questions were asked at the end of the witness's evidence and were courteous, polite, open, and displayed, it was suggested, no implication of bias. The trial judge's interventions were minimal, in truth, when considered in context.

248. There is nothing improper in a trial judge asking questions that clarify chronology or other aspects of evidence already given – indeed that may be helpful and even essential on occasion if the judge is to ensure a fair trial. The judge is not a mere cypher. We think that the suggestion that the intervention amounted to some form of advocacy in favour of the prosecution is without merit, and indeed to characterise what occurred as some form of cross-examination is entirely wrong. In any event, even if this Court were to be of the view that the relatively short questioning went further than was appropriate, this would not be a basis *per se* for regarding the trial as having been necessarily unsatisfactory, since any such intervention by a trial judge must be viewed in the context of the trial as a whole. While this trial judge may, perhaps, in a number of questions that she asked, be regarded as having moved slightly beyond clarification of matters which were the immediate subject of the witness's examination or cross-examination, her questions related to relevant matters the elicitation of which could not be open to any possible criticism.

249. Her engagement was far from what was criticised by O'Malley J. in *The People (Director of Public Prosecutions) v Rattigan* [2018] 3 IR 417. There, the Supreme Court held that in his charge, the trial judge put the prosecution case to the jury in terms of such trenchancy as to impermissibly imbalance the charge in favour of the prosecution.

250. In written submissions, counsel for the respondent refers to *R v Inns* [2018] EWCA Crim 1081, where the English Court of Appeal addressed a complaint of judicial intervention. The appellants in the case in question were convicted of a number of counts, including false accounting, perverting the course of justice, and cheating the public revenue. The appellants argued that there was such extensive judicial intervention during the course of the appellant's evidence that it rendered the trial unfair. It was submitted that the Recorder asked approximately 197 questions during the course of the evidence. After reviewing the transcript, the Court of Appeal concluded that the extent of the questioning did not undermine the fairness of the trial - there was nothing controversial or wrong with the questions and interventions and the convictions were upheld. In doing so the court expressed the following views (per Singh L.J.) :-

33. *"First, the tribunal of fact in a criminal trial in the Crown Court is the jury and no one else.*

34. *Secondly, ours is an adversarial system, not an inquisitorial one. The role of the judge is therefore to act as a neutral umpire, to ensure a fair trial between the prosecution and the defence. The judge should not enter the arena so as to appear to be taking sides. These are well established principles of our law. If authority is needed for them, it is to be found in the two decisions of this court which have been placed before us: Hamilton, an unreported judgment of 9 June 1969 and Gunning (1994) 98 Cr.App.R 303.*

35. *Thirdly, there is nothing wrong in principle with a trial judge asking questions of witnesses in order to assist the jury. That indeed is one of the fundamental functions of the trial judge. For example, this may be done to clarify a point that may arise on the face of a document or in an immediate response to an answer that has just been given by a witness. Otherwise, it may often be preferable for the judge to wait until the end of the evidence given by that witness, or at least the end of the evidence-in-chief. Often things that are not clear may become clearer once the evidence-in-chief has been completed.*

36. *Fourthly, since ours is an adversarial system it is for the prosecution to prove its case and it will have the opportunity to cross-examine the defendant if he or she chooses to give evidence. It will often be unnecessary for the judge to ask any questions during the defendant's evidence-in-chief because it should be for the prosecution to cross-examine the defendant. It is certainly not the role of the judge to cross-examine the defendant.*

37. *Fifthly, it is particularly important that the defendant should have the opportunity to give his or her account to the jury in the way that he or she would like that evidence to come out, elicited through questions from their own advocate. If there were constant interruptions of the evidence-in-chief there is a risk that a defendant will not be able to give his or her account fully and in the manner they would wish to put before the jury.*

38. *Sixthly, this is not affected by the fact that the defence account may appear to be implausible or even fanciful. If it is truly incredible, the prosecution can reasonably be expected to expose its deficiencies in cross-examination and the jury will see through it. If anything, unwarranted interventions by a judge may simply prove to be counterproductive."*

and later:

> "We turn to the facts of the present case. In our view, it was unfortunate that the judge intervened as much as he did during the evidence-in-chief of Emma Inns. However, we do not accept the suggestion that his tone was hostile or abrupt. To the contrary, having examined the transcript in full we consider that his tone was

courteous and not hostile. Furthermore, we consider that his questions were usually framed as open questions and were designed to elicit or clarify the evidence that was being given at the time as it was being dealt with topic by topic."

251. The questions complained of do not offend against any of the principles elaborated on in the *Inns* case. Moreover, in that case the questioning was wide ranging and far more extensive than here.

252. In the present case, we think, in any event, that if there was any basis for criticism it did not render the trial unsatisfactory and we accept the submission made on the part of the Director in that regard. We accordingly dismiss this complaint also.

Jurisdictional issues and the Sexual Offences (Jurisdiction) Act, 1996

253. Two complaints were made that would come under this general heading. The first was that the trial judge erred in law in admitting evidence from a purported expert on the law of New Zealand. The second was that the trial judge erred in law in ruling that evidence relating to the jurisdictional basis for the counts on the indictment relating to offending conduct which was said to have taken place in New Zealand did not have to be given before the jury.

254. Under the provisions of the Sexual Offences (Jurisdiction) Act, 1996, a citizen or person ordinarily resident in Ireland can be found guilty of offences against or involving a child committed outside the State. Section 2(1) provides as follows: -

> "Where a person, being a citizen of the State or being ordinarily resident in the State, does an act, in a place other than the State ("the place"), against or involving a child which—
>
> (a) constitutes an offence under the law of the place, and
> (b) if done within the State, would constitute an offence under, or referred to in, an enactment specified in the Schedule to this Act,
>
> he or she shall be guilty of the second-mentioned offence."

255. The trial judge held that it was for the court to be satisfied as to the whether the conditions for liability under s.2 (1) were fulfilled rather than the jury. The judge held that this was a jurisdictional matter and as such it was for her to determine but the appellant submits that on the contrary it was a matter for the jury to determine whether the acts concerned constituted offences under New Zealand law. Effectively this was on the basis that what is or is not the law of a foreign jurisdiction is a question of fact for the trier of fact – in this context, the jury.

256. In order to prove that the acts alleged constituted an offence in New Zealand the prosecution sought to introduce the evidence of an Irish solicitor who had qualified as a barrister and solicitor in New Zealand and who had practiced there for three years; such practice, *inter alia*, was in the District Court and as junior counsel in two trials in the High Court, one of which was on a charge of rape in relation to a child victim. The evidence

was adduced by reading a statement pursuant to s.21 of the Criminal Justice Act, 1984. The appellant submitted at trial and here that the expertise of the witness was insufficient to permit its receipt as expert testimony, a contention rejected by the trial judge. The evidence in question was the only evidence on the matter before the court.

257. We cannot see on what basis one could question the expertise of the witness: he was a lawyer who had professionally qualified as a Barrister in New Zealand and who had practiced there for a number of years. We are satisfied that it was within the trial judge's legitimate range of discretion to have been satisfied, on the evidence before her, as to his credentials to give evidence on an expert basis.

258. The respondent submitted that the trial judge was correct in ruling that foreign law is a matter to be determined by the judge alone and he referred us to *Phipson on* Evidence, (18th edn, 2013) where the learned authors say: -

> "Foreign law …must unless ascertained the statutory procedure, be proved as a fact by skilled witnesses. […]. Foreign law, though regarded as a question of fact, is to be decided by the judge alone. The function of expert witnesses on foreign law may be summarised as follows:
>
> (1) to inform the court of the relevant contents of the foreign law identifying statutes or other legislation and explaining when necessary the foreign courts approach to their construction;
>
> (2) to identify judgements or other authorities explaining what status they have as sources of the foreign law;
>
> and
>
> (3) where there is no authority directly in point to assist the [..] judge in making a finding as to what the foreign court's ruling would be in the issue was to arise for decision there."

259. We cannot see any basis for suggesting that this statement of long-established principles is erroneous. We therefore consider that the trial judge was correct in her ruling.

260. Accordingly, we also dismiss these complaints.

Complaints based on the amending of the Indictment

261. It is complained that the trial judge erred in law in acceding to the repeated applications by the prosecution to amend the Indictment and in refusing the defence application for a direction with respect to discreet counts on the indictment (save for the counts admitted by the prosecution to be unsustainable).

262. The power of a trial judge to amend the indictment is set out in s.6(1) of the Act of 1924 which provides that: -

"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice...".

263. There were initially eighteen counts on the indictment and following the complainant's evidence, a number of proposed amendments were indicated by the respondent in response to the fact that there had been significant variations between what had been alleged and the complainant's evidence: this is, again, a commonplace occurrence in cases involving multiple accusations of sexual offences against children.

264. In due course, an application to amend the indictment was made at the end of the prosecution case. The appellant submits that the trial judge failed to properly consider the effect of the proposed amendments and the alleged patent unfairness which would arise for the appellant in circumstances where as the amendments sought were only proposed after the cross-examination had concluded. It was submitted that the cross-examination had been conducted on a certain basis, namely based on the specifics alleged in the indictment, and the defence were entitled to rely on clear inconsistencies which had emerged in the evidence between what was specifically alleged on the indictment on the one hand, and what the complainant had told the jury in the witness box on the other hand.

265. The respondent submits that the trial judge acted within her jurisdiction to amend. The exercise of the power of amendment was discussed by Fennelly J. in *People (DPP) v Walsh* [2010] 4 I.R. 746 (at para.19) where he said: -

"The court is satisfied that s. 6(1) of the Act of 1924 confers a broad discretionary power on the trial judge to amend the indictment. The purpose of any amendment must be to ensure that the jury will address the true issues when they come to deliberate on their verdict. The counts in the indictment should correspond as closely as is reasonably possible with the real case for the prosecution. The section requires such amendments to be made as "the court thinks necessary to meet the circumstances of the case". The section sets no time limit to the exercise of this power. It may occur "at any stage of a trial". It may well be that, in a particular case, a late amendment cannot be "made without injustice". A court should not exercise the power in circumstances involving prejudice to the defendant in the defence of the charges against him. This is prejudice in the legal sense. It does not mean that an appropriate amendment should be refused merely because it would lessen the chance of an acquittal."

266. The substantial issue in any application for an amendment is whether the proposed amendment materially alters the nature of the case which a defendant must meet; the proposed amendments did not do so in this case. The amendments were made to ensure that the indictment reflected the case made by the prosecution as it emerged in evidence,

specifically, the sample counts in relation to offences that were said to have occurred in New Zealand.

267. It is further complained by the appellant that a ruling of the trial judge to omit the original "count 2" from the issue paper deprived the appellant of the benefit of a "not guilty" verdict on that count. The respondent submits that this alleged a separate sexual assault on the same date as the vaginal and anal rapes charged in the original counts 3 and 4. We cannot see how the failure to obtain a verdict by direction or otherwise on that count could render the trial unsatisfactory. The consequence is merely that in theory that charge is still outstanding, but no-one has suggested for a moment that it will be proceeded with separately. In point of procedure, a directed verdict of not guilty was the appropriate course. The fact that the jury was not required to decide on this count had no effect on the fairness of the trial – no benefit could legitimately accrue, nor could prejudice be suffered, on the other counts because of what occurred.

The adequacy of the delay warning

268. An overlap arises between this ground and certain grounds (i.e., grounds (xiv) and (xv) in the Notice of Appeal) pertaining to the charge and requisitions thereon and we consider the issue is best dealt with under those headings.

The adequacy of the corroboration warning

269. In the course of her charge the trial judge had this to say on the topic of corroboration:

> *"Now, the other factor that arises in child sexual abuse cases such as this is that there is rarely, if ever, any independent evidence that corroborates the complaint and the term corroboration refers to evidence that is independent of the complainant but that tends to implicate the accused in the offence and I'll just give you an example of that. For example, if a woman was unfortunately raped last night somewhere in Dublin and goes straight to the guards and complains, then she would be brought to the Sexual Assault Treatment Unit. There might be DNA evidence. There might be medical evidence. All of which would be independent of her which would corroborate her complaint. In child sex abuse cases we don't generally have that. This case is interesting in that we might have had that if the Gardaí had gone and conducted a medical exam when she made a complaint in 2013 but they didn't…"*

and also:-

> *"Now, there is no doubt that this case, as it happens, rests squarely on the shoulders of TC.".*

270. This was substantially in accordance with what the trial judge told counsel she would say, when addressing the issue before the charge. She had stated: -

> *"I will certainly say that there is no independent evidence. There is no forensic evidence and that no medical evidence and I certainly I think will make some observation that there could have been medical evidence had a decision taken to do*

so at the time the complaint was made and that, if there is benefit arising from that, it must inure to your clients benefit"

271. Of course, on the evidence there was no basis for suggesting that there "could have been" medical evidence – evidence would have been required to show that had an examination occurred in 2013 it would have yielded matter of an evidential value. Accordingly, the judge's remarks arguably conferred a gratuitous benefit upon the appellant.

272. In any event, the decision as to whether or not a corroboration warning ought to have been given or the terms of it are matters for the discretion of the trial judge, and this court has repeatedly stressed this fact; such a discretion being dependent upon the view formed by the trial judge on consideration of the entirety of the evidence. The trial judge, as we have previously said, is in a far better position than this court to make a judgement as to whether or not such a warning ought to be given or, if so, its terms. It is appropriate to stress again, however, that a judge must exercise care when determining whether or not a warning should be given, and if so in what terms, having regard to the abolition of the rule that a warning was essential. The giving of such a warning should not be something that occurs as a matter of course if the law is to be properly applied. The trial judge chose not to give a warning in the present case, as she was entitled to do within her discretion, but the observations which were made rightly emphasised the absence of corroboration and the fact that, accordingly, the case had to be determined solely on the evidence of the complainant. No requisition was raised on this topic. She need not, in fact, have emphasised any of these things. Accordingly, we also reject this complaint.

Complaints that charge to the jury lacked balance and favoured the prosecution, that the delay warning was inadequate and that requisitions raised were not adequately responded to.

273. A number of complaints were raised and requisitions were made following the trial judge's charge. Counsel for the defence submitted that the charge lacked balance and dealt with aspects of the case in a fundamentally unfair manner from the perspective of the accused/appellant. Mr O'Higgins SC opened his submission at that stage of the trial by summarising his criticisms the following terms: -

"First of all, judge, I'm concerned, Judge, that arising from the court's comments on some certain key issues the Court will have got the impression that you yourself have formed a firm view on matters and if I may respectfully be blunt my complaint is that, with respect to certain core issues, the charge lacked balance in that the Court dealt with variously the following matters; the question of the retraction in 2014, tearing up the notebook by the complainant, the issue as to the medical examination, the absence of medical examination, the issue concerning -- the disputed evidence concerning locks, the issue concerning the alleged incident over the washing machine, the issue concerning the question of whether the allegations were detailed or general and the issue concerning the delay in the case and the necessity for a Judge Haugh type warning and with respect to each of those issues,

Judge, certainly the first five, I have a concern, Judge, that the jury will have formed the impression that the court has effectively diffused what were clearly, on the defence position, strong points for the defence…"

274. The criticisms, and requisitions which it is claimed were not adequately acceded to, or in some instances not addressed at all, can be outlined for the purposes of this appeal by quoting each complaint directly from the appellant's written submissions, and dealing with them seriatim: -

"(i) The trial judge made reference to the assertion in the closing speech on behalf of the appellant that the complainant had 'retracted' her statements in 2014 when she had made it known to a social worker that she wished to do so. The trial judge commented on this during the course of the charge at Transcript Ref: Day 14 — P.33 — Line 22 onwards. Objection was taken to the remarks of the trial judge and it is submitted that her characterisation of the retraction in 2014 totally misrepresented the significance of such an occurrence by claiming it was not a 'formal' retraction and that '…you go to the gardaí [to] retract your statement'. Notwithstanding the objection taken, the trial judge refused to revisit the issue and indicate that the retraction of a statement does not necessarily involve '[going] to the gardaí'. In the circumstances, the jury were left with the impression that unless the complainant had gone to the gardaí, little or no weight was to be attached to the fact that the complainant was retracting her statements of complaint."

275. This is what the trial judge said: -

[Counsel for the appellant] "…put emphasis on the fact that in 2014 she was willing to retract to go and live with her father in New Zealand and the answer that she had given to that initially 'But I didn't retract' and certainly I think it is accepted by the prosecution that that was her mindset in 2014 but, as you will see from the statements you have about the complaint she made in 2015 I think it was, retraction is a formal thing. You go to the gardaí and you retract your statement and she was anxious to point out that she never actually retracted her statement but Mr O'Higgins says all of that demonstrates an unreliability on her part, that you shouldn't give weight to her evidence and he contrasted that with what he said was the calm and dignified evidence of Ms RC and it's a matter for you in the light of all of the evidence what weight you attach to Ms C's evidence."

276. We cannot see anything untoward about this passage in the charge and do not think that it could have given rise to any implication that little weight should be attached to the complainant's actions in "retracting" her complaints simply because she had not gone to the Gardaí; in our judgment the judge rightly sought to make the distinction between the expression of a desire or intention to retract and the actual act of retraction which requires the taking of a formal step.

277. "(ii) Objection was taken to the characterisation by the trial judge of a jotter which had been produced to the complainant in evidence in which she had drafted a letter to

Ms Emily Logan as her "*private notebook*" [Transcript Ref: Day 14 — P.34 — Line 23 onwards in the Judge's charge]. It was submitted that this characterisation of the notebook implied that the appellant had invaded the privacy of the complainant in seeking to rely on the material. This was notwithstanding the fact that content of the draft letter in the jotter (which incidentally contained virtually nothing else) had been left behind in the house of her grandmother (the appellant's mother) had been subsequently transcribed digitally and sent by the complainant to the appellant via the *Facebook* messenger service. The trial judge did not accede to the requisition raised and the jury were left with the characterisation of the jotter which had been promulgated by the trial judge which was unfair, factually inaccurate and designed to give the impression to the jury that the appellant had behaved with reprehensible disregard for the privacy of the complainant.

(iii) In addition, it is important to note that the trial judge had already made known her displeasure that the complainant was cross-examined about this letter to begin with and had inappropriately directed criticism at counsel for the appellant during the cross-examination of the complainant, in large measure because the complainant became very angry when the jotter was produced (and subsequently in fact ripped up the jotter in front of the jury). When the jury retired shortly after the jotter had been shown to the complainant, the trial judge commented on its production as "*No blow too low*", in what appears to have been a reference to the decision by defence counsel to confront the complainant with evidence which, in point of fact, was materially inconsistent with the allegations."

278. The trial judge's characterisation of the document as being a "*private notebook*" was accurate in substance, but even if such a characterisation was debatable and a matter of opinion in respect of which different views could be held, we cannot see that the use of the term by the judge could have given rise either to the implication alleged or, much less, that this was "*designed to give the impression to the jury that the appellant had behaved with reprehensible disregard*" for the complainant's privacy. The behaviour of the complainant, in a fraught trial, dealing with sexual allegations, is entirely unsurprising given the nature of the document. We do not think that the fact that the complainant became angry to the point of ripping up the jotter or notebook in the presence of the jury undermines this conclusion.

279. It is true that in the absence of the jury the judge commented adversely on the production of the item, suggesting that it was a case of (to use her words): "*No blow too low*". Judges will often have views about the evidence adduced or the way in which counsel may be conducting a case and it is important that they restrain themselves from making inappropriate observations. While the judge may not have approved of the way in which the exhibit was obtained, or of the way in which this witness was confronted with it, what was done was both legally permissible and procedurally fair. It is therefore less than ideal that she felt the need to comment as she did, but since it was done in the absence of the jury it can have had no bearing on the verdict.

280. "(iv) The trial judge characterised the complainant's allegations as "detailed" rather than general - [Transcript Ref: Day 14 — P.29 — Line 12 onwards in the Judge's charge]. The attribution of this description to her evidence was completely without basis, contradictory and could only have buttressed the evidence of the complainant in the eyes of the jury. This is in the context that the prosecution had conceded in reply to the application for a direction, (along with the trial judge in her ruling on that application), that there were "inconsistencies" in the complainant's evidence noting it was a matter for the jury. Notwithstanding this indication, the characterisation of the allegations as detailed was to unfairly and impermissibly bolster the complainant in the eyes of the jury - [Transcript Ref: Day 11 — P.41 — Line 1 onwards]. Notwithstanding the objection taken, the trial judge did not accede to the requisition raised."

281. We unhesitatingly reject this complaint as having no validity. The fact that the witness was said to have given detailed evidence in no way served to undermine the defence suggestion that she was inconsistent. Indeed, the allegations as to inconsistencies were in respect of matters of detail. It was all about detail. It was for the jury to examine the detail of what she said on different occasions and, if inconsistencies were patent, to assess what the implications of those inconsistencies were for her overall credibility and reliability. Moreover, there was a context to the impugned remark. It was made as part of the introduction to the section of her charge dealing with delay. She stated:

> *"Now, that was a warning given by Mr Justice Haugh in a case where there was just a general allegation rather than a detailed allegation. I think Ms C, during the course of her evidence, certainly admit I think at one stage she said that there was, between 2006 and 2010, was like a block of an event in her life but what, in this case, you do have is detail. You have detail that it occurred, certainly the first offence you have been given a date and a place and the surrounding circumstances of the death, unfortunate death of JC. In relation to other offences, where they happened. There is I think another one where it's said to have happened on the day of the school photographs in February of 2010 and in fact the fact that it has been precise has allowed the defence to challenge the evidence and you have seen Mr O'Higgins cross examine on the basis of was there or wasn't there a washing machine in the downstairs loo in [a named place] after 2008 and you have seen him cross examine in relation to the locks on the door. Now, the locks on the door issue, there's contrary evidence according to TC, those doors were only put in when the renovations were going on. Now, the renovations were going on sometime after they came back from New Zealand it would appear the evidence is and she is saying that before that period there were different doors there and that, in a sense, has been well certainly agreed by RC in her evidence but she says there weren't locks on those doors either but Mr O'Higgins, because there's detail given, has been able to challenge. So, it's not a bare allegation such as was described by Mr Justice Haugh. This is an allegation in respect of which certainly, for some of the offences, there is a lot of detail given which can be cross examined on."*

and further:-

> *"Now, as I say in the prosecution haven't laid just bear counts here such as you abuse me over a period of time and I don't tell you the nature of the abuse or the circumstances in which it occurred. When I think Ms [C] accepts that many of the incidents that she seeks to describe have blended into one another, they have come with specific events that she says she can recall and there is detailing – they are not phrased in just a general way. She is giving evidence by reference to the specific places and by reference to events such as her mother's death in the photograph and in relation I think to the last count by reference to the fact that it happened in the week before she was taken into care. So, that in – I'm giving you was called the delay warning in the sense that if you think that he might have been hampered in defending the New Zealand counts that you bear in mind when you are assessing the evidence in relation to that but I think, generally speaking, there has been the kind of detail in this case that allows you to focus in or has allowed the defendant to focus in and question*

282. Simply stating, accurately in our view, that the complainant had given detailed evidence, in the context in which that observation was offered, could not have served to bolster the witness in the eyes of the jury in the manner suggested. The complaint is made without reference to the context in which the characterisation was offered. It is clear from the context that the characterisation complained of was entirely apposite, accurate and correct.

283. It will be seen from the passages quoted, that it was in the context of seeking to distinguish between the difficulties identified in the present case, and those in the Haugh case, that she referred to the question of detail; she went further and elaborated upon that detail but referred also to evidence where it might be argued it was lacking. It is suggested by failing to refer more extensively to portions of the evidence where there was a supposed want of detail the charge was rendered into an unbalanced state. We cannot see on perusal of the relevant passages any basis for this submission. We cannot reprise here the evidence of the complainant given over many days, but we think on perusal of that evidence that much detail was given and it permitted the appellant to cross-examine the complainant all the more effectively – which, of course, diminished any potential prejudice following from delay. In our experience, indeed, as cases of this kind go, the level of detail was relatively high and certainly, a very clear distinction could be made, as was made, by the judge (perfectly properly as any delay warning must be put in context having regard to the evidence) between this case and the case of *R.B.*

284. "(v) Issue was also taken concerning the delay warning which was given by the trial judge. In it, the trial judge compared this case with the length of time which prompted the so-called "*Judge Haugh warning*". In Judge Haugh's matter, the trial judge stated that the "*complaint that was made 15 years after the event, not three years after the event… [as here]*"- [Transcript Ref: Day 14 — P.27 — Line 28 onwards]. As such, although a warning was given to the jury, there was an attempt

to dilute the effect of the warning and reduce it — by comparison — by a factor of five. In fact, what had occurred here was that the alleged offending was said to have occurred between 2006 to 2010. Therefore, it was plainly incorrect to say that there was a delay of a mere three years when in fact it was not until 2014 that the complainant made a statement to the gardaí and it was not until 2016 when the appellant was charged with the offences. Notwithstanding this obvious factual error, the trial judge refused to correct the position with the jury."

285. What the trial judge said in this context was:

> *"I would also say that the delay, such as it is in this case, is a minor order compared to a lot of cases that come before the courts. The disclosure to the Gardaí was in 2013 when the complainant was 14 years of age. So, that's three after the last event and seven years since the first event."*

286. The appellant seeks to suggest that in some sense the warning was erroneously diluted by "a factor of five" by reference to dates or numbers of years. This is an oversimplification; reference to dates or numbers of years in the present context was perfectly proper and indeed it is hard to see how any period after 2014, at the latest, could be of much relevance. Warnings must be tailored to the facts of a given case: there will be cases even of considerable antiquity where the only real prejudice will be the natural fallibility in memory with time. At the other end of the spectrum, so to speak, may be cases where real evidence, the absence of which can, objectively speaking, be viewed as prejudicial, would have been lost. At all times, of course, when dealing with lapse of time the court and the jury must guard against speculation that given prejudice exists; in many instances the class of warning used, based upon that of Haugh J. may be over-elaborate and could fall into the trap of inviting speculation. Indeed, perfectly correctly, of more recent years, less elaborate forms of words are commonly used and appropriate. On any view the warning given here can only be considered of the most comprehensive kind and indeed may have gone further than is necessary. The references to dates and numbers of years were substantially accurate – insofar as it might have been suggested that inaccuracy arose with respect to references to 2013 and 2014 these were, at worst, a minor kind which could not have impinged in any real way in a prejudicial manner on the appellant, especially having regard to the exhaustive cross examination on every possible ground. The judge addressed the matter as follows: -

> *"Now, we don't have a, by the standard of these cases, we don't have huge delay here but certainly the courts have -- I think the incidents here are alleged to have occurred between 2006 and 2010. The complaint was made in 2013 and the accused was arrested and questioned about it in 2014. So the courts are still mindful, even though we now understand why it takes people time to disclose abuse, that delay can cause difficulties for both the prosecution but more particularly the defendant"*

And:

"So, in deciding whether or not you are satisfied to the requisite degree of beyond reasonable doubt you have to bear in mind the factor of delay. So, has delay impacted on the accused's right to a fair trial in your assessment of the evidence? Now, the late Mr Justice Kevin Haugh formulated warning for juries in sexual assault cases. The case he formulated in was a complaint that was made 15 years after the event, not three years after the event…"

287. We consider that the delay warning in this case was entirely sufficient and adequate in its terms. Furthermore, it is in our view arguable that such a warning was not necessary at all – such a warning having been originally devised to cope with cases of far greater antiquity. Be that as it may, a delay warning was given in this case and in our view it provides no basis for any legitimate complaint.

288. "(vi) The trial judge also made reference to the assertion in the closing speech on behalf of the appellant that he could not have had the complainant medically examined — a submission which was to the effect that the appellant could not have insisted on such an examination without the consent of the complainant. The trial judge took issue with this part of the closing speech. In commenting on this, the trial judge stated "*Mr O'Higgins also puts emphasis on what he describes as a sloppy investigation by the gardaí and he referred to the failure to get the medical evidence and, as I said to you, the reality is now you can't speculate because neither the State didn't, and should have, but Mr C also said [in interview] he was going to and he didn't seek it either and the reality is that you now can't speculate and you have just got to assess the case on the basis of the evidence of TC because that's the only evidence you have."*- [Transcript Ref: Day 14 — P.34 — Line 12 onwards] When the matter was raised, even the prosecution acknowledged that the comments of the trial judge may have given the impression that the burden of proof lay with the appellant on that issue. - [Transcript Ref: Day 15 — P.53 — Line 15 onwards] Nevertheless, when the trial judge revisited the issue, the manner it was dealt with remained inadequate and unfair, In doing so, the trial judge stated that *"[t]he failure to organise the medical examination is a failure of the State and the prosecution and again the presumption of innocence has to be remembered, that the defence doesn't have to do anything but I just wanted to correct the impression that they couldn't do it. In fact it was open to them to ask but you cannot take from that anything, as it were I just wanted to clarify that it was open to them to ask but the onus again still remains on the State to prove every aspect of its case"* - [Transcript Ref: Day 15 — P.5 — Line 1 onwards in the Judge's charge]. Notwithstanding the attempts by the trial judge to ameliorate the damage done by what she had said originally, the Judge in fact accentuated her criticisms of the defence closing speech which was unfair and imbalanced. In reality, the comments of the trial judge gave the impression to the jury that while on the one hand no burden rested on the appellant to have the complainant medically examined, yet on the other hand, an adverse inference could be drawn from the fact that having said it could not be done, it in fact could have be done by the appellant and was not. Even in debating the matter back and forth with counsel,

the trial judge acknowledged she had never been involved in a case where such an examination had been done at the request of the defence, nevertheless she insisted that she wished to bring this to the attention of the jury. The effect of this was to create a real unfairness for the appellant. In point of fact, the trial judge had herself acknowledged the absence of a medical examination as significant in the application for a direction when she stated: *"The issue in relation to the absence of medical evidence, the Court has a strong view that in a case like this where the prosecution is putting up a young girl to be cross examined and failing to give her the opportunity to be assessed, validated and medically examined is extremely unfortunate."* - [Transcript Ref: Day 11 — P.40 — Line 22 onwards]."

289. In her charge to the jury the trial judge did criticise the respondent for failing to organise a medical examination of the complainant at the time of her original complaint, but on requisition clarified what counsel for the defence had stated in his closing speech (i.e. that this could not have been done by on or on behalf of the accused but could have been done by on behalf of the prosecution). She originally said:-

> *"There was absolutely nothing to stop Mr C from requesting a medical examination of his daughter, either when he became aware of the allegations, which does appear to be from the text messages to be somewhere around 2013, or when he was arrested and charged by the Gardaí in 2014."*

290. This matter was revisited after requisitions. The judge told the jury that [defence counsel]:-

> *"…went on to say, "This is not something we could organise. We cannot force a doctor on a complainant" and the reason I mentioned at all to you was that in fact it is perfectly open to an accused person to request a medical examination. Now, again there's no onus on Mr C to do anything. The failure to organise the medical examination is a failure of the State and the prosecution and again the presumption of innocence has to be remembered, that the defence doesn't have to do anything but I just wanted to correct the impression that they couldn't do it. In fact, it was open to them to ask but you cannot take from that anything, as it were - I just wanted to clarify that it was open to them to ask but the onus again still remains on the State to prove every aspect of its case."*

291. This re-charge by the trial judge after requisitions more than adequately dealt with the issue of the absence of medical evidence.

292. "(vii) The trial judge in her charge to the jury emphasised in extenso the answers the complainant had given in response to matters including the Facebook material where the complainant indicated a desire to return to the care of her father, notwithstanding the allegations which had been made. As was clear, revelations of this nature were totally inconsistent with her evidence - [Transcript Ref: Day 14 — P.X33 — Line 26 onwards to page 33]. However, the trial judge sought to emphasise the complainant's answers to the patent inconsistencies which arose. As

such, it was submitted that the trial judge's over emphasis of these matters was unfair and created an imbalance and an impression that the trial judge was trying to reduce the effect or significance of the contradictory positions adopted by the complainant. Despite a request to do so, the trial judge did not re-charge the jury in relation to this submission."

293. We think that this characterisation of the charge is simply unsustainable; in fact what occurred was that the trial judge gave an appropriate summary of the evidence with due emphasis of the evidence pertaining to inconsistencies, so far as they existed.

294. In the circumstances outlined we are therefore rejecting each of the complaints numbered (i) to (vii) under this subheading.

Overall Conclusion

295. Having considered the numerous issues raised by the appellant on this appeal, we have not been disposed to uphold any of his complaints and we are satisfied both that his trial was satisfactory and that his conviction is safe.

296. We therefore dismiss the appeal against conviction.