THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 95

Record Number: 151/13

Whelan J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

B.S.

APPELLANT

JUDGMENT of the Court delivered on the 9th day of April 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. On the 22nd March 2019, the appellant was found guilty by a majority verdict of a count of rape contrary to s.2 of the Criminal Law (Rape) Act 1981.

Background

2. This appeal relates to a count of rape that occurred on 26th July 2010. The complainant in this case was seventeen years old at the time and an employee of the appellant. On the night in question the complainant was attending a staff party at the hotel owned by the appellant. At a certain point the appellant asked the complainant if he could confide in her, and she had a further drink with him in the hotel bar. Later, the complainant went with the appellant to the presidential suite in the hotel. The complainant turned on the television and made some comment about what was on TV. The evidence was given that the appellant told the complainant to shut up, which the complainant initially thought was due to the appellant's inability to say what was on his mind. A little later, the complainant made a further remark whereupon the appellant told the complainant to shut up and in an aggressive manner lunged at her, pinned her down on the couch and had sex with her. The complainant struggled and managed to get the appellant off her. The complainant got dressed and left the hotel. A few days later she confided in her friend what had happened and a few months later she told her parents who brought her to the Rape Crisis Centre and thereafter she made a complaint to the Gardaí.

Grounds of appeal

3. In his notice of appeal dated the 10th October 2013, the appellant puts forward seven grounds of appeal but in written submissions he appears to only rely on the following three:-

   (1) The trial was unsatisfactory in all the circumstances

(2) The applicant has also instructed that his previous legal representation failed in numerous material aspects, to adequately or properly prepare and conduct his defence case thereby rendering the conviction unsafe and unsound

(3) The applicant reserves his right (*inter alia* in light of ground 2 above), to adduce new or additional evidence in the course of the hearing of the appeal as same may be necessary to properly present his appeal.

4. Grounds (1) and (2) may be read together. The appellant sought leave by way of notice of motion to particularise ground (2) by the insertion of the following:

> "The appellant's defence was not presented in a satisfactory manner during the course of his trial having regard to material and instructions provided by the appellant to his legal team prior to and during the course of the trial."

The Court is satisfied to permit of this particularisation.

5. The appellant also seeks leave to add the following proposed ground of appeal:-

> "The learned trial judge erred in law and in fact in holding that the evidence tendered by WG during the course of the trial was capable of amounting to corroboration and erred in so instructing the jury during the course of his charge."

6. While, originally, the respondent sought to contest the addition of this ground of appeal, it became clear during the hearing of the appeal that this issue had been raised with the trial judge prior to his charge. Consequently, there was no substantial objection to the addition of this ground and we are satisfied to deal with the appeal on the basis of, what is in substance, two grounds of appeal.

Submissions of the parties

Manner in which defence was presented at trial

7. These grounds of appeal are predicated on an assertion by the appellant that his previous legal counsel failed in presenting his defence by failing to establish in evidence matters specifically relating to timing; namely, the time spent by the appellant and the complainant in the presidential suite on the occasion in question. The appellant contends that this was for a period of approximately two hours, whereas the complainant stated that it was for a period of some 20-30 minutes. It is contended that the previous legal team failed to put this matter specifically to the complainant and to another prosecution witness; WG and further failed to interrogate the issue properly or at all with the witnesses. This issue, it is submitted, was of critical importance and would have cast serious doubt on the complainant's credibility.

Fresh evidence

8. The appellant has sworn an affidavit dated the 28th November 2019 in order to provide additional evidence relating to these grounds, his present solicitor, Ms. Bartels, has sworn an affidavit, while his previous solicitor has sworn a replying affidavit.

9. An issue arose at hearing as to whether the sworn averments on the part of the appellant come within the ambit of 'additional evidence' as that term is understood in the context of seeking leave to adduce fresh evidence. Where new evidence is presented on appeal, a court must assess whether the material renders the trial unsatisfactory. Prior to doing so, however, as an appeal is conducted on the basis of the evidence at trial, fresh evidence will only be permitted in certain instances and where certain criteria are established. In the ordinary course of events, an affidavit of the proposed witness setting out the 'fresh evidence' is lodged together with an explanation as to why such material was not relied upon at trial.

10. The Director of Public Prosecutions accepts that s.3(3) (d) of the Criminal Procedure Act, 1993, permits this Court to receive and consider the affidavit evidence in terms of the principles stated in *The People (DPP) v. O'Regan* [2007] 3 IR 805. The appellant also relies on s.3(3)(e) of the 1993 Act. The relevant provisions of the Act provide as follows:

"3(3) The Court , on the hearing of an appeal or, as the case may be, of an application for leave to appeal, against a conviction or sentence may –

(d) receive the evidence, if tendered, of any witness;
(e) generally make such order as may be necessary for the purpose of doing justice in the case before the Court."

11. The principles which govern the admissibility of fresh evidence are as stated in *Willoughby v. DPP* [2005] IECCA 4 and as approved by the Supreme Court in *The People (DPP) v. O'Regan* [2007] 3 IR 805:-

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

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

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

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

12. By way of brief summary, it was established in evidence that a key card for the presidential suite had been cut by WG, the hotel porter, at 3.23am at the appellant's request. WG also gave evidence that he went to the hotel bar sometime between 4am and 5am and that nobody was present when he did so. Moreover, the evidence disclosed that WG had made a number of phone calls between 5.07am and 5.41am looking for taxis at the behest of the appellant.

13. It was the complainant's evidence that she had left the hotel at approximately 5am having spent some 20-30 minutes in the presidential suite.

14. The appellant, when interviewed by the Gardaí, said he believed they had spent 45 minutes in the room. The appellant argues that since reading the book of evidence, he believes that they had in fact spent over two hours in the hotel room, having gone up straight after the key was cut at 3.23am.

15. The appellant submits that he instructed his previous legal team that it was of vital importance that it be established that he and the complainant went to the presidential suite shortly after the key was cut and contends that this was not done.

16. The gravamen of the appellant's complaint is that in failing to cross-examine the complainant and another witness on the assertion of a two-hour time gap between the cutting of the key card and the phone calls to the front desk, his previous legal team failed to properly conduct a line of defence which was supported by circumstantial evidence and would have undermined the whole narrative of the complainant's version of events.

Discussion

17. In accordance with well-established jurisprudence, it is only in exceptional circumstances that new evidence will be admitted on appeal. In the present case, where the appellant is alleging that his previous counsel failed to cross-examine adequately, or at all, the complainant and WG on the issue of times, a balance must be struck between the desire for finality in legal proceedings and the interests of justice in the particular circumstances.

18. It would undoubtedly be unacceptable and contrary to the interests of justice if an appellant failed to alert his legal team to an issue at trial and subsequently sought to raise a contention that the trial was in some way deficient as a consequence.

19. Equally, should an error of substance have been made by his previous legal team at trial, then a balance must be struck between the interests of justice and the need for finality in trials.

20. The evidence now sought to be relied upon must not have been known at the time of trial. The incident, the subject of the offence is dated the 26th July 2010, the appellant's trial took place in March 2013, the notice of grounds of appeal is dated the 16th October 2013. In this notice it is important to observe that the ground of appeal alleging failures on the part of the appellant's previous legal representation is not particularised. Ground (2) states in full:-

> "The Applicant has also instructed that his previous legal representation failed in numerous material aspects, to adequately or properly prepare and conduct his defence case thereby rendering the conviction unsafe and unsound. These grounds of appeal are filed following a change of solicitor and counsel; as a result, it is not appropriate at this stage to particularise this ground of appeal as it is not possible, at this time, to fully and responsibly advise the Applicant in relation to this issue

and fully advance it as a ground of appeal. The Applicant expressly reserves the right to further particularise and amplify this ground of appeal."

21. We make three observations at this point; firstly, the issue concerning the time spent in the presidential suite was not an issue which was dependent upon expert testimony or some intricate analysis, but, was something which was directly within the knowledge of the appellant from a very early stage. Indeed, he avers in his affidavit that having read the book of evidence, it became apparent to him that he had spent much longer than three quarters of an hour in the presidential suite. Therefore, this material was known to the appellant prior to trial.

22. Secondly, as the appellant was present at his trial, he must have been alert to this issue and consequently aware of any deficit in the cross-examination for which he now contends at the time of trial. This aspect is, in this Court's view, central to the issue of the admissibility of this material on appeal.

23. The third observation we make is that no appellant has an automatic right to further particularise or amplify a ground of appeal. The notice of appeal sets out the grounds of appeal and an appeal is ordinarily confined to those grounds. Whilst this Court may entertain new grounds or expanded grounds of appeal, this is only in limited circumstances.

24. Insofar as the second observation is concerned, the appellant has sworn an affidavit on 28th November 2019 and lodged in the Court of Appeal in December 2019. The notice of motion seeking to particularise ground (2) of his grounds of appeal is dated 3rd December 2019. When we are assessing the credibility of the appellant's assertions on affidavits, we take into account the period of time between the original notice of grounds of appeal (16th October 2013) and the date of the notice of motion seeking to particularise ground (2) of the grounds dated the 3rd December 2019. Therefore, the period of some six years elapsed before the appellant sought to set out the actual alleged deficiencies on the part of his previous legal team.

25. In that affidavit, he avers that he instructed his legal team in relation to the significance of the periods of time. He says:-

> "I instructed my legal team in relation to the importance of the times in this case and that the complainant's version was unlikely to be true if it was the case that she had been in the room for a period in excess of two hours, during which time she had made calls and sent some texts and where the evidence was that I had made various attempts, over a period of more than half an hour, to organise a taxi to take her home."

He further avers: –

> "My firm instructions to my legal team were that we got the key and a bottle of wine from WG and that we then went straight up to the room and, accordingly,

where there was evidence that the complainant left approximately 5.00 or sometime after – this matter was central to my instruction and to the defence of the case. The documentation I provided was central to establishing my defence."

26. Insofar as the above is concerned, this complaint related to the contention that the appellant's previous counsel had failed to establish by cross-examination that the key for the presidential suite had been cut at 3:23 am. However, it is clear from a perusal of the transcript that whilst this material was not put to the hotel porter, WG, before his cross-examination concluded, WG was recalled and the material was put to him and it does not appear to be in dispute but that the key was cut at that particular time.

27. The complaint advanced on appeal was that as the documentation relating to the cutting of the key card was only adverted to after WG's cross-examination, that this in some manner supported the appellant's contention that his previous counsel was not alert to this particular instruction concerning the issue of times.

28. However, it is the evidence before the jury that is of paramount importance and it is quite clear that the evidence established that the key card was cut at 3:23 am.

29. The appellant continues in his affidavit that he stressed the importance of the times with his legal team and believed that his legal team were aware of the significance of this line of cross-examination. The appellant's view is that the two hour period was "the most critical linchpin of my defence".

30. Significantly, the appellant avers as follows: –

> "…. As the trial progressed, it became more and more clear to me that my legal team did not appreciate the significance of the fact of the period of over two hours which we had spent in the hotel suite, which, in my view, would have cast severe doubt on the complainant's credibility. This was apparent when senior counsel, in cross-examining the complainant, put it to her that she had been in the room for half an hour and failed to put the issue of the two-hour period to her. Nor was the question of the two-hour period put to any other witness in the case."

31. The appellant continues as follows: –

> "I recall that I was very confused that the issue of the two-hour period had not been raised following the recall of WG. I am certain that I also spoke to senior counsel following his cross-examination and emphasised that the issue of the over two-hour period was central to my defence. I raised this with my legal team as I was really concerned and worried over what had transpired during the evidence."

32. However, it was not until senior counsel for the defence was closing the case that the issue of the two hour period was raised, which met with an immediate complaint from senior counsel for the prosecution on the basis that the defence was creating a timeframe that had never been established in evidence.

33. In this Court's view, the above two paragraphs of the appellant's affidavit are important together with an assessment of the totality of the evidence in considering whether the appellant ought to be permitted to advance this new material on appeal. It is of interest in this respect that the appellant does not aver that he raised the issue with his legal team following the cross-examination of the complainant but only did so on the conclusion of WG's cross-examination.

34. We also examine the affidavit of the appellant's previous solicitor. On the issue raised in the aforementioned two paragraphs of the appellant's affidavit, he avers:-

> "I say that the appellant's instructions were followed at all stages before and during the trial. It is apparent from the appellant's own affidavit that detailed preparations went into this matter. The trial took place over a number of days. No complaint was made by the appellant during the trial that his instructions were not being followed. If that had occurred there would have been ample opportunity to apply to the court for leave to have a witness recalled, or whatever the case may be. This did not occur because no issue arose."

35. Clearly, a conflict therefore arises on the affidavit sworn on appeal. Such conflict cannot be resolved by this Court on affidavit evidence alone. Mr Hartnett, SC on behalf of the appellant makes the point that this affidavit was not served on his solicitor and was only received on the morning of the hearing of this appeal.

36. However, we are satisfied that we can address the issue by virtue of an examination of the surrounding circumstances in order to test the veracity of the appellant's assertions.

37. The appellant seeks to make a very simple complaint; that is, that his previous legal team did not do what he asked them to do at trial. It was not a complicated issue and it was one which was well within the appellant's understanding. Therefore, the following can be said:-

    1. The appellant does not contend in his affidavit sworn in November 2019 that he raised concerns regarding the complainant's cross-examination with his legal team. He avers he spoke to senior counsel only following WG's cross-examination.
    2. Given the simplicity of the appellant's complaint, it is surprising that the original grounds of appeal did not reflect the actual complaint which must have been known at the time of trial in March 2013.
    3. The grounds of appeal dated October 2013 do not particularise the complaint.
    4. No effort is made to particularise the complaint until December 2019.

38. The following can also be gleaned from a perusal of the transcript: –

    1. The issue regarding the time the key card for the presidential suite was cut was not raised by counsel for the appellant in the initial cross-examination of WG, but WG was cross-examined on the cutting of the key card and the evidence established that the key was cut at 3.23am.

2. In cross-examination of the complainant, it was suggested to her that she was in the presidential suite for half an hour.
3. The issue regarding the contended time period of two hours is addressed in closing argument by counsel on behalf of the appellant.

Conclusion

39. This Court is of the view that it is significant that the original grounds of appeal did not particularise the appellant's complaint and that the gravamen of the complaint was not apparent until December 2019. While there was a requirement to recall WG in order to put the issue of cutting the key card to him, this evidence was before the jury and was apparent in short order. We do not accept that the failure to put the material to the witness in the course of his initial cross-examination or indeed to the complainant supports the appellant's contention that there was a misstep on the part of counsel.

40. Section 3(3)(d) and (e) of the 1993 Act permits this Court, where the appeal is based on new or additional evidence, to receive evidence from any witness and to generally make such order or orders as may be necessary for the purpose of doing justice in the matter at issue. Leave to allow fresh evidence will only be granted in exceptional circumstances. The evidence must not have been known at trial or reasonably have been known or acquired at trial. It must be credible with reference to the other evidence established at trial and finally, there must exist the possibility that the evidence might have had a material and important effect on the result of the case.

41. It is clear that the appellant has failed to meet the requirement that the evidence he now seeks to rely upon was not known at the time of trial or could not reasonably have been known at trial.

42. It is contended that there was a misstep or mishap on the part of the previous legal team. Insofar as an alleged failure on the part of a previous legal team is concerned, this Court will only intervene where there is a serious risk of a miscarriage of justice; that requires a consideration of the effect, if any, of the alleged failure on the part of the legal team on the outcome of the trial.

The complaint

43. The central issue advanced on behalf of the appellant is of the period spent in the presidential suite, which it is said, ought to have been fully explored with WG and with the complainant in an effort to undermine the complainant's credibility. If this had been done, it is said that it would have been possible to show that the complainant was in the suite for two hours rather than for the 20-30 minutes which she asserted when interviewed by the Gardaí.

The evidence

44. It is important to scrutinise the substance of the complaints made.

The complainant's evidence

45. In her direct evidence concerning events in the hotel bar the complainant said:-

"So WG came in, and BS asked him for a key for a room and a bottle of wine. And I hadn't actually drank my vodka and orange, again, it was the same, just wetting my lips. And that was fine, and we went and got in the lift there behind reception.

Q. Yes, which we can see in that map, yes?
A. Yes. So all that was going through my head at this point was what's he going to tell me, why me, like, and really how am I going to get out of drinking this bottle of wine, like, you know it was just purely -- there was nothing else going on in there, like. So then we got up to the fourth floor, and you can see there where we would have come out of the lift.
Q. Yes?
A. And we turned right and came down the corridor, so we came down, and we went into the presidential suite. Now, I opened the door, BS was holding the bottle of wine and the two glasses.
Q. So you had the key?
A. I had the yes, he handed me the key and I opened it the door."

As to the time spent in the suite, she said:-

"Sorry, sorry, you know, that he was finding this, I suppose, courage to tell me whatever this was, you know, this secret that I thought. So that probably -- you know, I went in and sat down. So I'd say, really I wasn't there that long, 20 minutes, half an hour, yes."

In cross-examination, the following exchange took place:-

"Q. -- in this case. How long do you stay do you say you were in that room?
A. I genuinely don't know, it's a really an estimate to say 20 minutes, half an hour.
Q. Yes. Well, I have to you that it is about a half an hour?
A. Mm-hmm."

46. Shortly after, in cross-examination, the complainant was asked whether she sent text messages from the suite and the following took place:-

"Yes. Well, after the attack then, do you not recollect making any attempt to text in the room, from the room?
A. No. I know I did make a phone call on my way home. But in the room, I don't remember texting.
Q. Yes?
A. I could well have, don't get me wrong.
Q. And I suggest to you that there are three texts from you before you meet WG on the way out, and after he has made his last phone call for a taxi for you?
A. That's I don't -- I'm not saying that didn't happen, because I mean I was 17, and the first thing you do when you pick up your phone, regardless of anything, you're constantly on your phone and you're going to do that.
Q. Yes. What I'm putting to you ?

A. Oh sorry.

Q. is that after the attack, as you've described it, which I say didn't take place, on my instructions, that you remained in the room, made three texts, that BS telephoned down more than once to get you a taxi, and that it was the best part of a half an hour after the attack that you left the room?

A. I mean, that obviously isn't how I remember it.

Q. Yes?

A. But having said that, it was four or five months later before I did tell it as a full story. So, I won't I won't fight with you on that one, do you know, I won't --

Q. Are you you replied to me, "That is not as I remember it"?

A. Yes.

Q. What does that mean?

A. Well, that is I wouldn't have thought that I was in the room for half an hour after the attack.

Q. Because you told Ms Murphy, I think - I'll be corrected if I'm wrong, I'll be corrected very vigorously - I understood your evidence to be that after the attack you put your boots back on and left almost immediately?

A. Yes.

Q. And that BS was on the telephone as you left?

A. No, he was sitting on the couch as I left. He had went to the telephone."

47. Finally, when asked about how long she was in the suite before matters became unpleasant, the following was said:-

"Yes. How long was it -- were you in the room before things turned unpleasant?

A. Like I said, I don't know. He was sitting for some time just sitting.

Q. Yes?

A. Not, not of any and that's when I kind of started the awkward chat, kind of "oh, I can't believe this is on the telly at this time".

Q. Yes?

A. And "shut up", and then I said "oh what time is it", and that's when, it was just a

Q. As you went up in the lift, was there any chat?

A. I can't remember, to be honest. I can't.

Q. As you were walking down the corridor was there any chat?

A. I can't remember. Presumably so.

Q. Yes?

A. But I can't, I can't say there definitely was or wasn't.

Q. If there was it was just idle banter, pleasantries?

A. Yes.

Q. You go into the room, you take off your boots, you switch on the telly, and you can't help us as to how long it was before he first told you to "shut the fuck up"?

A. I don't want to say how long because it would be a guess, to be honest. I mean, it was a long time, and I don't want to do you know.

Q. Yes?

A. I don't want to say something that I don't know is true, basically."

WG's evidence

48. WG was the hotel porter on duty on the relevant date. He gave evidence that he saw the appellant in the hotel bar around 3 or 4am with the complainant. He gave evidence of calling for taxis and of the complainant's demeanour on her return from the presidential suite.

49. At the conclusion of cross-examination, the issue of the documentation regarding the cutting of the electronic key card was raised and WG was recalled that day and the following evidence adduced:-

"WG will identify it by its correct name. Is it a record of keys being cut?

A. That's what it appears to be, yes.

Q. Yes?

A. Yes.

Q. Now, what number is the presidential suite?

A. On the phone system it's 415.

Q. And was was a phone cut for room 415 on the 26th of July 2010?

A. Yes, at 3.23.

Q. 3.23 am?

A. Yes.

Q. Now, who cut that key?

A. The the operator there is HL but we all use that one, same log-in, it's left logged in constantly. So I would I would say it would be me, but obviously I couldn't confirm; other people may have had access, managers may have come up

Q. Yes?

A. that would have passwords to get into the system.

Q. Yes?

A. But that would be limited to a few people, not all all the staff that were there.

Q. But you did cut a key for ?

A. I did, yes.

Q. for 415?

A. Yes.

Q. And the record would seem to say that the key a key was cut at 3.28 -- sorry, 3.23?

A. Yes.

Q. And there doesn't appear to be a record of any other key being cut for room 415 around that time?

A. Yes, so that would be me that did that then.

Q. It's fair to say?

A. Yes."

50. He was then re-examined, with the relevant portion being:-

> "Well, if if you're correct in what you're telling us that there's a key card cut at 3.18.45, another one at 3.23, which is the one you say is for the presidential suite, another one says; "key assigned to reception, 3.34.26", is that the one you said you put a number of people in one room?
>
> A. No, that would have been much later, it would have been around probably the 5.40 maybe, possibly."

51. He confirmed that he gave the appellant the key card in the hotel bar and did not see him again. He stated that he did not know how long the appellant remained in the hotel bar, after WG gave him the key card.

The closing arguments

52. Issue was taken by the prosecution with the defence closing address, wherein the suggestion was made that the appellant and the complainant were in the presidential suite by 3.34am. In his charge the judge properly drew the jury's attention to the evidence on this and reminded them about the drawing of inferences. On requisition by counsel for the prosecution, the judge again instructed the jury as follows:-

> "JUDGE: Ladies and gentlemen, there are just one or two matters that perhaps I should have mentioned to you. One relates to the key. The key was cut at 3.23, WG -- I thought I told you in my summary, WG doesn't go back to the having given that to BS at that time, he doesn't go back to the ..bar, he said, till either 4 or 5, when there's nobody there."

The submissions on appeal

53. The appellant submits that there is a duty in contentious litigation to put a client's case to the appropriate witnesses. This cannot be gainsaid. In this particular case, it is contended that previous counsel for the defendant put a period of time to the complainant that did not accord with his instructions but was in fact in accordance with the complainant's version of events concerning the time spent in the room.

54. It is said that counsel did not canvass this issue with the complainant in cross-examination in any manner and nor did counsel cross-examine the hotel porter, WG on this issue.

55. Moreover, that in closing the case, counsel sought to rely on a particular period of time that had never been put to the complainant or to any other witnesses and so the closing argument lacked a foundation in evidence.

Submissions of the appellant

56. The appellant refers to *The People (DPP) v. Doherty* [2009] IECCA 17 where Macken J. stated that a court, where incompetence is alleged, should look at the basis for the complaint made and its contended for effect on the trial. It is submitted that the court must examine whether the decisions made or the conduct complained of were proper and

reasonable and were for the benefit of the accused person's defence. One must examine whether the conduct was open to criticism and whether it might have had an adverse effect on the result of the trial.

57. The appellant refers to *Browne v. Dunn* (1893) 6 R. 67, HL where it was established that counsel must put their case to opposing witnesses to allow that witness give their comment or to contradict it. In the present case, defence counsel failed to do this in relation to the matter of timing and as a result, the appellant's conviction is unsafe.

Submissions of the respondent

58. The respondent submits that the appellant has failed to discharge the requisite test as the guiding case law asserts that an appellate court should only intervene in exceptional circumstances where the effects of the inadequacy of the defence at trial is sufficient to threaten the safety of the conviction. The respondent submits that the bar is high when considering the effects of the defence's conduct at trial.

59. The respondent submits that the issue of timing was put to the complainant multiple times to no avail. The appellant in his cautioned statement put the time at 45 minutes.

60. The respondent further submits that the facts established in evidence, namely that a key was cut at 3:23 am and the night porter made a call for a taxi at 5:41 am, do not concur with the appellant's assertion that there is circumstantial evidence consistent with the complainant being in the presidential suite for over two hours.

Discussion

61. This Court must consider by way of an objective evaluation the transcript of the evidence and the sworn affidavits and determine whether the conviction is unsafe in light of the alleged failure to explore the issue of time with the complainant and WG.

62. Having scrutinised the complainant's evidence the following emerges: –

- The complainant was unsure as to how long she spent in the presidential suite
- Her direct evidence disclosed that when in the hotel bar, the appellant asked WG for a key for the presidential suite and a bottle of wine.
- In her direct testimony, it is clear that the complainant had not drunk her vodka and orange at this point and that they went to the lift behind reception
- When the complainant opened the door to the suite, the appellant was holding the bottle of wine and the two glasses.
- In cross-examination it was suggested to her that she spent a half hour in the room.
- In cross-examination it was repeatedly suggested to her that she sent text messages from the suite after the attack and stayed in the room for the best part of half an hour after the attack.

- Those text messages were timed at 5:14, 5:17 and 5:33 am
- The first call for the taxi was at 5:07am and the last call 5:41am
- The complainant was asked how long she was in the suite before the incident complained of and she was unsure in this respect.

63. WG 's evidence discloses the following: –

- He said he saw the appellant in the hotel bar at around 3am or 4am with the complainant.
- The appellant asked WG for a key for the presidential suite.
- In cross-examination it was established that the key was cut at 3:23am.
- WG gave the appellant the key in the hotel bar .
- WG did not see the appellant after giving him the key.
- WG locked up the hotel bar around 4 or 5am.

64. It is essential to look to the evidence which was offered by WG. He said he cut the key card at 3:23am and gave it to the appellant in the hotel bar . He then said that he returned to the bar sometime between 4am and 5am and that he did not see the appellant in the intervening time period.

65. This therefore means that on one view, the time spent in the presidential suite was a greater one than that indicated by the complainant in her direct testimony. It is clear that in the course of the cross-examination it was put to the complainant the period of time spent in the presidential suite was that of 30 minutes. It is this positive assertion as to the period of time spent which is the primary issue insofar as this Court is concerned.

66. However, it is important to look at the context in which this issue arose. Cross-examination took place on the basis that the complainant had spent half an hour in the presidential suite **after** the incident. It was suggested to the complainant that she was sending text messages from the hotel bedroom. When one examines the sequence of the questions, it is quite clear that the initial question stated in somewhat bald terms, that she had spent a period of 30 minutes in the hotel room, but the argument is made that this cannot be read out of context. The sequence of questions and answers following this particular question, as set out above, are important. When one examines those questions, the import of the cross-examination in this respect was not to the effect that the appellant had spent half an hour in total in the hotel suite, but that in fact she had spent half an hour **after** the incident complained of sending text messages.

67. However, the position remains that it was suggested to the witness at the outset of this sequence of questioning that she had been in the room for a period of a half hour, which,

the appellant contends, accorded with the complainant's version of time but conflicted with his instructions.

Conclusion

68. The central focus of this ground of appeal was that there was a misstep on the part of the legal team for the appellant in that counsel failed to put questions sufficiently or at all to the complainant and to WG regarding the time period spent in the presidential suite, thus rendering the appellant's conviction unsafe.

69. The appellant contends that notwithstanding the content of his interview where he indicated that he and the complainant spent a period of some 45 minutes in the room, the time spent was in fact longer than that; for a period of some two hours.

70. The complainant gave evidence that she was in the room for a period of some 20 to 30 minutes but it is quite clear from a perusal of the transcript that she was unsure as to the time period she spent there.

71. The appellant does not assert in his affidavit sworn in November 2019 that he complained to his legal team in the aftermath of the cross-examination of the complainant. We can readily see why this was the case. Not alone did the complainant's cross-examination disclose that she was unsure as to how long she had spent in the presidential suite, but also, on one view of the evidence that once the key card and the bottle of wine and two glasses had been received by the appellant and the complainant that they made their way shortly thereafter to the presidential suite. This can be gathered from the direct testimony of the complainant where she indicates;-

> "So WG came in, and BS asked him for a key for a room and a bottle of wine. And I haven't actually drank my vodka and orange, again, it was the same, just wetting my lips. And that was fine, and we went and got in the lift there behind reception."

72. Moreover, shortly after that evidence, the complainant said: –

> "… So all that was going through my head at this point was what's he going to tell me why we, like, and really how am I going to get out of drinking this bottle of wine, like, you know it was just purely-- there was nothing else going on in there, like. So then we got to the fourth floor, and you could see there where we would have come out of the lift.
>
> … And we turned right and came down the corridor, so we came down, and we went into the presidential suite. Now, I opened the door, BS was holding the bottle of wine and the two glasses."

73. The evidence also disclosed that efforts were made to call a taxi from 5:07am. Whilst it was not suggested to the complainant that the key to the room had been cut at 3:23am, this evidence was readily apparent from the subsequent cross-examination of WG.

74. Therefore, there was evidence before the jury that the key card for the room was cut at 3:23am, that the appellant was given the key card and a bottle of wine in the hotel bar, that WG did not see the appellant having given him the key card and that he closed the hotel bar sometime around 4am or 5am The first call for a taxi was made at 5:07am.

75. In those circumstances there was scope for the jury to conclude that the appellant and the complainant had spent a greater period in the room than the 20 – 30 minutes as asserted by the complainant. The purpose of this line of cross-examination was in order to discredit the complainant's narrative of events in the particular and in the broader sense. In contending that she was incorrect on the duration spent in the suite, the intention was to discredit her testimony, that the appellant, almost immediately upon entering the room, attacked her in the manner she described. If she had spent longer in the room then she had indicated, this, on the defence case, pointed towards not only an indication that the complainant was incorrect on the time spent in the room, but also that, on a broader view, her evidence was not credible in that if she had been attacked in the manner alleged, she would not have remained in the room for that timeframe and would not have sent three text messages in the aftermath of the incident.

76. While a different legal team may well have approached the cross-examination of the witnesses in a different manner, this, of itself does not render the conviction unsafe. It is apposite, that on the appellant's affidavit, he does not assert that he called into question the cross-examination of the complainant, rather that he became concerned after WG's cross-examination.

77. However, in this Court's view, the crux of the matter rests with two issues. Firstly, the period of time spent in the suite was not tested to any significant degree in cross-examination of the complainant. The time the key card for the room was cut was not canvassed with her in evidence, however, this evidence was given by WG and the time established at 3.23am. The failure to explore and to specifically put to the complainant that she spent two hours in the room, would not in our view have had an important and material influence on the outcome of the trial. It was established that she was unclear on the time spent there and the jury were entitled to look to the other evidence in the trial, such as that of WG and indeed the complainant's own evidence regarding the opening of the door with the key while the appellant was holding a bottle of wine and glasses and the evidence that text messages were sent from the suite in the aftermath of the incident. Secondly, it is said that the *positive* suggestion to the complainant that she had spent a half an hour in the room impacted on the safety of the conviction, however, again, on an examination of the transcript, it is clear that this question is directly connected to the questions which follow, which are related to the time period spent in the room **after** the incident complained of.

78. In counsel's closing argument for the defence, it was said that WG cut the key card at 3.23am, that when he cut the next key at 3.34am, the appellant and the complainant had left the hotel bar, all of which, it was said, suggested that the parties were in the suite by 3.34am or thereabouts.

79. Prosecution counsel took issue with the closing address on this basis and correctly indicated to the judge that WG's evidence was that he gave the key card to the appellant and went about his business and did not see the appellant again and that there was an entry in the hotel record saying 'key assigned, reception' at 3.34am.

80. There was evidence that the only key at the relevant time cut for the presidential suite was at 3.23am. There was nothing to suggest any connection between the cutting of this key and the entry in the record that "key assigned reception" at 3.34am had any relevance to the issue of when the complainant and the appellant went to the presidential suite. WG was quite clear in his evidence that he gave the key card to the appellant in the hotel bar, having cut the key card at 3.23am and did not see him again thereafter.

Decision on this ground

81. In this Court's view, having conducted an objective evaluation of the complaints made by the appellant on affidavit and an assessment of the evidence at trial, we are led to the conclusion that the appellant has failed to demonstrate that the manner of the defence at trial rendered the conviction unsafe. The direct suggestion by counsel that the complainant was in the suite for a half an hour was an error (and not in accordance with the appellant's contention in interview of a 45-minute period or with the instruction averred on affidavit), but on an objective assessment, this does not render the trial unsafe. While this suggestion could have been corrected, it was a question clearly put in the context of a line of argument, seeking to place the complainant in the room for a period of a half an hour after the incident.

82. It is also apparent that the trial judge summarised the evidence accurately. The error in counsel's speech regarding WG's testimony that by the time he cut a key at 3.34am, the appellant and the complainant had left the hotel bar, if anything, advanced a proposition favourable to the appellant.

83. The height of the argument advanced by the appellant is that counsel might have undermined the reliability of the complainant had he pressed her on the time issue – but it must be remembered that her evidence was vague and uncertain in this regard in any event, and there was evidence present which had the potential to place her in the room for a longer period than her suggested 20-30 minutes in any event.

84. Consequently, this ground fails.

Corroboration

85. This ground is concerned with evidence given by WG who was the night porter on the night in question. WG gave evidence that he saw the complainant in the foyer of the hotel before she left:-

> "Q. Did you notice how she was there standing at the reception?
> A. Well, she was--seemed kind of maybe a bit panicked, that mightn't be the right word, but she was in a hurry to get out the door.
> Q. If you were to describe how she was, how would you describe her?

A. Well, with a bit of distance between us and her standing at the reception, it's hard to know exactly how to answer it. But the only way I could deduct how she was is by her -- she was quite keen to leave after asking for a taxi, I think I kind of said "no", as I was turning away from her to put down the cups or whatever it was, I'm not sure what I was holding. But by that time -- by the time she just listened to my short answer and was gone, and didn't hang around.

Q. What did she do; you answered, what did she do next?

A. She had left, she went--you can leave through the front doors.

Q. Well, what was the manner of her leaving?

A. Quickly. I don't really know how other to describe it, it was very--it was brief.

Q. Yes, no, but so she's there at the reception, she asks you a question, and before you can answer, what happens -- or you answer, what happens then?

A. She just leaves. I'm pretty sure she just put down the phone or whatever, but my view would be -- is quite restricted, there's only a narrow gap; once she's left the three or four foot from the reception desk, I wouldn't have been able to see anything.

Q. Well, now, did you do anything?

A. I followed her out into the reception where I'd be able to see, but she'd gone out through the front door by then."

In cross-examination, WG further stated as follows:-

> "So I couldn't comment comprehensively on how she was walking as such. But it just her manner seemed panicked is all I could say."

86. When considering the issue of whether to give a corroboration warning, the trial judge accepted that he was inclined to do so in light of the fact that the evidence of WG, if corroborative, was weak corroboration.

87. The trial judge proceeded to give a corroboration warning and stated as follows on the evidence of WG:-

> "And the most that I can say to you in respect of this particular case is that in terms of WG's remarks or observation that he thought [the complainant] was panicked, he said, he used those words, when she was leaving the hotel, you might find corroboration in this evidence. But as I say, it's entirely a matter for you. And certainly if you did find it as such, the law would oblige me to say -- to remind you that that would be regarded certainly as not strong corroboration at all."

Submissions of the appellant

88. The appellant submits that the trial judge was incorrect in law in instructing the jury that the evidence of WG was capable of corroborating the evidence of the complainant.

89. The appellant submits that in order for evidence of distress to be capable of being corroborative, there must be clear evidence of such. The appellant refers to *The People*

(DPP) v. Mulvey [1987] IR 502, wherein the Court held that the distressed condition of a complainant in a case of rape might, depending on the circumstances, amount to corroboration of the offence but the jury should be wary of relying on it.

90. The appellant notes that the detail and care by the trial judge in *Mulvey* is striking as the trial judge took care to set out a potential view of the alleged corroboration which is consistent with the defence case and he also gave an additional warning that just because there is corroboration does not mean that the jury have to convict. Such warning was not given in the present case and in any event it is submitted that WG's evidence did not amount to corroboration.

Submissions of the respondent

91. The respondent submits that in the circumstances of this case, the evidence of WG was clearly capable of amounting to corroboration. The respondent points to the fact that the appellant and the complainant gave differing accounts of her demeanour when she left the hotel room and consequently, the evidence of WG independently supports the details given by the complainant.

92. The respondent submits that the trial judge's charge on corroboration was correct in the manner in which it set out the demeanour evidence as being capable of corroboration, albeit weak corroboration.

Discussion

93. It is important to observe that the evidence which may constitute corroboration depends upon the circumstances of any given case. Moreover, the defence put forward by an accused is an important criterion in deciding whether or not material as a matter of law is capable of corroborating the evidence desiring of such corroboration.

94. It is the position in this jurisdiction that a more nuanced and flexible approach to the issue of corroboration than that stated in the seminal decision of *R v. Baskerville* [1916] 2 K.B. 658 is preferred. As stated by Kearns J. in *The People (DPP) v. Meehan* [2006] 3 IR 468; at page 495:-

> "This court is of the view that a more flexible approach to the whole issue corroboration beyond the narrow formalistic definition of *Rex v. Baskerville* is entirely open on the decided cases in this jurisdiction and in the particular circumstances advert to by Denham J. in the passages just quoted. The views of the Supreme Court in *The People (DPP) v. Gilligan* do, in the opinion of this court, permit such an approach. The review of cases demonstrates that the application of *Rex v. Baskerville* in Ireland has over the years been of a flexible and nuanced nature. The court believes in any event that the formula of words adopted in *Rex v. Baskerville* to define corroboration, including as it does the words "tending to connect him with the crime", leaves a considerable margin of discretion with any court dealing with issues of corroboration to decide what may therefore may not constitute corroboration. As noted in *Attorney-General v. O'Sullivan* by O'Byrne J., it is for the court of trial to determine in the particular context, including the conduct of the defence, what may constitute corroboration."

95. In the present case, the appellant stated when interviewed by the Gardaí that the complainant was not upset when she left the hotel suite. He said: –

> "Q. When ye were talking in the room, did you say anything to upset her?
> A. No, there was nothing said in the room that would upset her"
> Q. So there was no reason that when she came downstairs from the room she'd be upset?
> A. No."

96. As we have observed above, whether evidence is capable in law of amounting to corroboration is dependent upon the circumstances of the case which includes the defence put forward. In the present case, in circumstances where the appellant stated in interview that there was nothing said in the room which would upset the complainant, WG's observation of the complainant's demeanour becomes significant and is evidence, in the view of this Court, which could in law amount to corroboration.

97. In *The People (DPP) v. C* [2001] 3 IR 345, at page 362, Murray J. (as he then was said: –

> "Corroborative evidence does not mean that the evidence of the complainant must be corroborated in every material respect."

98. Moreover, as stated in *The People (DPP) v. Meehan* [2006] 3 IR 468 at p. 493: –

> "In recent years the courts have shown themselves more prepared, at least in sexual offence cases, to evaluate various evidential facts cumulatively as partial or complete corroboration of a complainant's account, even where the corroborative value of each established fact is low."

99. We are satisfied on the circumstances of the present case that the material was capable in law of amounting to corroboration. Moreover, it is quite clear from the trial judge's charge that he gave an expansive corroboration warning and in so doing, firmly highlighted to the jury that the corroborative material, that is WG's testimony on demeanour, was not strong corroboration by stating:-

> "And certainly if you did find it as such, the law would oblige me to say – to remind you that that would be regarded certainly as not strong corroboration at all."

Conclusion

100. For the foregoing reasons, we are satisfied that the evidence was properly regarded as corroboration in law and we reject this ground.

Decision

101. According, the appeal against conviction is dismissed.