THE COURT OF APPEAL

Record No: 233/2021

Edwards J.
McCarthy J.
Donnelly J.

Between/

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

RESPONDENT

V

D.H.

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 15th of May 2023.

Introduction

1. On the 5th of October 2021 the appellant was convicted by a jury in the Dublin Circuit Criminal Court of the single charge of sexual assault, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001. He was subsequently sentenced to imprisonment for a period of 3 years and 6 months, with the final 6 months thereof suspended on conditions, the said sentence to date from the 13th of December 2021.

2. The appellant has appealed against both his conviction and the said sentence. This judgment deals with his appeal against his conviction, and a related motion seeking leave to adduce new evidence at the hearing of the appeal.

Evidence at trial relevant to the appeal

3. The jury heard that the complainant was born in 2001. She gave evidence that after the breakdown of her parents' marriage, her mother and the appellant entered into a relationship. The complainant subsequently resided with her mother, sister, and the appellant. In her evidence to the court of trial the complainant alleged that in October or November 2013 she and the appellant were at home alone in the sitting room of the house where they resided and that she had asked the appellant for a foot massage. She had moved over to the sofa on which the appellant was sitting and sat at the other end of it, and there placed her calves and feet on his lap.

4. The complainant stated that the appellant massaged her feet and then proceeded to move his hands higher up her legs. He then massaged the outside of her vagina over her

leggings before sliding his hand under her leggings and rubbing the outside of her vagina over her underwear. He then slid his hand under her underwear and rubbed the outside of her vagina. The complainant was asked how she had reacted to this at the time, and she replied,

> *"I just absolutely froze. I didn't know what to do. And I remember I was looking at the clock and I was thinking of an excuse, anything to get out of it, and I just got up and I said I needed to go and do my homework and I ran into my bedroom".*

5. The complainant went on to say that the appellant subsequently followed her into the bedroom and saw that she was crying. She said that he started hugging her and apologising, and that he then asked her if he had touched her "*forky parts*", which she took to mean her vagina. The complainant did not respond but continued crying. She was 12 years old at the time.

6. The complainant stated that the first person to whom she relayed what had happened to her was her younger sister. She told her sister approximately a year later, in 2014. The sister did not give evidence at the trial, however. The first adult whom she told was the counsellor in her school, also in 2014. By that stage she was in secondary school. Again, the counsellor was not called to give evidence as to the complaint she received. The complainant also told some schoolfriends, referred to as "W" & "S", respectively. These friends were called to give evidence as to the complaints they each respectively received. The complainant's mother was also informed at some point, although the complainant initially indicated some uncertainty both as to the circumstances in which this disclosure occurred and as to its date. The complainant thought that her mother had probably been informed by the school rather than by her, and that having been so informed her mother had collected her from school. The complainant's mother did not give evidence on any matter at the trial.

7. The complainant lived with her paternal grandparents thereafter, and subsequently moved to the United Kingdom to live with her father.

8. There was evidence in the case that the complainant had had a strained relationship with her mother and a good relationship with her father. At a certain point after the parents had separated, the complainant and her sister had been forbidden by their mother from seeking to contact their father, such was the toxic nature of the relationship between the mother and father. However, the complainant would, on occasion, avail of the opportunity of contacting her father during visits to her paternal grandparents' home. The evidence was that this continued until the complainant's mother found out about it and forbade any further such contact. Indeed, for a time the complainant was not allowed to visit the grandparents' home on account of this having occurred.

9. At the conclusion of the complainant's evidence-in-chief, the witness was tendered to the defence for cross examination. However, before counsel could commence her cross-examination the witness herself interjected to say "*I actually have something else to say that I know -- Am I allowed to do that?*" The trial judge then asked the jury to retire, and

in their absence enquired of the witness "*what additional thing did you want to say?*" The witness then responded:

> *"When my mother found out she confronted him in the living room and I remember I could hear it because, you know, we were in the room beside the living room with my sister and [the appellant] came in, was shouting at me saying he didn't do it and stuff like that and he grabbed my arm and he pushed me across the room. I don't know if that's relevant or not."*

10. Counsel for the prosecution confirmed that the complainant had alluded to the alleged confrontation incident in a supplemental statement that had been taken from her on the 20th of July 2021, and that this had been disclosed to the defence and moreover had been made the subject of a Notice of Additional Evidence. However, counsel for the accused had indicated to counsel for the prosecution that the defence would be objecting to any such evidence, and although counsel for the prosecution was unsure as to the basis for the objection, she had not sought to lead that evidence. The trial judge then enquired of counsel for the defence as to the basis for the objection. A threefold basis was put forward, namely

    (i) that the evidence was hearsay;

    (ii) the conversation was undated (although counsel for the accused conceded that that was a matter that could be dealt with in cross examination), and

    (iii) that it was evidence of misconduct unrelated to any count on the indictment.

11. In reply, counsel for the prosecution disputed that it was hearsay evidence and in regard to the other complaints indicated that she was prepared to be guided by the ruling of the court. The trial judge then ruled that the witness should be allowed to give the evidence in question before the jury, and gave her reasons (which will be considered later in this judgment). The jury was then brought back, and the witness gave the following further evidence-in-chief before them:

> *"I wanted to add that when my mother was informed by the school she brought me home and she confronted [the appellant] about the incident and [the appellant] was shouting at her saying "I didn't F ing do that". I was in my bedroom with my little sister and we could hear because the living room was beside us, there's a wall dividing of course, and they – [the appellant] came into our room and he grabbed my arm and he pushed me across the room and he was just shouting at me. I don't remember what he was saying and that's what I would like to add."*
>
> [name redactions in square brackets by the Court]

12. The complainant was then cross examined. The cross-examination was predominantly concerned with the relationships between the complainant and her mother, between the complainant and her father, and between the complainant and her paternal grandparents, as well as the interpersonal dynamics within the family home in a situation where the

complainant's parents had become estranged, and the complainant's mother and the appellant had entered a relationship. Ultimately, it was put to the complainant in cross examination by counsel for the appellant that she had not in fact been sexually assaulted by the appellant. The complainant was adamant that, "*he did assault me*". She was cross-examined as to why she had spent a year after the assault in the same house as the appellant without complaining to anybody. She said that she had kept it quiet because she was scared. The cross examination concluded shortly thereafter with the following exchanges:

"Q: Okay. And what I am suggesting to you is a possible reason for making a complaint in 2014 is that your father had suddenly messaged you in 2014 after a period of time when you weren't allowed, through no fault of your own, contact him, at a period of time when you were at logger heads with your mum, and this was a way of getting back to your dad?

A: No, that is no."

13. At the conclusion of the complainant's cross-examination, there was no re-examination.

14. Evidence of recent complaint was led from the complainant's paternal grandfather. He said that following receipt of a phone call from the complainant's mother, she had brought the complainant to their home. She simply dropped the complainant at their door and when the witness opened the door, he found the complainant standing outside with her suitcase. When he had enquired where her mum was, he was told, "*She's gone*". He had then asked the complainant, "*Are you not getting along with your mum?*", to which the complainant had replied, "*The reason I'm here is that [the appellant] was touching me inappropriately and when I told my Mum* [she brought me here]." The witness said that this occurred on the 7th of November of either 2014 or 2015. He subsequently reported the matter to gardaí.

15. The court also received complaint evidence from the aforementioned "S" and "W", respectively.

16. S told the jury that she was a schoolfriend of the complainant, and that they were in a certain school in the 2014/2015 academic year. She then gave the following evidence:

"Q. And do you remember any conversation about any matter that she was discussing with you in September or around that time?

A. Yes, I do. I remember that she was upset one day, it would have been on a lunchtime, and myself and my friend, we went over to see what was wrong with her as she looked very upset and we asked her. I believe that she was kind of she was reluctant at first to tell us what had happened and then she told us the reason why she was upset.

Q. And what did she say to you?

A. It was along the lines of that her mother's boyfriend had touched her inappropriately.

[…]

Q (JUDGE): So, it was I know one is inclined to gallop along and to get it over with but if we can just slow it down. It was along the lines of?

A. Sorry, that her mother's boyfriend had touched her vagina.

Q.(COUNSEL): And did she say how this had come about?

A. I believe that she had pain in her muscles, I don't remember why, and he I think gave tried to give her, I'm not sure, and then one thing led to he put his hand down her trousers then in her pants.

Q. Yes. And?

A. And he touched her vagina.

Q. Thank you. And did she say anything else about the incident to you or how she dealt with it afterwards?

A. No. I believe that she said that she was very upset after the incident had happened and I don't remember much after that.

Q. And did she say when it had occurred?

A. I think she had said it was a while ago. I don't think it was recent to when she was telling me."

17. W told the jury that she was also a schoolfriend of the complainant in the same secondary school. She then gave the following evidence:

"Q. And do you remember a conversation you had with her and some other friends around that time?

A. Yes.

Q. Can you tell the Court what that was?

A. So, around October time [the complainant] told me and a few other girls at just before we started secondary school she was at home by herself with her mam's boyfriend and she had a pain in her leg and he offered to give her a massage and that he then continued up her leg and put his hand down her trousers and touched her vagina.

Q. And did she say when it had happened?

A. Not exactly, just that it happened before we had started school."

18. The appellant gave evidence for the defence. He described the relationship between the complainant and her mother, and his characterisation of it was that "*[t]heir relationship wasn't great at all*". He accepted that complainant had wanted to be with her father, but contended that her mother's attitude, insofar as he could see it, was that she didn't have a problem with the children seeing their father. He was asked about the alleged sexual assault and said that it had never happened. When asked what his reaction was upon learning of the complaint, the appellant said that he was in shock. However, when asked about the alleged confrontation incident, he replied, "*I wasn't shouting it and denying it*". He said that the complainant's mother had spoken with the complainant at the time and had asked her to come out and speak with them both, but that the complainant had refused and had stayed in her bedroom. He said that there was then an agreement made that, pending her father coming home at the weekend, the complainant would be left with her grandfather so that he could speak with her. The complainant left the house then.

19. Under cross-examination the appellant contended that the complainant had not been affectionate towards him. He averred that he had received hugs from her only the odd time, indeed very rarely. He was asked if there had been foot rubs and he said "*no*", "*none at all*". When pressed in regard to the complainant's allegation of sexual assault, he stressed, "*[i]t never happened. It's just an allegation.*" The specifics of the allegations were put to him and he denied them. In regard to the suggestion that he had touched her vagina he said, "*Definitely not, no. Never happened*", and that "*It's a lie*". He was asked about the suggested underlying motive that had been put to the complainant by his counsel, and he said: "*It's possible*". When pressed in regard to this, the appellant said:

> "*Well, I think she's here today because of what she said allegedly happened in a playground has snowballed to the effect that the guards were involved and now there's a court case.*"

20. The appellant denied that the term "*forky parts*", was a term that he used. He denied any recollection of shouting something along the lines of "*I didn't f-ing do that*", when confronted with the complaint. When it was put to him that he had been angry, he said that he had been upset and that the complainant's mother and younger sister had been in an awful state. He denied grabbing the complainant by her arm and pushing her across the room while shouting at her (it should be noted, however, that it was never been put to the complainant that she had not been grabbed and pushed as she had alleged).

Existing Grounds of Appeal

21. The appellant has appealed his conviction on five grounds, as follows:

I. The learned trial judge erred in permitting the prosecution to adduce evidence in respect of an allegation of an assault, other than the sexual assault, by the accused on the complainant upon learning that an allegation of sexual assault was being made against him. The learned trial judge erred in determining that the said evidence was admissible as part of the accused reaction to the allegations been put

to him, in circumstances where the prejudicial effect of the said evidence outweighed its probative value in respect of the offence for which the accused was charged, namely, sexual assault.

II. The learned trial judge erred in permitting recent complaint evidence in respect of multiple witnesses. The learned trial judge erred in determining that the recent complaint evidence met the criteria for admission and further failed to exercise discretion in favour of excluding the said evidence because of the substantial risk of prejudice arising from multiplicity.

III. The learned trial judge erred in failing to direct an acquittal at the close of the prosecution's case in circumstances where the particulars of the count on the indictment, namely the date of the said offence, did not accord with the evidence.

IV. Further or in the alternative, the learned trial judge erred in permitting the prosecution to amend the indictment after the close of its case and in response to a direction application made on behalf of the accused.

V. The conviction of the accused is unsafe in circumstances where the accounts offered by the complainant prior to and during the trial is materially inconsistent with that which was prepared for the purposes of a Victim Impact Statement resulting in an unfairness to the accused in his ability to effectively defend himself against the allegation.

Motion to Adduce additional evidence

22. By a Notice of Motion dated the 30th of June 2022, grounded upon an affidavit of his solicitor, a Ms. Deborah Cody, sworn on the 29th of June 2022, a supplemental affidavit of the said Ms. Cody sworn on the 3rd of October 2022, and an affidavit of the appellant sworn on 11th of October 2022, the appellant seeks leave from this Court to adduce additional evidence. It is clear from the grounding affidavits that the additional evidence which the appellant seeks to adduce is in support of Ground of Appeal No V.

23. The gravamen is contained in paras. 4 to 7 inclusive of the appellant's said affidavit sworn on the 11th of October 2022, where he avers:

> *"4. I say that I have maintained my innocence in respect of the said offence. I have instructed my legal advisers to appeal against my conviction on a number of grounds. For the purposes of advancing my appeal I instructed my legal advisers to seek leave from this Honourable Court for permission to adduce additional evidence, namely an unedited Victim Impact Statement that came into existence after my conviction. I say that my conviction is unsafe in circumstances where the accounts offered by the complainant prior to and during trial is materially inconsistent [with] the unedited Victim Impact Statement prepared by the complainant post-conviction.*
>
> *5. I say that the unedited Victim Impact Statement (prepared by the complainant) was furnished to my legal advisers prior to my sentence hearing. The unedited*

Victim Impact Statement sets out a course of dealing between the complainant and me, which was previously unknown to me and inconsistent with the accounts previously provided by the complainant.

6. I am advised and so believe that my ability to defend myself against the allegations made by the complainant was prejudiced in circumstances where the credibility of the complainant's account of the alleged offence is undermined by the inconsistencies arising between the complainant's previous recollections of her dealings with me and those put forward in the unedited Victim Impact Statement.

7. I say that if the information provided in [the] unedited Victim Impact Statement had been available to me at trial, I have no doubt that I would have instructed my legal advisers to cross examine the complainant in respect of the inconsistencies between her contemporary account and those which were previously provided. I say and believe that the credibility of the complainant's evidence was a central issue for the jury to consider and that the effect of those inconsistencies is such that it would impact on the jury's determination."

24. The document referred to therein as the "*unedited Victim Impact Statement*" was exhibited as exhibit "DC1" in the first affidavit of the said Ms. Cody. It is a reasonably lengthy document, and it is neither necessary nor appropriate to quote all of it, but to the extent that it provides an account of the circumstances in which the complainant was said to have been sexually assaulted it was in these terms (with appropriate redactions):

"When [the appellant] entered our family unit in 2012, I was 11 years of age. [The appellant] treated me as though I was special. I was going through a hard time with my mother who is having an affair with [the appellant] while she was still married to my father. [The appellant] would bring me out for walks, treat me to ice cream and gained my trust. I considered him kind and understanding. In the Summer of 2013, I was 12 years old, [the appellant] would often carry me on his back and pushed me on a swing. As I look back now, I understand that there was an inappropriate amount of contact for a child of my age. He would find reasons to touch my posterior, touch me and hug me. He would put me on the kitchen countertop and massage my thighs stop I knew at that young age that it may be uncomfortable and that I did not feel it appropriate, but I was too young to express and understand how inappropriate it was. He would massage me only when my mother was not present in the house, and it happened countless times. He would ask me to sunbathe in my underwear and would consistently walk into the bathroom while I was showering, using the toilet, and always with a grin on his face. He would ask if I had pubic hair and on one occasion ask if I had hairy armpit. He escorted me into my mother's and [the appellant's] bedroom to show me how to shave my armpits. He did many little things that led ultimately to the worst episode which was touching my vagina. My reaction was that I froze, and I wanted to find a way to leave the situation as quickly as I could. When he touched my vagina, I recall staring at the clock, and I finally came up with a reason to take myself out of

the situation which was to finish my homework. I quickly got up and ran to my bedroom and I remember sitting at my window with my Irish project, I remember the specific project, and I cried waiting for my mother to return with my sister, [named]. [The appellant] entered my room with a grin on his face and he started to hug me and apologise and asked if he touched my 'forky parts', which referred to my genitals. I cannot recall what happened after that moment. For about seven or eight months after the event, I cannot recall whether [the appellant] interreacted with me inappropriately. If he did, I was too young to be aware of it. Due to the trauma of the event, I cannot recall every sexual comment and feel that I may have been subjected to abuse during the 7 to 8 months. But my mind has chosen to forget or block it out.

In the summer of 2014, at 13 years old, he again began to walk into the bathroom while I was showering. He would ask if I wanted a massage, and I was too intimidated to say no. These massages would occur while I was lying on my mother's bed, on my stomach and he would massage my thighs and posterior with baby oil. He would remark that the muscles in my posterior were the strongest in the human body and would request that I flexed my posterior muscles while he massaged me. I would comply with fear. My mother or my sister were not present in the house during these occurrences. He would also walk into different rooms with an erection when he knew I was alone. There are many occurrences and sexual comments, too many to mention, during this time."

25. In her first affidavit Ms Cody avers that (in the passages just quoted) the unedited Victim Impact Statement had set out the following allegations against the appellant for the first time:

    (i) That there was an inappropriate amount of physical contact between the appellant and the complainant prior to the date of the alleged offence;

    (ii) that the appellant would find reasons to touch the complainant's posterior, or to touch her or hug her;

    (iii) that the appellant had put the complainant on a countertop and massaged her thighs when her mother was not home countless times;

    (iv) that the appellant asked the complainant to sunbathe in her underwear;

    (v) that the appellant walked into the bathroom while the complainant was showering, using the toilet and that he would always grin at her whilst doing so;

    (vi) that the appellant asked the complainant whether she had pubic hair or hairy armpits and that he showed how to shave her armpits;

    (vii) that the appellant made sexualised comments to the complainant after the date of the alleged offence;

(viii) that the appellant massaged the complainant after the date of the said offence, and/or that he would massage the complainant using baby oil whilst she was lying on her mother's bed by touching her stomach, thighs and posterior;

(ix) that the appellant would request that the complainant flex her posterior muscles while he massaged her because he told that they were "the strongest in the human body";

(x) that the complainant complied with such requests because she was in fear, and;

(xi) that the appellant would walk into rooms with a visible erection when the complainant was alone.

26. At para. 7 of her affidavit sworn on the 29th of June 2022, Ms. Cody says that:

> *"I say and believe that the complainant's account of her dealings with* [the appellant] *is directly at odds with previous accounts of her interactions with* [the appellant] *prior to and after the alleged offence. The complainant, during the course of receiving counselling, is noted to have reported to St Louise's hospital that she had not permitted* [the appellant] *to massage her after the date of the alleged offence. Similarly, the complainant is recorded as stating that prior to the alleged offence*, [the appellant] *had not massaged anywhere other than between her foot and knee".*

27. Ms. Cody exhibits the relevant counselling notes as exhibit "DC2" to her said affidavit. The Court has inspected these notes and the position is as stated by Ms. Cody. She asserts that, had the applicant been apprised of the said account at the time of trial, it is likely the complainant would have been cross-examined concerning the inconsistencies in her accounts, and says:

> *"In circumstances where the complainant's evidence was uncorroborated, I say that such inconsistencies are matters which would be capable of influencing the jury's assessment of the complainant's credibility."*

28. In moving the application for leave to adduce additional evidence counsel for the applicant [i.e., the appellant] accepted that the law in relation to the admission of fresh evidence is reasonably well settled, and that the principles set down by Kearns J., as he then was, in *Willoughby v. DPP* [2005] IECCA 4 (more commonly known in practice as "the *Willoughby* principles"), as approved by the Supreme Court in *The People (DPP) v. O'Regan* [2007] 3 I.R. 805 at para. 69, should be applied in the Court's adjudication on her client's application.

29. The Willoughby principles are reproduced below, as set out in Kearns J.'s judgment at pp. 21 to 22:

> *"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."

30. Counsel submitted that that the first and second of the *Willoughby* principles were readily satisfied in the circumstances of this case. In that regard, the original / unedited Victim Impact Statement did not come into being until the conclusion of the trial. The allegations contained therein were not previously disclosed to the defence. In respect of the third of the Willoughby principles, namely that the new or fresh evidence to be adduced must be evidence that is credible, it was suggested that the complainant's credibility in respect of her previous accounts was directly engaged and undermined by reference to the original / unedited Victim Impact Statement.

31. It was further submitted that any assessment of credibility or materiality of the fresh evidence, by reference to the other evidence at the trial, would lead one to conclude that the complainant's credibility would be undermined had the defence been in a position to cross-examine the complainant in respect of the said allegations. It was suggested that if the evidence provided in the original / unedited Victim Impact Statement had been available at trial, it might have had a material bearing on the outcome insofar as the defence would have been in a position to identify that the complainant had previously informed her therapists that before the alleged offence, she was not massaged by the appellant on any part of her body, save from her foot to her knee, and that after the offence there were no further massages. It was submitted that these assertions, recorded by her therapists, directly contradicted the complainant's subsequent account in respect of the conduct of the accused towards her.

32. The application has been strenuously opposed by the respondent. The respondent contends that the unedited Victim Impact Statement has to be viewed in the context in which it was made and against the protracted procedural history of the present case. The complainant was aged 12 years at the time of the offence (October-November 2013), 13 years at the time of disclosure and complaint to An Garda Síochána (November 2014), and was aged 20 years at the time of this trial (September 2021) and the appellant's subsequent sentencing (December 2021). As such, the evidence adduced at the trial pertaining to the sexual assault was limited to the account given in the video interview pursuant to s. 16(1)(b) of the Criminal Evidence Act 1992 when the complainant was aged 13 years. The complainant made her Victim Impact Statement when she was aged 20 years looking back on her 12-year-old self with all of the knowledge that maturity

brings including, says the respondent, recognition of signs of grooming and other inappropriate behaviour that she could not have conceivably been aware of when making her complaint at the age of 13 years. In this respect, the respondent does not accept that inconsistencies arise in the manner characterised by the appellant.

33. The respondent maintained before us that it is highly speculative to suggest that had defence lawyers been in possession of the unedited Victim Impact Statement at the trial of this matter that same would have been used in cross-examination of the complainant. Such a course would have entailed introducing extraneous matters comprising alleged "*misconduct*" or bad character evidence, and would also have exposed the appellant to possible cross-examination by the prosecution (assuming he was still planning to give the evidence that he, in fact, gave). The respondent says it is also highly speculative to suggest that this would have impugned the complainant's credibility such that the jury verdict would have been any different.

34. Counsel for the respondent referred the Court to *The People (Director of Public Prosecutions) v M.R.* [2015] IECA 286, in which this Court had rejected a similar application on the basis that the discrepancies disclosed in the circumstances of that case did not cause the Court to have a sense of unease of the sort which had led the Court of Criminal Appeal to intervene in the earlier cases of *The People (DPP) v. G.K.* [2006] IECCA 99 and *The People (DPP) v. T.C.* [2009] IECCA 63. Moreover, the Court was not satisfied that even if the alleged new facts had been available to the appellant's counsel in that case they would have resulted in a markedly different or more extensive cross-examination such as might have made a difference.

35. The respondent submitted that, likewise, the new alleged facts in the present case are matters of minor detail which are qualitatively quite different and readily distinguishable from the much more far-reaching new facts that were the subject matter of the *G.K.* and *T.C.* cases. Even if they had been available to the appellant's counsel in the present case they would not have resulted in a markedly different or more extensive cross-examination such as might have made a difference.

This Court's Ruling on the Motion

36. We are readily prepared to accept that the first two of the *Willoughby* principles are satisfied by the appellant. However, as regards the third of those principles, while we have no difficulty in accepting that the proposed additional evidence is credible, namely, that the unedited Victim Impact Statement can be credibly attributed to the complainant both as to its execution and as to its contents, we are not persuaded that if that statement had been available to the defence at the time of the trial before the jury it might have had a material and important influence on the result of the case. In making our assessment on the materiality of such evidence we have, as required by the fourth Willoughby principle, done so by reference to the other evidence at the trial.

37. We think it is important in that context to make the following observations. First, the new evidence that the appellant seeks to introduce does not contradict or impugn in any way the complainant's core allegation. To the extent that inconsistencies are said to arise,

these are inconsistencies as between what the complainant is said to have said during counselling at St Louise's unit in Crumlin Children's hospital in March 2015, when aged 13 years, and what she recalled at the age of 20 years, when she gave her Victim Impact Statement, concerning interactions with the appellant both prior to and after the alleged offence. It is true that during counselling she said that prior to the date of the alleged offence the appellant had not massaged anywhere other than between her foot and knee, whereas in her Victim Impact Statement she outlined physical touching by the appellant of other parts of her body on a number of occasions prior to that event. It is also true that she during counselling she said that she had not permitted the applicant to massage her after the date of the alleged offence, whereas in her Victim Impact Statement she had contended that she had in fact done so. While these are undeniably inconsistencies, they are inconsistencies only regard to matters of collateral detail.

38. Secondly, the inconsistencies upon which the appellant now seeks to rely have to be seen in context. They arise in accounts provided years apart, and in a situation where the later account was being recalled by the complainant having reached adulthood and physical and mental maturity, as against the earlier account which was provided by her as a 13-year-old child. We consider that if the inconsistencies upon which the appellant now seeks to rely had been established in cross-examination of the complainant at the trial, and it was being urged upon the jury by defence counsel that they should attach significance to them in assessing the credibility and reliability of the complainant with respect to the charge laid on the indictment, the prosecution would undoubtedly have been making the counter case, as indeed they have done before us in submissions: (a) that the inconsistencies were only as to matters of collateral detail, and; (b) that, as a matter of common sense (and as jurors would appreciate from their experience of life), a person such as the complainant, having reached adulthood and maturity, might more readily appreciate the potential relevance or significance of matters of collateral detail in recounting the history of an alleged sexual assault committed against them years earlier, than would the same person in providing such a history closer to the time but while just 13 years of age and consequently being both physically and mentally immature and inexperienced in life at that time.

39. Thirdly, mindful of the injunction in the fourth of the *Willoughby* principles, we have had regard to the entirety of the evidence in the case and to the run of the trial. The complainant's evidence at trial was clear and compelling with respect to what she said had occurred to her on the single occasion giving rise to the account on the indictment. Moreover, her testimony at trial with respect to that was demonstrated to be consistent with what she had told her friends W and S respectively had happened to her on that occasion. It was also consistent with the more limited complaint that she made to her grandfather. Nothing in the unedited Victim Impact Statement contradicted anything that the complainant actually said in her evidence at the trial.

40. We also regard it as being of significance in assessing whether the proposed additional evidence might have made a difference to the outcome of the case that the case was being defended on the basis that what the complainant was alleging had occurred on that

occasion had simply never happened; rather that she was telling lies and that her complaint was deliberately fabricated. Indeed, there was, as has been seen, an attempt to attribute a motivation to her for such fabrication, namely that she was at loggerheads with her mother and that this was a way of getting back to her father.

41. We have taken account of the fact that the appellant gave evidence in his own defence and note that he was adamant that he had never at any time had inappropriate physical contact with the complainant, and that he maintained that the complainant's allegation, the subject matter of the indictment, was a lie and a fabrication.

42. If the complainant had fabricated her allegations against the appellant, and indeed was now disposed with the passage of time to embellishing her initial false account with additional false collateral details, we think it is of some significance that the alleged embellishments now being complained of were not offered by her to the jury. Significantly, there was, in fact, one additional matter offered by her to the jury, namely her evidence as to the appellant being confronted with the allegation, and as to his reaction. However, this was the subject of a supplementary statement which she had given to An Garda Síochána before the trial and which had been served as a Notice of Additional Evidence. In that situation the defence were on notice, in advance of the complainant going into the witness box, of what she might say in that regard and, once that evidence had been given, had had the possibility of addressing it in cross-examination. The question has to be asked, if it is to be accepted that the complainant was disposed to embellish an initial false account by offering at a later stage additional false collateral details, what possible end could it have served from her perspective to have withheld the additional false details until making her Victim Impact Statement? If she had fabricated the core allegation from a base motive, her primary objective was surely to secure the conviction of the appellant, and perhaps thereafter seek to influence any possible sentence that might be imposed upon him. However, the latter consideration would have been only a secondary one as it would only come into play in the event that he was convicted. It seems to us that if her objective had at all times been, as the defence have contended, to see him convicted on foot of a false allegation which she had made when aged 13 years (whether, at this remove, the motive for the continuing maintenance of that be out of spite, or resentment, or revenge for the appellant having allied himself with the complainant's mother and against the complainant and her father, or for a self-serving reason such as a perceived need to follow through lest there should be legal or personal repercussions for her, or indeed some other reason), it is much more likely that she would have offered the supposedly embellished account in time for the trial so that it could have been led before the jury to the likely prejudice of the accused, rather than for the first time in her Victim Impact Statement. On the contrary, it is our assessment that if the jury had become aware in the course of a cross-examination of the complainant of the additional details now contained in her unedited Victim Impact Statement, the effect of it would likely be (assuming she was prepared to stand over them, and there is no reason on the evidence before us to believe that she would not have been prepared to do so) potentially more supportive of, than damaging of, the prosecution's case, notwithstanding any demonstration by defence counsel that she had

said something different in regard to those details during counselling at St Louise's unit when she was aged 13 years.

43. While ultimately, if the putative additional evidence had been available, it would have been a matter for the jury to assess whether any inconsistencies were of any significance in the context of the overall credibility and reliability of the complainant with respect to the charge laid on the indictment (in particular, those inconsistencies demonstrated between what she had said during counselling in March 2015 with regard to the issues of collateral detail that are now in controversy, on the one hand; and what she had stated with regard to those matters in her Victim Impact Statement in 2021, on the other hand), we have not been satisfied that it might have had a material and important influence on the result of the case.

44. We have arrived at that conclusion based on (i) the fact that the inconsistencies upon which the appellant now seeks to rely were not with respect to the core event; (ii) that those inconsistencies have arisen in the specific context identified; (iii) that there is no demonstrated inconsistency with anything that the complainant actually said in her evidence at the trial, and; (iv) having had due regard to the other evidence adduced and the overall run of the trial. We have found the case law referred to by counsel to be of limited assistance only as in each instance the relevant court's decision was very fact specific, as indeed it has had to be in this case.

45. For completeness, we have also given consideration to the approach adopted by Baker J. in *The People (DPP) v S.Q.* [2023] IESC 8, a case that post-dates the reservation of judgment in the present case, namely that of asking whether the evidence which it is now sought to admit "*would be of any possible assistance to the defence*", whether the evidence could have had any relevance to the evidence at trial, and whether it bore any relationship to the offence with which the appellant was charged. Although *S.Q.* dealt with a different issue, namely the failure of the gardaí to obtain a statement from, or even disclose that, strangers who had accompanied the complainant in that case to the Garda station, we acknowledge that the issue is somewhat similar in terms of credible information being raised subsequently by or on behalf of the prosecution which the convicted person claims may affect the trial. Having considered *S.Q.* we have not changed our view. We do not see how the evidence in question would ultimately have been of assistance to the defence for the reasons stated in the penultimate paragraph. It would not have enabled the defence to attack the credibility and reliability of the complainant with respect to her core complaint, namely the sexual assault forming the subject matter of the indictment. Rather, at best, if armed with the Victim Impact Statement the defence might have been able to establish some inconsistencies in her account with respect to matters of collateral detail, but arising in the specific context to which reference has already been made. Significantly, the evidence now sought to be relied upon does not appear to us to bear any relationship to the specific offence with which the appellant was charged.

46. In conclusion on this issue, we are not disposed to grant the relief sought in the appellant's Notice of Motion. Consequentially, Ground of Appeal No. V must also be dismissed.

Ground of Appeal No. I

47. We now turn to deal with the complaint that the trial judge erred in admitting the evidence of the complainant concerning the alleged confrontation with the appellant after he had learned that the complainant had made an allegation of sexual assault against him. The tripartite basis on which the defence had objected to the appellant giving such evidence has already been outlined. In truth, as the second aspect was not ultimately pressed, there were just two facets to the objection that required to be engaged with, one to the effect that the proposed evidence constituted inadmissible hearsay, and a second to the effect that it constituted evidence of misconduct which was not the subject matter of any charge on the indictment. It is now appropriate to set out the trial judge's ruling on those issues. She stated:

> *"JUDGE: Thank you. Yes. Well, this part of the evidence relates to is set out in the statement of the witness taken on the 19th of July 2021 so the defence were on notice of it and the basis of the defence's objections in relation to the first part is that it's hearsay. I don't accept that because the witness herself heard a confrontation. There's something said about what was said but she heard a confrontation going on within her ear shot and also she could hear him shouting and hear the general gist of what he was saying and I don't accept that that's hearsay. It's something that the witness herself heard.*
>
> *In relation to the second aspect, I accept that this was at the stage where the allegation had come to the attention of the mother and obviously emotions were running high and I think it's admissible as part of his reaction to the allegation being put to him. So, I am allowing the evidence."*

48. It is unnecessary to review in any detail the parties' respective submissions on the hearsay aspect, although we have taken full account of them. This is in circumstances where we have a clear view as to the correctness of the trial judge's ruling.

49. The evidence was not hearsay to the extent that the witness was merely describing the substance (although not the *ipsissima verba*) of out-of-court statements by her mother in the course of her allegedly confronting the appellant, which confrontation the complainant had personally heard, and which statements had been uttered in the presence of the appellant. Moreover, even if her mother's *ipsissima verba* had been given in evidence it would still not have been hearsay in circumstances where the witness had personally heard the controversial statements and they had been uttered in the presence of the appellant.

50. The evidence of what the appellant himself is alleged to have said upon learning of the complainant's allegation, i.e., "*I didn't F-ing do that*", was also not hearsay where the party introducing the statement, i.e., the prosecution, was not seeking to rely on the

truth of the statement. In this instance the prosecution's position was that the reaction of the appellant to being confronted with the allegation made by the complainant, and the proportionality of that reaction, was potentially relevant evidence that could assist the jury in assessing the credibility of relevant actors. The prosecution's position was that the words spoken by the appellant, whether true or not, formed part of that reaction, and the jury should hear what he had said at the time because they might or might not consider those words to be important in considering his reaction, and its significance, if any, in the context of the issues before them. It bears noting that prosecuting counsel did not, in her closing speech, suggest to the jury that they should interpret what was said by the appellant, and the circumstances in which it was said, in any particular way. After reminding them as to what the evidence had been, she merely left it with them on the basis that, "*You can make of it as you will*." Be that as it may, we are clear in our view that the words spoken, in circumstances where the evidence was led by the prosecution in the manner outlined, were not hearsay.

51. We therefore reject Ground of Appeal No. I to the extent that it is based upon breach of the rule against hearsay.

52. Turning then to the objection based upon misconduct evidence, it will be helpful in this instance to review the submissions of the parties. The appellant alleges that the trial judge erred in permitting the prosecution to adduce evidence in respect of an allegation of an assault, other than a sexual assault, by the appellant on the complainant upon learning that an allegation of sexual assault was being made against him.

53. The appellant submitted that the admission of the said evidence was highly prejudicial and unfair to the accused. We were referred to *The People (DPP) v. Murphy* [2005] 2 I.R. 125 at 147 as setting out the general rule (with reference made therein to Halsbury's *Laws of England* (4th edn, 1990) vol. 11 (2) at para. 1074):

> "[…] *the jury should not be permitted to know of an accused's bad character. Thus the prosecution is debarred from tendering evidence to show that the accused is of bad character, or is guilty of criminal acts of the same nature as the offence charged, merely 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 for which he is being tried."*

54. In further support of the appellant's argument we were also referred to the following passage from McGrath, *Evidence* (2nd edn, Round Hall 2015) at para. 9-96 (para. 9-124 in the 3rd edn of the same work published in 2020):

> *"A fundamental question that must be addressed in every case where it is sought to admit misconduct evidence is whether it is necessary to do so. In People (AG) v. Kirwan, Black J endorsed the statement of Bray J in R. v. Bond that "bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class… the greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something that is in issue. Similarly*

in People (AG v. Havlin, Davitt P rejected the contention that misconduct evidence was "admissible to rebut some subsidiary matter raised by the defence which was not clearly relevant to the issues whether the accused was, or was not guilty of the offence charged. More recently, in People (DPP) v. McNeill, Denham J stated that misconduct evidence could only be admitted if it was necessary to do so and that it was not sufficient that it would be helpful to the prosecution to admit the evidence. A trial judge should, therefore, be vigilant to ensure that the admission of misconduct evidence or the disclosure of misconduct evidence on the part of an accused is really necessary in determination of the issues in the case."

55. Counsel for the appellant also referred the Court to the following further passage from para 9-68 of the same work (largely reproduced at paragraph 9.82 of the 3rd edn), which indeed was quoted by Edwards J., in *The People (DPP) v. Shannon* [2016] IECA 242:

> *"9-68* […] *it is suggested that the admissibility of misconduct evidence now falls to be determined in accordance with the following principles:*
>
> *(a) Misconduct evidence is not admissible for the purpose of inviting the jury to infer from it that the accused is a person who, by reason of his disposition or bad character, is likely to have committed the offences charged.*
>
> *(b) Misconduct evidence can be admitted in evidence if (i) it is relevant to and sufficiently probative of an issue in the proceedings, (ii) its admission is necessary, and (iii) there is sufficient proof of the commission of the acts of misconduct.*
>
> *(c) A trial judge has a discretion to exclude misconduct evidence which would otherwise be admissible if its probative force is outweighed by its prejudicial effect.*
>
> *(d) In any case where misconduct evidence is admitted and there is a risk that the jury may draw the inference that the accused is likely, by reason of his other criminal conduct or character, to have committed the offences upon which he or she is charged, the trial judge should instruct the jury as to the limited purpose for which the evidence has been admitted and warn them not to draw such an inference."*

56. In submissions to this Court the appellant sought to place great emphasis on the requirement that background evidence may only be admitted where the evidence is relevant and necessary. In that context we were referred to para. 49 of the judgment of Denham J., as she then was, in the Supreme Court in *The People (DPP) v. McNeill* [2011] 2 I.R. 669. We reproduce the said para. 49, and also para. 50, of the same judgment, for their potential assistance:

> *"[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 a ground for excluding the evidence;

(vi) 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."

57. Counsel for the appellant further relied upon para. 103 of the judgment of this Court in *The People (DPP) v S.A.* [2020] IECA 60, where Kennedy J., giving judgment for the Court, stated at para. 103:

"The test to be applied in considering whether background evidence should be permitted is whether the material is relevant and necessary. The purpose for the admission of the evidence is crucial. Therefore, it may be that even where evidence tends to show the commission of offences, apart from those charged, nonetheless such evidence may be admissible in the particular circumstances of any given case, if such evidence is relevant and necessary. It may be that evidence is necessary in

order to render the factual matrix in a case complete and comprehensible. A case cannot be decided in a theoretical vacuum."

58. It was submitted that the nature of the evidence offered failed to come within an exception to the rule as stated in *Murphy* (cited above). It was submitted that the nature of the allegation of assault was not relevant to the issue to be decided (i.e. the sexual assault had occurred one year previous to the purported assault). It was further submitted that the other evidence in the case did not call for or require background evidence to render the evidence of the allegation of sexual assault complete or comprehensible.

59. It was further submitted that the evidence of an alleged assault after the allegation of sexual assault cannot be regarded as having been necessary to establishing the prosecution's proofs in respect of the offence for which the appellant was charged. This was so particularly in circumstances where the prosecution's case concerning the delay in reporting the alleged offence did not rely on intimidation or threat on the part of the appellant. It was submitted that the effect of the said evidence was such that evidence of misconduct on the part of the appellant was unnecessarily adduced and was highly prejudicial in its effect.

60. In reply, counsel for the respondent has contended that the trial judge dealt with the admission of the complainant's evidence of the appellant's reaction to her disclosure of the alleged sexual assault entirely appropriately and properly admitted same. The point was made that the evidence now sought to be impugned was not evidence that had inadvertently slipped out before the jury as is so often the case. Rather the defence objection was flagged and fully considered by the trial judge in the absence of the jury. Before deciding to admit the evidence the trial judge had been assiduous to ensure that the defence had been on notice of it.

61. This was a case which was defended on the basis that the matter alleged by the complainant had never happened, and indeed that her complaint in that respect had been fabricated. The defence further contended, in support of the fabrication claim, that the allegation was improbable and implausible having regard to the layout of the house in which the sexual assault was said to have occurred. The appellant had opted to give evidence in his defence and he had gone into the witness box and had characterised the complainant's allegation as lies. In examination-in-chief the appellant had been asked how he had reacted when he learned of the complaint. He stated that he had been in shock. There were then the following exchanges:

"Defence SC: Okay. And we heard you were shouting and so forth denying it; is that right?

Appellant: No, I wasn't shouting it and denying it.

Defence SC: Okay.

Appellant: Her mother spoke to her and she asked her to come out and speak to us but [the complainant] refused. So, she stayed in her bedroom and then her mother – "

62. The respondent maintained in argument before us that the evidence in controversy was both relevant and necessary to enable the jury to have a complete picture as to the dealings between the parties relevant to the alleged sexual assault in controversy, in a situation where the credibility of the complainant was likely to be, and as it transpired was in fact, a live issue before them. Moreover, in a situation where the appellant would subsequently give evidence in his defence, and in doing so had maintained the allegations were fabricated, his credibility (although he was not required to prove his innocence, and the burden of proving the case against him remained at all times on the prosecution) also became a live issue for the jury.

63. We were reminded that in fact the defence was permitted to lead good character evidence in relation to the appellant, and that the trial judge had, at the request of the defence, given a robust "*good character*" direction when charging the jury. It was submitted that any potential or perceived prejudicial effect of the complainant's evidence concerning the aspect of the confrontation incident now being characterised as an assault, was more than nullified by the generous "*good character*" direction given during the charge.

64. Counsel for the respondent submitted that the position may have been different had such alleged conduct towards the complainant arisen in a different situation or in circumstances unconnected with the alleged sexual assault. However, it was not adduced for the purpose of suggesting that the appellant was likely, by reason of the alleged misconduct now being relied upon, i.e., the claimed assault, to have committed the very serious offence with which he was charged. Nevertheless, the controversial evidence was inextricably linked to the allegation of sexual assault. It concerned his reaction upon being confronted, and it was said to be relevant and necessary in the circumstances of the case where the overall credibility of both complainant and appellant, respectively, required to be carefully assessed, and that the jury should hear of it. During the confrontation, the appellant had positively asserted in robust terms that he had not done the things which were the basis of the complainant's allegation. This was, says the respondent, unquestionably relevant. In the respondent's submission, the trial judge was correct in admitting same, having correctly identified that it was "[…] *part of his reaction to the allegation being put to him.*"

<u>Decision on the misconduct issue.</u>

65. We agree with the trial judge that in the circumstances of this case it was both relevant and necessary that the jury should hear of the appellant's reaction upon being confronted with the allegation being made by the complainant. The fact that part of his reaction was said to have involved grabbing the complainant by the arm and pushing her across the room, while technically comprising an assault (if true), was not a reason to deprive the jury of the complete picture in regard to what each side was claiming had occurred on that occasion, in a situation where there was a direct nexus between the central

allegation in the case and this interaction between the parties. If the jury were to have viewed his overall reaction as having been a proportionate and understandable one by a person, enjoying the presumption of innocence, who had just learned for the first time that he was the subject of a very serious allegation, it might enure to the benefit of the defence. However, if the contrary view was taken, it might enure to the benefit of the prosecution. What is clear is that the material was not introduced for the purposes of seeking to blacken the appellant's character, or suggesting a propensity on his part to commit sexual assault. On the contrary, it is clear to us that the trial judge's rationale for admitting the evidence was that it could potentially assist the jury in their assessment of the credibility of key witnesses in the case, namely the complainant and the appellant. We agree that it had the potential to assist in that way. The trial judge had in our view properly recognised that the jury should have the full picture for the purpose of assessing credibility. The evidence having been admitted, the prosecution properly invited the jury to "*make of it as you will*".

66. We also think that the potential for prejudice was, in fact, slight when one considers the relative gravity of the claimed misconduct in the circumstances in which it was said to have occurred, compared with the gravity of the offence charged.

67. In the circumstances we are not disposed to uphold Ground of Appeal No. I.

Ground of Appeal No. II

68. This ground relates to the decision of the trial judge to permit the receipt of recent complaint evidence from multiple witnesses, namely the schoolfriends S and W, and the paternal grandfather of the complainant. Relevant in this regard is that the admissibility of the recent complaint evidence of S and W, in particular, was challenged at trial both on the basis that the conditions for admissibility were not met in their case (because it was said the complaints made to them were not made at the first reasonable opportunity), and also on the basis that recent complaint evidence had already been received from the paternal grandfather.

69. It is appropriate at this point to set out the trial judge's ruling in which she rejected the challenge. She said:

> *"The prosecution now seeks to adduce evidence of recent complaint in respect of the complainant telling her school friends and they propose to call two of those witnesses, Ms* [S] *and Ms* [W]*, with regard to what she told them when she was in secondary school. The complainant herself gave evidence of the context within which she told her friends about the allegation against the accused. The defence object on the basis that first of all the child's grandfather, the complainant's grandfather, [name redacted], has already given evidence of recent complaint but I must say in respect of that, while certainly she told her grandfather, his evidence is that she told him that the accused had interfered with her. She did not go into any detail of that and that evidence had a twofold purpose; to explain the context within which a complaint was made to the gardaí and also indeed to explain why the child was at her grandfather's house, why she had been brought there in*

response to a question about that but there is no particulars in that regard, other than a general allegation and I would first say that that somewhat distinguishes it from the other two statements.

So, the issue then is whether the other two statements are admissible as an exception to the hearsay rule on the basis of the test in respect of recent complaint and the admissibility of that for the purposes of establishing the consistency of the complainant with the evidence that she has laid before the jury in her own evidence. The first objection is in relation to the delay in the complaint made to the school friends which, on the complainant's own admission, was some one year later and some case law has been opened to me and authorities opened to me in respect of the meaning of the first reasonable opportunity by reference to all of the relevant circumstances in the case. One has to consider the Court has to consider issues such as inhibition or oppression and the particular circumstances in which the disclosures were made, with an emphasis on the context in which they were made. In that regard I am satisfied in respect of each of these witnesses, Ms [S] *and Ms* [W]*, that the test is fulfilled in respect of the first reasonable opportunity in circumstances where the complainant was in first year in secondary school. She was 12 years old at the time of the allegation and the context of it was within a rather toxic relationship with her mother and there's plenty of evidence of that before the Court. The child was in a vulnerable position where her parents had split up, her father had gone to the UK to live and she was not allowed to contact him and the father's evidence has also supported that, that he had not been in touch with his children and the complainant lay that squarely at the feet of her mother and she gave reasons also in the course of her evidence as to why she couldn't make a complaint and she felt so scared and she referred repeatedly to being living in a state of fear. And again, furthermore, the allegation was against a person who was living in the same household and was in an intimate relationship with her mother.*

So, for all of these reasons I am satisfied that the complaints were made at the first reasonable opportunity. Indeed they were made before the conversation with the grandfather which in my view was more so to explain the context in which she had arrived there and indeed didn't go into detail and the grandfather's evidence was he specifically didn't ask her the detail of those complaints.

The next issue then is whether to allow both statements to go in would be prejudicial and whether it could lead to an unfairness in the case. Had the grandfather's evidence been dealing with greater particularity regarding the complaint I would have certainly erred on the side of caution and not allowed in two further statements but in circumstances where the grandfather doesn't give evidence of the particulars or anything else other than a general explanation for why she was there, I am satisfied that both statements are admissible and that the Court can deal, by way of warning to the jury, giving a stern direction in respect of the purpose of the evidence itself. So, I am going to permit both witnesses."

70. For complete contextualisation, it should be noted that the trial judge duly followed through on her promise to give a stern direction in respect of the purpose of the evidence. No complaint is made in respect of that aspect of her charge.

71. The case made before us on appeal is that the trial judge erred in determining that the recent complaint evidence met the criteria for admission and by failing to exercise her discretion in favour of excluding that evidence, or some of it, because of the substantial risk of prejudice arising from the multiplicity of complaints.

72. In written submissions the appellant accepts that recent complaint evidence is admissible at the trial of sexual offences where (i) the complaint was made at the first reasonable opportunity after the commission of the offence; (ii) the complaint was voluntary, and; (iii) the complaint is consistent with the evidence of the complainant. We were further referred to *The People (DPP) v. G.C.* [2017] IECA 43 in which this court approved of the following statement from *R. v. Valentine* [1996] 2 Cr App R 213:

> *"The authorities establish that a complaint can be recent and admissible although it may not have been made at the first opportunity that presented itself. What is the first reasonable opportunity will depend on the circumstances, including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity."*

73. There were two facets to the argument advanced on behalf of the appellant in respect of this ground. Firstly, it was submitted that the conditions of admissibility in respect of the evidence of S and W, respectively, were not satisfied because the complaints made to them were not the made at the first reasonable opportunity. It was contended that the complainant had made a complaint to both her sister and her mother in advance of making a complaint to either S or W. That was said to be factually relevant in the context of assessing whether the complaints made to S and W were capable of being considered as having been complaints made at the first reasonable opportunity, given the remove of time between the date of the alleged offence and the allegation then being made.

74. Secondly, it was submitted that prior to the evidence of either S or W being adduced, evidence had already been led by the prosecution of a recent complaint, namely the complaint to the paternal grandfather of the complainant. In such circumstances, the jury heard evidence from three witnesses who were told by the complainant that she was sexually assaulted by the appellant. It was submitted that the potential prejudice arising from a multiplicity of complaints was such that the learned trial judge erred in failing to exercise her discretion to exclude some of the proposed complaint evidence. Further, the appellant maintained that where the complainant's account of the alleged offence was uncorroborated by other evidence, the inherent danger of prejudice arising from the jury receiving multiple recent complaints was heightened.

75. In reply to the appellant's submissions, the respondent made the point that it was clarified before the trial judge that the complainant's mother and sister (who was still a minor at the time of the trial) were not available to the prosecution. This was, in fact, the third trial of the appellant in respect of the offence in question. The complainant's mother had given evidence for the defence in the previous trials. Further, the complainant's mother would not consent to the complainant's sister making a statement to An Garda Síochána.

76. Counsel for the respondent pointed to the following circumstances as being relevant to whether the complaints, in respect of which evidence was available, were made at the first reasonable opportunity. The complainant was only 12 years of age at the time of the offence. She had a difficult relationship with her mother. She was in a vulnerable position where her parents had split up and she was not allowed to contact her father who lived in the UK. Her mother was in an intimate relationship with the appellant and the appellant lived in the family home. The complainant had said in the course of her evidence that she had been scared. She had also testified that it was only upon starting secondary 25chooll, where she learned about sex abuse, and she had realised that what had happened to her was wrong. It was submitted that in those circumstances a year was not unduly lengthy period of time for the complainant to have made complaints to her friends S and W, and that indeed she could be regarded as having made those complaints at the first reasonable opportunity.

77. The point was also made that the complaints to S and W, respectively, were in fact made before the complaint made to the paternal grandfather, although the latter was the first complaint that the jury heard details of. It was pointed out that the evidence led from the grandfather as to the complaint made to him was primarily led for the purpose of explaining how the complainant had arrived on his doorstep and ended up living all with him. The fact of that complaint had emerged in the course of the grandfather making a statement to An Garda Síochána, and had contained no detail beyond an assertion that the appellant "*was touching me inappropriately*".

78. On the issue of the multiplicity of witnesses the prosecution called just two persons to whom detailed complaints were made, namely S and W. There was no basis for preferring the evidence of one over the other. The circumstances in which those complaints came to be made and had been received by them were to all intents and purposes identical. In that situation it was not accepted that there was undue prejudice in the jury hearing from both of them.

Decision on the recent complaint issue

79. We are satisfied that the trial judge was right to regard the complaints made to S and W has having satisfied the conditions for admissibility. As we pointed out in *The People (DPP) v. G.C.* the temporal proximity of a complaint to the conduct complained of is of less importance as an indicator of consistency than the context in which the complaint is made, although a complaint made closer to the index event may carry more weight as an indicator of consistency that a complaint made later. However, the precise weight to be

attached to a complaint, in terms of possibly demonstrating consistency of conduct, is a matter for the tribunal of fact, i.e., the jury in a case such as the present.

80. We are satisfied it was entirely reasonable to admit the complaints made to S and W, in circumstances where the mother and younger sister were not available to the prosecution, and the complaint made to the grandfather had been devoid of specifics and had been made in the context outlined above. While a trial court must always be conscious that it may in some circumstances be prejudicial, in the sense of being unfair, to admit evidence of multiple complaints, it does not follow that the admission of evidence of multiple complaints will always be prejudicial in that sense. While a trial judge must have regard to the risk of possible prejudice, it is a matter for the trial judge's discretion as to whether or not to admit evidence of multiple complaints.

81. While sheer weight of numbers will sometimes give rise to a concern about prejudice in cases involving multiple complaints, there were just two substantive complaints here. We think the evidence of the complaint to the grandfather can be discounted in terms of any prejudicial effect by virtue of the fact that it contained no specifics. Moreover, although the complaints made to S and W, respectively, were very similar, we do not believe that the trial judge is to be criticised for having admitted both of them in circumstances where they were both schoolfriends of the complainant, where both complaints were received in or about the same time, and where there was no real basis for differentiating between them and calling one rather than the other. We do not think that in the circumstances of this case the trial judge could realistically have been concerned about prejudice from sheer weight of numbers. It might have been different if a greater number of the complainant's friends had been called, and in that regard we note that statements of other friends in respect of whom the complainant had also disclosed the alleged sexual assault were served as additional evidence but that they were not called. The fact that two friends amongst a larger number were called as witnesses does not, in the circumstances of this case, raise in our minds a sufficient concern about weight of numbers as to justify an intervention by this Court.

82. In the circumstances we are not disposed to uphold Ground of Appeal No. II.

Grounds of Appeal Nos. III & IV

83. These two grounds of appeal can be dealt with together. Ground No. III complains about the failure to direct an acquittal at the close of the prosecution's case in circumstances where the particulars of the count on the indictment, namely the date of the offence, did not accord with the evidence. Ground No. IV complains that the trial judge erred in permitting the prosecution to amend the range of dates referred to in the indictment .

84. The circumstances giving rise to the application for a direction to acquit are as follows. The sole count on the indictment was framed on the basis that the alleged sexual assault had occurred "*on a date unknown between the 1st of October 2013 and the 31st of October 2013.*" However, the following evidence had been elicited from the complainant in the course of her evidence-in-chief:

"Q. And you know why you're here today?

A. Yes, I do.

Q. You're here to give evidence in relation to a complaint you made of sexual assault to gardaí against [the appellant]; is that correct?

A. Yes.

Q. And do you remember when this occurred?

A. Yes.

Q. The approximate date of when it occurred? Just take your time.

A. I'd say, like, I think November, October, I can't remember."

[…]

"Q. Do you remember what year it was?

A. 2013.

Q. Okay. And

Q. JUDGE: I think you've said November or October, do you remember?

A. October or November 2013."

85. The overall case for the prosecution was relatively short. It concluded within a single day. At the close of the prosecution's case, counsel for the appellant applied for a direction on the basis of insufficiency of evidence, relying on the first limb of Lord Lane C.J.'s celebrated test in *R v. Galbraith* [1981] 1 WLR 1039, which states at p. 1042 of the Reports: *"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty*". The sole basis for the application related to the date of the alleged offence. The contention on behalf of the appellant was that the prosecution case, viewed at its height, had not adduced evidence on which a jury could be satisfied beyond reasonable doubt that any offence had occurred within the timeframe specified in the indictment. Moreover, the prosecution had made no application to amend the indictment and, it was contended, were too late to do so at that point.

86. Counsel for the prosecution in responding accepted that an application to amend had not yet been made but asserted that there had at all times been an intention on the part of the prosecution to make such an application, and further stated that indeed it had been her plan to make the necessary application once it was clear that all evidence in the case had been adduced. However, in circumstances where an application for a direction was being made at the close of the prosecution's evidence, the prosecution would instead seek to make the necessary application at that point and in a situation where the judge had

not yet ruled on the direction application. Accordingly, there was in effect a cross application from the prosecution for an amendment of the indictment to expand the date range to read "*from the 1st of October 2013 to the 30th of November 2013*".

87. The trial judge acceded to the prosecution's application to amend the indictment and refused the application for a direction. In doing so, she ruled as follows:

> *"JUDGE: Thank you, Ms Leader. This is an application by the defence based on the single issue regarding the evidence given by the complainant vis à vis the single count with regard to the dates on the indictment and the defence contends that there's a vagueness regarding the date and an inconsistency with regard to the date on the alleged indictment and seeks a direction in relation to that. I have considered the Galbraith test in respect of this application and I suppose the Court also is mindful of the power of the Court to amend the indictment and the issue is whether it would be unfair to amend the indictment at this point. I do accept the point that it would have been better had the prosecution applied to amend the indictment before they closed the case but it was something I was conscious of as trial judge as well in terms of the dates on the indictment. I am satisfied however on the evidence that there is evidence that the offence alleged occurred. There is evidence in that regard that the jury may properly consider because the complainant gave evidence in respect of that, although she described the dates as within October and November, which expands the dates of the alleged offence by a full month, and she alleges that it comes within those dates, that's the nature of her evidence and I do accept were there not power to amend the indictment at any stage the prosecution would be left with that. However, I am satisfied that there is strong evidence in relation to that test of whether there is evidence that the offence occurred. The issue is with regard to the date. The real test is whether an amendment can be made at this stage without injustice. No new allegation has been added. That's not the application. It is effectively the same allegation, although it is now, on the evidence, based on a wider time frame and that's a time frame of within a month. I accept the submission of the prosecution that where one is dealing with somewhat historic allegations of an allegation of child sexual abuse, clearly memories can be more vague with regard to times. It's hard to find the islands of fact to establish dates and that's always the case where the complainant was a child at the time of the alleged offence and by reason of the somewhat historic nature it's now eight years since the allegation and that again plays with memory and issues of memory come to the fore in cases such as this. I am satisfied that there is no substantial prejudice in amending the date at this point. I accept it's coming within the context of a Galbraith application but nonetheless the Court must be fair to both sides in the case. So, the substantial nature of the allegation remains the same. I don't consider that there would be prejudice to the defence in terms of amending the indictment to cover the period up until the 30th of November 2013. As trial judge was aware of the deficit between the charges laid out in the indictment and the nature of the evidence. The issue is whether it would be unfair on foot of a Galbraith application based on the*

charge in the indictment to amend the indictment but I am satisfied, by reason of the authorities opened to me, in particular Walsh, that I am entitled to amend the indictment at this stage and I think it would be unfair to the prosecution to allow a Galbraith application based on a failure to make the application before the prosecution close the case because it's clear on all the authorities that the amendment may be made at any point in the trial. So, for those reasons, I am rejecting the defence application for a direction and I am going to accede to the prosecution application to amend the indictment to cover the date up to the 30th of November 2013, so November 30th 2013. It's not a case where the nature of the allegation or the fact of the allegation has changed. It still relates to the same allegation so the substance of the charge remains the same. I am satisfied there is no injustice to the defence in amending the indictment and in refusing the Galbraith application. Thank you."

It may be helpful to observe in passing that the reference in the trial judge's remarks to "*Walsh*" was a reference to *The People (DPP) v. Walsh* [2010] 4 I.R. 746 to which she had been referred by prosecuting counsel in argument.

88. Counsel for the appellant has submitted that the trial judge erred in determining the application for a direction by reference to the separate and distinct power to amend an indictment during the currency of the trial. In particular, it was argued, the issues of prejudice and fairness to the prosecution in respect of a no-case-to-answer application are not relevant factors in assessing the ultimate question as to whether or not the jury, properly directed, could convict the accused on the basis of the evidence at the close of the prosecution's case.

89. It was accepted that the prosecution may apply to amend an indictment during the currency of the trial. Similarly, the trial judge was entitled to make an amendment of his or her own motion. However, it was submitted that the power to make such an amendment does not interfere with the obligation on the prosecution to adduce *prima facie* evidence of the offence charged on the indictment prior to the close of their case.

90. In replying submissions to this Court, counsel for the respondent referred to the power to amend an indictment contained in s. 6(1) of the Criminal Justice (Administration) Act 1924. As he had similarly done in the court below, he sought to rely on *The People (DPP) v. Walsh* in which Fennelly J., giving judgment for the Court of Criminal Appeal, stated at p. 752 of the Reports:

"[19] 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."

91. Counsel for the respondent also commended to us this Court's judgment in *The People (DPP) v. S.O'S.* [2020] IECA 96, in which we expressly endorsed the approach taken by the Court's predecessor in the *Walsh* case. We were also referred to *The People (DPP) v. C.K.* [2021] IECA 348 in which we again noted the high degree of latitude that should be afforded to the prosecution when seeking to amend dates on an indictment in cases involving child victims. In that case, McCarthy J., giving judgment for the Court, remarked at para. 31 thereof that:

> *"We might say in passing at this stage that objection was taken to the amendments on the basis that they extended to amendments made to take account of what was described as "the defence case" – by this was meant propositions which emerged in cross-examination of the complainants. In our view such objection was misconceived since amendments can be made on the evidence howsoever it may emerge. We should add also that amendments may be made at the conclusion of all of the evidence, and not just at the end of the prosecution's evidence."*

92. Counsel for the respondent submitted that in circumstances where there was no prejudice to the appellant (it being accepted that he had resided in the house described with the complainant around the time of the alleged sexual assault), the trial judge correctly refused the Defence application for a direction and exercised her discretion to amend the indictment to extend the period from the 1st of October until the 30th of November 2013.

93. It was further submitted that the trial judge properly refused the Defence direction application on the basis that there was sufficient evidence of the alleged offence to go to the jury and acceded to the application to amend the indictment in circumstances where no prejudice arose.

Decision on the issues relating to refusal of the direction and permitting the indictment be amended.

94. The law is quite clear. An application to amend the indictment can be made at any stage. There is a discretion to refuse such an amendment where to do so would enure to the legal prejudice of the accused. However, in this case there was no legal prejudice to the appellant in granting the amendment. The case that was being made against him, and that he was seeking to defend, was crystal clear.

95. Moreover, the law is quite clear that considerable latitude has to be granted with respect to the amendment of an indictment to take account of uncertainty as to dates where you are dealing with sexual offences involving victims who were very young at the time. It is entirely understandable that there may be uncertainty as to dates, and that this may

need to be accommodated in terms of amendment to formal pleadings. The *C.K.* case relied upon by the respondent had involved multiple sexual offences rather than a single sexual offence as in the present case. Nevertheless, we feel that the following observations made by McCarthy J. in that case (at para. 29 of his judgment) are apposite to both situations:

> *"In cases of multiple sexual offences, especially cases involving offending against child victims (and notwithstanding that they may be prosecuted many years later when the victims are adults), a high degree of latitude must be given to the prosecution when seeking to amend the indictment. It is not uncommon in such cases for the evidence to differ in respect of many incidental particulars from what might have been anticipated by reference to the witness statements, but no injustice will in general be caused when amendments are made to bring the indictment into conformity with the evidence actually given. This is because the law is concerned with the core allegations of which all concerned will know; indeed, on occasion it may be possible to give better particulars of the offence as the case proceeds. Nor is it uncommon for complainants to fail to come up to proof, for additional relevant evidence to emerge or for evidence to be vague or contradictory. These will be matters of degree and are the common currency of cases of the present type. At the end of the day, this is what occurred here."*

96. In the circumstances we are in no doubt that the trial judge was entirely correct in exercising her discretion to allow the amendment sought by the prosecution and to refuse the application for a direction.

97. In the circumstances we are not disposed to uphold Grounds of Appeal Nos. III and IV respectively.

Conclusion

98. The appeal against conviction must be dismissed.