THE COURT OF APPEAL

[55/21]

The President
McCarthy J.
Ní Raifeartaigh J.

BETWEEN

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

RESPONDENT

AND

J.B.

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of March 2024 by Birmingham P.

Introduction

1. On 21st January 2020, following a trial which had lasted seven days in the Central Criminal Court, the appellant was convicted by a unanimous jury of four counts which had appeared on the indictment: two of s. 4 rape (anal), contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990, as amended; and two of rape. One s. 4 rape and one rape, which were the first in time, had been alleged to have taken place in a field, while the second s. 4 rape and second rape were alleged to have occurred in the appellant's dwelling.

2. Since the conviction, the appellant has changed his legal representation. The appeal has raised a number of issues about rulings on admissibility by the trial judge and rulings in relation to what was said by the prosecution. In addition, there is an application to adduce additional evidence. We will deal with the issues on the appeal in the same order as they were dealt with by the appellant in the course of written submissions and in the course of the oral presentation of the appeal.

3. Before doing so, in order to put those issues in context, we will set out the factual background to the trial, which, it might be noted, was a retrial, an earlier trial having been aborted when the jury was discharged.

Background

4. The events in controversy were alleged to have occurred on 29th/30th July 2016. At the time, the complainant was aged 17 years and the appellant aged 21 years. The complainant and a female friend, CH, had contemplated going camping. They had reached out to others who they believed might be interested in joining them, but there was limited response. The proposed camping trip also ran into difficulty in that the complainant and her friend had difficulty accessing a tent. Among those contacted in relation to the proposed camping trip – though the word "trip" is

something of a misnomer as it was not envisaged that they would necessarily travel anywhere, but would camp locally – were the appellant and a male friend of his. It appears the appellant and the complainant knew each other to see from the locality, but that they had met only once in person, on an occasion in a public house in June 2016. On that occasion, they had kissed, and in her direct evidence, the complainant said, "[a]nd he put his hand on my thigh and asked if I wanted to go somewhere private. And I said, 'no'."

5. In the aftermath of the June meeting, the appellant added the complainant on Facebook, and she had accepted his friend request. The complainant's friend contacted the appellant on Facebook, and he agreed to go camping. The appellant's male friend and the complainant's female friend were known to each other from the night of the meeting in the public house. Later that day, the group met up and the appellant and his friend brought alcohol. They walked together to a field where it was the intention to stay the night, although at this stage, they did not have a tent. On the prosecution account, on the way to the field, the appellant tried to kiss the complainant, but she backed away. The complainant's evidence was that she was menstruating at the time and was using tampons. The group drank vodka and lemonade, and the evidence was that the complainant was drunk. It might be noted that when Gardaí examined the scene after a complaint was made, they found two empty bottles of vodka. The complainant's evidence was that in the field, she and the appellant had kissed consensually, but that she then fell back. She said the appellant got on top of her and started taking down her trousers. On her evidence, she said "no", but he did not listen, and he put his penis into her vagina. He then turned her over onto her stomach and put his penis into her anus despite her telling him to stop. The complainant's evidence was that she went to the side of the field, and at that stage, was talking to her friend and was crying and she was saying she did not want to do that. On the complainant's account, the appellant came over and asked why she was crying, and she told him to go away. She remembered being picked up off the ground, and she did not remember making her way to the appellant's home. However, she did have a memory of being in the appellant's room where he penetrated her, both vaginally and anally. The next morning, the complainant said she was exhausted and sore and just wanted to go home. At that stage, the appellant had already left, and they went to the home of the complainant's friend. At that stage, the complainant noticed she was bleeding, and she told her friend. She also told her friend's mother about what had happened and told her that she was bleeding. Her friend's mother ran a bath for her, but the complainant still felt sore after the bath. She was sore in both the vaginal and anal areas. She stayed the night in the home of her friend. Her evidence was that on the morning after she had left the home of the appellant, he messaged her on Facebook saying, "[i]f you want to talk about last night, here's my number". She said she blocked him on Facebook and deleted the message. At a later stage, she rang her sister and told her sister what had happened. Her sister told the complainant that if she had said "[n]o", then it was rape. At this stage, the pain was getting worse. The complainant went to her mother and told her what had happened, and her mother brought her to hospital, noting that there was anal bleeding. There was contact with Gardaí.

6. The complainant was examined by a nurse from the Sexual Assault Treatment Unit (SATU). The nurse gave evidence that she had detected injuries, which included multiple bruises and abrasions. The complainant had three lacerations on the outside of the anus. The complainant

was in a lot of pain and was not able to undergo an internal anal examination. So far as the vagina is concerned, on internal examination, the vaginal walls were red and swollen, and the complainant cried in pain. There were also abrasions on the external genitalia. We will be referring to this issue again presently.

7. The appellant's position in relation to what had happened was that all the sexual activity which had taken place was entirely consensual.

8. Following deliberation, the jury returned unanimous guilty verdicts.

The Sentence Hearing

9. While this judgment, and the hearing of the appeal to date, has focused solely on the conviction aspect, it is necessary for reasons which will shortly emerge to refer to matters that occurred on 24th February 2020 at the sentence hearing.

10. The evidence in the sentence hearing was heard on 24th February 2020. As is usual, the Court heard from an investigating member of the Gardaí who summarised the facts, and also heard from the complainant who read a detailed victim impact report to the Court. The victim impact report was a powerful and eloquent one. Of note in the context of subsequent developments is that, in the course of her reading of the report, the complainant, addressing the appellant, said:

> "You didn't just take my childhood and my innocence, you took away who I once was and I am now a different person because of it.
>
> . . .
>
> You didn't just abuse my body, you abused and took my innocence. You abused and took the rest of my childhood that I had left."

11. The sentence hearing also heard a plea in mitigation offered by Senior Counsel for the defence. The trial judge indicated that she would not impose sentence there and then, but rather, would defer sentence. In the circumstances, the case was adjourned to 28th February 2020. When the Court convened on that date, Senior Counsel for the defence said he had a short letter from the appellant which he would ask the Court to read. The letter was handed to the judge who then read it aloud for the record. The letter was in these terms:

> "Dear Honour, members of the Court and prosecution,
>
> I am sorry for causing anyone any distress. I apologise for any wrongdoing. I am getting an interview with the school this evening. I am going to see if I can get work in jail and I'm going to see about doing my music in there, too. I ask that you see that I have a loving family and three beautiful kids and I would love to be there for my kids and my partner, [name of partner]. We were going to get married but I had to put it on hold for now. I haven't been away this long from my kids and I know my little girl misses me and my boys and [my partner] and I hope you and the Court can accept my apology.
>
> Yours sincerely,
>
> [the appellant]"

12. Having read the letter, the judge addressed Senior Counsel for the defence. The judge said:

> "… I'm somewhat concerned that this letter has been sent -- or given to you literally, as I'm about to pass sentence. Now, I'm not being critical of [the appellant] at all in relation to that but it's important that full instructions [are] taken from [the appellant]. An apology is expressed. I'm not quite sure who the apology is specifically addressed to and that has a very, very large significance in terms of any portion of a sentence that I may suspend. I'm unhappy to deliver sentence in this circumstance. Now, I'm obviously not going to adjourn the matter again to another day.
>
> …
>
> But I think it would be better, [Senior Counsel for the appellant], if you spoke to [the appellant] in relation to this.
>
> . . .
>
> It's fine for people to express apologies. I'm not quite sure if an apology is being expressed to [the complainant]."

At that point, the judge addressed the complainant, saying she was sorry she was not going to deal with it at that point, but she wanted to be absolutely clear about to whom the appellant was apologising. If there was an apology being proffered to the complainant, then it was important that it was very specific and that there could be no misunderstanding in relation to whom the apology was being directed. The judge added:

> "… court time is one thing. I don't need to be apologised to. So, if it's a thing that there is an acknowledgement in relation to what you were subjected to and if you are being apologised in relation to that by [the appellant], it is important we all understand that and no more person is more important than you because that is of significance. I also would also have to assess the grounds in relation to that and the genuineness of any apology. So, I don't want to rush this because it has a significance and it's of significance to everybody, [to the appellant], but also to you, [the complainant]. You're the one who has to go back and live in [the area]."

When the Court sat later that afternoon, defence counsel stated:

> "…Judge, [the appellant] wants to apologise to [the complainant] and his clear instructions are to that effect and that he was reckless as to her consent on the night in question."

In the course of her sentencing remarks, the judge commented:

> "Up until today the [appellant] had not accepted the jury verdict and had not expressed any remorse for his actions. In light of the letter that I received prior to lunch which I read into the record it's clear that the [appellant] has now thought of his actions and I don't know is that as a result of spending a period of time in jail and focusing on what occurred in relation to this matter or what the cause of his remorse now is but in any event [the appellant] now accepts to [the complainant] that the jury convicted him and he accepts that verdict. He has also expressed remorse to [the complainant] and I obviously must take that into account. It's unfortunate that it's come as late in the day as it has come. Clearly, people accused and convicted in relation to crimes are entitled to have an acknowledgement of their guilt taken into account by a trial judge. However, the reality in this case is that it's come after an entire trial has taken place and also -- not that I was fully aware of this fact but also after an earlier trial and earlier listings in relation to this matter. Nonetheless it is of significance

> that [the appellant] accepts his guilt in relation to this matter. [The area where the complainant and the appellant lived] is a relatively small place and [the complainant] can hold her head high in relation to the fact that it's not just that the [appellant] was found guilty by the jury, he in fact accepts his guilt in relation to this matter".

A Preliminary Issue

13. When the Court convened to hear this appeal, it was the case that, in the usual way, members of the Court had read the papers in advance. In those circumstances, at the outset of the appeal, we indicated to counsel for the appellant that the Court had serious concerns about a situation where an accused person would seek to secure a reduction of sentence by way of an admission of guilt and an apology to the injured party and an expression of remorse, and then resile from that, by asserting innocence in the course of an appeal hearing. Counsel on behalf of the appellant – and we note again that this was not the counsel who appeared at trial – accepted that what had occurred was not satisfactory, and acknowledged that seeking leniency on a particular basis and then resiling from that approach was unacceptable. Counsel for the appellant stated he accepted that it would only be in exceptional circumstances where an accused would be permitted to act in such a manner, but he argued there were indeed exceptional circumstances present in this case. He made that argument by reference to the application to adduce additional evidence to the material which was put before the Court in support of that application. In broad terms, the application to admit additional evidence was to allow material to be put before the Court which would establish or suggest that the complainant was more sexually experienced than she had led people to believe, and had the information now sought to be put before the Court been known at the time of trial, there would have been an application to the Court for leave to cross-examine the complainant on prior sexual history under s. 3 of the Criminal Law (Rape) Act 1981, as amended, the basis of the application being that the complainant was giving a false and misleading impression of the extent to which she was sexually experienced in order to bolster the allegations she was making.

14. In the course of exchanges with counsel for the appellant, members of the Court raised the question of what the situation would be if the appeal against conviction failed. Would this Court be entitled to increase the sentence, if the conclusion was reached that the sentence in the trial Court was lower than it would otherwise have been, because of the apology in writing and the expression of remorse? Counsel's response was to say that all that was before the Court was an appeal against conviction, and his client was not interested in appealing against severity of sentence. This led to the documentation relating to the Notice of Appeal being examined; the documentation did not all go one way, in circumstances where some of the documentation had been provided by the appellant in person, some by his present legal team, and some by lawyers earlier engaged on his behalf. However, while not entirely free from ambiguity and equivocation, it did seem to this Court that what emerged was that, from an early stage, the appellant's interest was in appealing his conviction and if the various documents were read as a whole, what emerged was that the appellant did not wish to appeal the severity of his sentence. In those circumstances, we have concluded that adjusting the sentence, even if that stage was reached, is not an option available to this Court.

15. Members of the Court remain quite unhappy about the route the proceedings have taken. It is quite clear that the appellant set out to secure leniency from the trial judge. It is also clear by reference to the sentencing remarks of the trial judge that she took the acknowledgement of guilt, the remorse and the apology seriously, and that these were matters which were factored into the sentence imposed.

16. In the course of an affidavit sworn on 14th June 2023, in respect of the apology, the appellant says he had not wanted to accept criminal liability as he had always maintained his innocence, however, after receiving advice from his legal team, in regard to which he expressly said he made no criticism, he reluctantly agreed to be sentenced on the basis of recklessness. In the course of the affidavit, he also contended he wanted to apologise for the pain and suffering which objectively had been caused by his actions, not only to the complainant, but also to his family.

The Appeal

17. There are essentially two aspects of the appeal now before this Court. There are a number of grounds of appeal relating to rulings made by the trial judge during the course of the trial. There is also an application to adduce additional evidence, and, on the basis that there is now new evidence available which was not available at trial, there is a question of retrial. We will begin with the grounds of appeal which arise from the run of the trial, which are paraphrased as follows:

(i) That the trial judge erred in how she dealt with a requisition arising from the closing speech of prosecution counsel. This issue relates to how prosecution counsel, in the course of his closing address, dealt with evidence given by a nurse from SATU.

(ii) Issue is taken in relation to the trial judge's refusal to edit out of a memorandum of interview of the appellant, a question or an assertion by an interviewing Garda that the complainant had shouted "stop".

These two grounds are seen as interrelated:

(iii) An issue is raised in relation to the decision of the trial judge not to exclude certain Facebook messages emanating from the appellant.

(iv) Fresh evidence is sought to be adduced in the appeal, including to the effect that the complainant was sexually experienced at the time of the alleged offences and said so to her friend, despite the fact that, in her statement, the complainant had claimed that she had been a virgin prior to the said sexual incidents the subject of the prosecution.

Ground (i)

18. The complainant was seen by an experienced nurse from SATU who gave evidence of taking an account from the complainant and conducting a full examination. Her evidence was that she recorded numerous injuries. The nurse noted a red abrasion measuring 7.5cm x 4.5cm at the mandible or lower jaw. She recorded the patient as saying the area was painful, stinging and felt like it was bruised. Below the jawline, there was a red abrasion. There was a purple oval bruise on

the left collarbone. The nurse recorded that her patient winced in pain on palpation. There was a brown oval bruise on the middle of the chest, and on the other side of the chest, below the right collarbone, there were another two bruises. There was a light brown irregular bruise on the left breast, a bruise on the side of the right upper arm, and on the left leg there was a green/brown irregular bruise. This area was swollen, and the patient complained of pain on palpation. Further bruising on the leg was recorded, and again, the nurse gave evidence that the patient complained of pain on palpation and movement. The nurse conducted a genital examination. On examination of the external genitalia, she detected a number of injuries, including a red abrasion measuring 9cm x 7.5cm on the inner aspect of the right thigh, some 7cm below the right groin. The nurse reported that the patient said the area was painful and stinging and described the pain as moderate. At the bottom of the genitalia, at an area called the posterior fourchette, there was an abrasion. There was a laceration in the area of the labia minora. There was erythema, swelling and tenderness bilaterally on both sides of the labia majora and labia minora. In her evidence, the nurse referred to an extensive abrasion on the perineum, the area between the genitalia and the anal area. It appeared to the nurse that the area had been completely denuded of skin, that the outer layer of skin had completely detached. This area was red, swollen and painful on palpation. The nurse recorded that the patient cried with pain when she (the nurse) gently palpated the area. Upon an internal examination of the genital area, the vaginal walls were red and swollen and the patient complained and cried in pain. Paracetamol was prescribed for pain relief. The nurse also conducted an examination of the anal area. On the external anal area, she detected the following. The perianal margin was red and swollen and the patient complained and cried in pain. The nurse referred to three lacerations in particular, and stated that she did not perform an internal rectal examination as her patient was in too much pain and was unable to tolerate an internal rectal examination. Swabs were taken, but without the use of a proctoscope, an instrument used for internal rectal examinations. However, on this occasion, the patient stated she was in too much pain, she described the pain level as ten, being the worst possible pain.

19. In the course of her direct examination, the nurse did not offer an opinion as to whether her findings established or suggested that the sexual activity which had taken place was non-consensual. In cross-examination, she was asked by counsel for the appellant whether he was correct in saying that findings such as abrasions, bruising, and matters of that nature, can be found in situations of both consensual sex and non-consensual sex, a proposition with which the nurse agreed. She observed that the research would show that where what had occurred was consensual sex, the injuries tend to be minor. On re-examination by counsel for the Director, where he referred to the denuding of the skin with extensive abrasions of the perineum and asked whether these would be classified as minor or greater, the nurse said they would not be major, to the point where hospitalisation was necessary, but that they were more than minor. Asked whether such an area would cause severe pain, the nurse responded, "it caused severe pain".

20. In closing his charge to the jury, counsel for the Director made a number of comments in relation to the evidence of the SATU nurse to the effect that the sexual activity had not been consensual. He said, "[o]n any view of [the nurse's] evidence in this case, this was not consensual sex. This was rough sex, somebody holding somebody down against her consent and the evidence of her injuries are quite stark." At another stage, counsel said, "[t]hese are injuries not consistent

with consensual sex . . . [The nurse] found the area had been completely denuded on skin. This is not consensual sex." Counsel for the appellant, who addressed the jury after counsel for the Director, said his colleague had said something which had alarmed him, because he had said something which was not the evidence of the nurse. He said the nurse's evidence was that she had listed the injuries and said that injuries of the nature listed can occur with consensual sex. He said the tenor, or the import, of her evidence was that it is much more likely with non-consensual sex, and that stood to reason, but he said you get these injuries with consensual sex and the nurse had agreed with him that it was possible the injuries that she had found and the findings she had made were as a result of consensual sex. When addressing the jury, counsel for the appellant asked if the trial judge would comment on what had been stated by counsel for the Director in his closing speech. The trial judge indicated she would deal with the matter by reading the cross-examination and re-examination of the nurse. To this, counsel for the appellant responded, "I'm obliged to the Court". We have been told by Senior Counsel for the appellant, appearing before this Court, that he reached out to his colleague who had appeared in the trial court and had been told that the judge's approach had satisfied counsel for the appellant at trial which was why he had responded as he did when the judge gave an indication of how she was proposing to deal with the matter.

Decision

21. While the nurse was cross-examined with considerable skill by counsel for the appellant, who secured some concessions, it seems to us that it remains the case that the evidence of the nurse, when viewed in the round, was supportive of the prosecution case and was quite damning when seen from a defence perspective. That counsel for the Director would want to refer to the issue and place emphasis on it in his closing address is not surprising. Arguably, he went further than he should, insofar as he appeared to attribute views to the nurse which she had not expressly stated and did not confine himself to saying what his interpretation of the evidence of the nurse was and arguing for jurors to adopt that interpretation. As we have seen, the manner in which the matter was dealt with by the trial judge was to refer to what had been said by prosecution and defence counsel in their closing speeches, and to say she thought it was important that there be clarity as to what in fact the nurse had said, and that she herself was not going to get involved in the issue, but she was going to read from the transcript. As it happens, not only are we satisfied that there is no criticism to be made of the way the trial judge dealt with the matter, but it has now emerged that the manner with which she dealt with it was satisfactory from the perspective of the defence team at trial. That is sufficient to dispose of this ground of appeal.

Ground (ii)

22. The background to this issue is that in the course of an interview conducted with the appellant, an interviewing Garda asked:

> Q: "Can you explain to me why [the complainant] shouted stop and you were claiming you never heard it?
>
> A: I don't know."

The position is that the complainant, in her direct evidence, had not said she had shouted, she had said, at least twice, that she had said "no" and she told him to stop.

23. In the course of exchanges between counsel and the trial judge, counsel for the appellant made clear his real issue was with the word "shout". The judge's approach was to reference the transcript and to confirm the evidence of the complainant was that she had said "stop". There was no specific evidence as to whether "stop" was shouted or said in another voice, and in those circumstances, the judge said she was going to permit the question to remain in the interview notes.

24. In the course of the appeal hearing, the point was made that the significance of the question, to which objection was taken unsuccessfully, is heightened by the fact that prosecution counsel made reference to the issue, and also that it is not a complaint that stands alone and has to be seen in the context of and in conjunction with the complaint made about the prosecution treatment of the evidence of the SATU nurse.

Decision

25. In an ideal world, the question would have been asked in the form of "why, when the complainant said stop, you did not check if she was consenting to sexual activity?", as he contended was the case, or in the form of, "why, when you were told to stop by the complainant, did you not stop?" However, while the question as formulated was not supported by the evidence, it does not seem to us to have been an impermissible question. It was always open to the interviewee to say he never heard the complainant shout "stop" or say "stop" and he did not hear it because it was not said. We would not be prepared to uphold this ground of appeal.

Ground (iii)

26. In relation to the issue of Facebook messages, at the outset, it might be noted that this was a situation where counsel was content to rely on his written submissions.

27. The Facebook messages which the judge was required to consider were messages exchanged between the appellant and the at one time best friend of the complainant. While at one stage the prosecution had sought to introduce messages emanating from the complainant's friend on a number of different bases, the judge was not prepared to permit messages coming from the friend to be put in evidence. A different view was taken in respect of two messages from the appellant. Two messages were permitted to go before the jury, one sent on 31st July 2016. On that occasion, the appellant messaged, "[h]ere, tell me the truth now so I can put my mind at eas[e]. [Why] was [the complainant] crying? Did I do anything wrong? Head is fried here. Please answer." The further message was "[i]f she was uncomfortable why did she come back to mine?"

Decision

28. It seems to us that the first message containing an acknowledgement by the appellant that in the aftermath of his actions, the complainant was crying, was beyond any doubt admissible as a statement against interest. If the first message, with its reference to crying, was going in, then in fairness to the appellant, it was appropriate that the second statement, which contained an argument in favour of the appellant's position, should go in as well. There is a further point that might be noted which is that the first resort to Facebook messages was actually on the part of the appellant who was interested in a message sent to the complainant's friend, asking whether they were up yet. Having introduced the Facebook messages, the appellant was not in a strong position

to argue for the exclusion of other messages which he found disadvantageous. Once again, we are not prepared to uphold this ground of appeal.

Ground (iv)

29. Another aspect of the case relates to an application to adduce fresh evidence.

Background

30. To put the application to adduce new evidence into context, it is necessary, at the risk of a degree of repetition, to recap on what the evidence was at trial and what material was available to the parties in advance of trial. The complainant's position was that she was 17 years of age at the time. She was having her period and she did not consent to any sexual activity. She was intoxicated; too intoxicated to effectively resist physically. In the course of her statement made to Gardaí in advance of the trial, the complainant said she that she had never had sex before. She did say that on one occasion, she had been about to have sex but stopped before the penis actually penetrated her vagina. Her statement also made reference to the fact that on the occasion when she had previously met the appellant, and when she had kissed him, he had been rubbing his hand up her leg, and he asked her if she "would ever do a one-night stand" and she responded "…no I'm not into that." These extracts from the complainant's statement were not explored before the jury at trial.

31. It is also necessary to refer briefly to the evidence at trial of CH, a friend of the complainant, and AD, mother of the complainant's friend. The evidence of CH referred to asking the complainant in the field if she was okay, and the complainant responding that she did not know what she was doing. The witness gave evidence that the complainant was drunk and was a bit upset. At another point, CH said that at one stage she wanted to go back to the complainant's house, but that the complainant and the appellant had insisted on going back to the appellant's house. There, she had said to the complainant that they could not stay there, but the complainant was not listening. In the course of her evidence, AD referred to the fact that her daughter and the complainant came to her house on the day after the alleged rape, and her evidence was that the complainant had told her that she had anal sex in the field and that the complainant was laughing when she said this, though the witness said that she, AD, did not find it funny. The witness said she asked the complainant why she had anal sex in the field, and the complainant's response was that she did not particularly want to, but she had done so anyway, saying she was a little bit sore.

Fresh Evidence

32. The appellant is now seeking leave to adduce fresh evidence designed to establish or support the suggestion that the complainant had been sexually active with men and boys before she met the appellant, and that what she had told Gardaí in that regard about not having had sex previously was not the truth and was designed to bolster a false rape allegation. The application is advanced on the basis that if the defence had the information to the effect that the complainant had considerable prior sexual experience, they would have cross-examined her, or certainly have sought to do so, on the basis of her false assertions of not having had sex previously.

33. The proposed fresh evidence which it is now sought to be adduced is said to arise in circumstances where two witnesses at trial called on behalf of the prosecution, CH and AD, made contact with the mother of the appellant to tell her that what had been said by the complainant in

her victim impact statement, as reported, was untrue. The background to how this issue arises is to be found in the fact that the mother of the appellant has sworn an affidavit asserting that she was approached by CH and AD, both of whom had been witnesses called by the prosecution at trial. The mother of the appellant says the witnesses told her that they had read or heard about the victim impact statement of the complainant and were concerned because this indicated that the complainant had been a virgin and/or that the appellant had taken away her innocence, and the witnesses were of the view that this was not true. The mother of the appellant says she put the witnesses in touch with the solicitors acting on behalf of her son. Affidavits have been sworn by AD and CH.

34. The proposed evidence from CH, as set out in the appellant's written submissions, would be to the effect that she and the complainant were very good friends at relevant times, that they spent a lot of time together and would stay in each other's homes most weekends when they would go to public houses, that the complainant loved the attention she would get from men and boys they met, and that the complainant was unable to control her own behaviour when she was drunk. The witness would also say that a couple of weeks prior to the incident, the subject matter of the trial, the complainant had been with a boy for a couple of weeks and had told her that she engaged in sexual acts with him. The witness would say that whenever they were out, the complainant would take her boyfriend at the time into a different room and would tell her afterwards that she had sex with him. The evidence of AD, which it was intended should be adduced, would be to the effect that she knew the complainant very well, as she was good friends with her daughter and had slept over on many weekends, that she had read newspaper reports post-conviction to the effect that the appellant took away the complainant's innocence, that she (AD) was aware from speaking to the complainant that her mother put her out of the house on a number of occasions after catching her performing sexual acts with boys, that following the incident, the subject matter of the trial, the alleged rape, the complainant had come to her, with the witness's daughter, both looking very hungover, and that the complainant had told her, while smirking and giggling, that she had anal sex with a boy because she had her period at the time, and that subsequently, over the duration of her stay in the house, she had not given any cause for concern, and that the complainant did not appear upset or distressed. AD says she indicated to Gardaí before trial that she wanted to make changes to her original statement and she was told she could do so, but no additional statement was taken.

35. It might be noted that the manner in which AD and CH gave their evidence at trial caused some surprise, and indeed gave rise to comment on the part of the trial judge. In the course of ruling on an application by the Director to admit a text message sent by CH, the judge commented:

> "The second message from [CH] doesn't differ substantially from her evidence that she gave, but her -- the first message, so that's the second message in the four that is sought to be adduced by the prosecution, that is in stark contrast to the evidence that she gave and it's as well to say it, that there was an air about the evidence given by [CH] and indeed by her mother and while we now know that there was a fall out between [CH] and the complainant, without hearing that evidence it was clear to me that that indeed was the case and, in any event, we in fact now have evidence that after this event [the

complainant], in fact, is no longer in contact or friends, at least, with [CH]. I shouldn't perhaps say in contact, but that they're no longer friends and [CH's] mother gave the evidence that she hadn't been back down to [CH's] house after these events. That is something that I think is important and in due course it will become clear why I think it's important.

…

Now, as I've indicated, it's not on a principle basis, it's on a fairness basis in relation to this particular case, in relation to the evidence in this particular case and in relation to the fact that it's clear there's a fall out between the girls and I think a jury would feel that [CH] had been somewhat coy in relation to the evidence that she had given to them and that, in fact, this is the reality of the case and I think that perhaps is also the reason why [Senior Counsel for the Director], without maybe having thought about it in detail, was so in favour of presenting the messages of [CH] as evidence in their own right."

36. The message sent by CH to the appellant, which the prosecution had wished to introduce, read:

"Well, to be honest, she told you at the start she didn't want to ride and I told you not to force get (*sic*) and she told you multiple times and you still did it anyways. No[w] she's upset and really hurt and sore."

37. Insofar as it is suggested that CH would give evidence that the complainant had been going out with a boy for a couple of weeks and that she had told CH that she had engaged in sexual acts with him, it does not seem to us that this advances matters at all. The complainant made no secret of the fact that she had been in a relationship with a boy and that they had almost had sexual intercourse but had stopped short of actual penetration. The significance of the other areas the proposed additional evidence would address, that the complainant loved the attention she got from men and boys, that she was unable to control her behaviour when drunk, and that when the complainant and her friend would stay out, the complainant would take her boyfriend at the time into a different room and would then tell her friend afterwards that she had had sex, has to be seen in the context of the fact that the CH's evidence at trial had diverged significantly from the statement she had provided to Gardaí. Insofar as she says she had wanted to provide an additional statement, and she had been told that she could, but that no additional statement had been taken, it has to be observed that neither her nor her mother had given any indication of what the wished for additional statement would have contained.

38. In relation to the proposed additional evidence from AD, again, it has to be observed that her evidence at trial diverged in a number of significant respects from the statement she had provided in advance of trial. At trial, this witness did give evidence of her interaction with the complainant on the day following the events the subject matter of the trial. In her evidence, she said that the complainant had said she had had anal sex in the field and that the complainant was laughing when she said this, though the witness said she did not find it funny. Asked whether the sexual activity had any consequences, the witness said that the complainant was a little sore, and that she did not recall anything else. Asked whether the complainant was still upset, the witness said, "[a] bit". Asked what she meant by that, she said "[i]t wasn't, like, upset, like, crying and like that. It was more -- I don't know how to describe it". She was then asked "…she wasn't

bubbly?", and she replied, "[n]o. She wasn't her usual self, but I thought that was just because she was hungover".

Decision

39. The principles that should be applied when there is an application to adduce fresh evidence post-trial and conviction have been considered in a number of cases, specifically, *DPP v. Willoughby* [2005] IECCA 4 and *DPP v. O'Regan* [2007] 3 IR 805. In *Willoughby,* Kearns J. stated as follows:

> "Drawing these various strands together, it seems to this court that the following principles are appropriate to an application to introduce new or fresh evidence in the Court of Criminal Appeal:
>
> (a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.
>
> (b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.
>
> (c) It must be evidence which is credible and which might have a material and important influence on the result of the case.
>
> (d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

40. There are some unusual aspects to this application to adduce new evidence. First, there is the fact that the two witnesses from whom it is intended to adduce the evidence gave evidence at trial. The proposed new evidence is not evidence which relates directly to the events in controversy; it goes to matters which are, to a degree, collateral, namely the extent of the prior sexual experience of the complainant. If this Court was to permit the evidence to be adduced and proceeded to order a retrial, it would appear that the new evidence would most likely arise in the context of an application for leave to cross-examine the complainant on the extent of her prior sexual experience. At this stage, it is not clear whether such an application for leave would succeed.

41. The proposed additional evidence does not sit easily with the *Willoughby* criteria. It seems to us to be stretching matters to say that the proposed evidence was not known at the time of the trial and was not evidence which was capable of being brought forward. The manner in which the former friend of the complainant and the friend's mother gave evidence at trial, and in particular, the manner in which it diverged from statements provided by them was noted and was the subject of comment by the trial judge. We think this might have had the effect of putting the appellant on notice that there might have been a case for further enquiries. However, in making that observation, we do recognise that there might well be a reluctance to embark on enquiries if there was uncertainty as to what the outcome would be.

42. There is also the fact that the complainant and appellant were, to a degree, known to each other prior to the events the subject matter of the trial, and appeared to have mixed in similar circles. It would certainly seem to have been open to the appellant to investigate the extent to

which the complainant was sexually experienced. Her statement of evidence in advance of trial had indicated that she had not previously had sexual intercourse, though had engaged in intimacy short of that. If that did not accord with the appellant's understanding of the situation, then it was open to him to investigate matters.

43. It seems to us difficult to say that the proposed evidence is evidence which might have a material and important influence on the result of the case. First, it appears the height of the evidence is that it would provide a basis for an application to cross-examine the complainant on prior sexual history. It is not at all clear that such an application would be successful. There is also the point that if the proposed witnesses were called by the defence at any retrial, it would be open to the prosecution to cross-examine them by reference to their original statements, which would not be at all advantageous from the defence perspective.

44. It seems to us this is a case where we would have been justified in taking the view that, as the appellant had acknowledged guilt at the sentence hearing and apologised to the complainant when seeking leniency, that it would have been appropriate to refuse the application to admit additional evidence *in limine*. However, we have considered the merits of the application and we are firmly of the view that the application does not meet the threshold which would justify, still less, require, the admission of new evidence. In the circumstances, we must reject the application to admit further evidence. That being the situation, it is the case that we have not been persuaded to uphold any ground of appeal, and in the circumstances, the appeal must be dismissed.