An Chúirt Uachtarach

The Supreme Court

O'Donnell J
McKechnie J
MacMenamin J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000107
[2020] IESC 000
Court of Appeal Record Number: 2013/151
[2020] IECA 95
Central Criminal Court Bill No: CCDP00902011

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

Brian Shaughnessey
Accused/Appellant

Judgment of Mr Justice Peter Charleton of Tuesday 23 March 2021

1. This judgment concerns the proper approach to an appeal where an accused posits that due to poor representation at trial a conviction is unsafe. In March 2013, a jury convicted the accused Brian Shaughnessey of raping, following a staff party on 25/6 July 2010, a 17-year-old part-time employee in a suite in the hotel which he owned. Alongside working in his hotel, she was an occasional babysitter to his children. Sheehan J sentenced him to six years imprisonment, with twelve months suspended on condition of following a rehabilitation program. The accused claims that the incompetence of his defence mounted at trial led to his being convicted when otherwise he would not have been. He asserts that timings highlighting a possibly missing hour or so, which might have cast doubt on the young woman's account of sexual violence, were inadequately put to her during cross-examination, mentioned only as an afterthought in a defence speech to the jury, and generally glossed over. On 9 April 2020, the Court of Appeal upheld the conviction, ruling that claims of incompetent representation were to be analysed as if the application about representation was one to admit newly discovered evidence after a trial. The accused's former lawyers swore affidavit evidence contradictory to the accused's averment of incompetence and were allowed to address the court, in addition to the prosecution and the defence. No cross-examination, however, of witnesses as to these contrary assertions was permitted.

2. This Court determined on 20 November 2020 that the accused be granted leave to appeal on three issues:

> (1) Whether, in an appeal stated to be grounded on the evidence of the appellant that defence counsel did not properly appreciate the relevant materials provided, or follow his client's instructions in the trial, the four-part test arising from *The People (DPP) v O'Regan* [2007] 3 IR 805 relating to the introduction of new evidence on appeal is applicable;
>
> (2) Whether, assuming the first issue is resolved in favour of the Applicant, the standard set for allowing an appeal on the basis of incompetent representation has been met;
>
> (3) Whether the trial judge was correct in his ruling in relation to corroboration.

3. To properly analyse the various contradictory accounts of the trial, which have rendered the precise facts uncertain, it is necessary to consider the trial transcript in detail before, firstly, ruling on the corroboration issue and, then, proceeding to consider the incompetent representation point through setting out the appropriate test for an appellate court.

The defence and prosecution accounts

4. Some period of time after about 03.30 hours on the morning of 26 July 2010, Brian Shaughnessy and his employee, the complainant young woman, retired with a bottle of wine and two glasses to the presidential suite of his hotel. At some stage around 05:40 hours, the young woman left the hotel and walked home. There had been a staff party at the hotel which seems to have been winding down when Brian Shaughnessy and the young woman began talking. Prior to going up to the presidential suite, he and the young woman had been sitting in the hotel bar. At some stage between 04:00 hours and 05:00 hours, Mr Greene, a hotel employee, looked into the bar and did not see Brian Shaughnessy and the complainant there. This is not very helpful but it certainly puts them elsewhere. But when? On both of their accounts, for some substantial time, which could have been three-quarters of an hour or half an hour or thereabouts, or is perhaps uncertain, they were both in the presidential suite, where the alleged sexual violence took place. Neither claimed that they were elsewhere. The evidence from the complainant was that she had come late to the staff party and that she and a friend had been bought one or two drinks by the accused, who at this stage was coming and going, speaking to different members of staff. She had called a taxi but, on it arriving, three others had jumped in and rather than cause a fuss she returned to the bar where she was joined in what was, at first, small talk by the accused. During this, and the times are vague, she saw the hotel manager and his fiancée going by and then going up to a room. She, according to transcripts, testified thus as to the events following:

> And they headed off to bed and that was fine and after that then Brian said to me, "Do you know, are you sure you want to be my friend?" I thought, do you know when you see a little child, and they're saying, "Will you be my friend", I just felt like oh this, like, God love him, kind of, you know, it was just a stupid on my part, but it was just -- you know, it was just I can't explain what it was, I just thought "of course I'm going to be your friend." You know it was a general, genuine reaction, like. And that was fine, and, you know, I just -- I don't know what -- I just there was this like thing that he was going to tell me. I thought there's some problem, there's this isn't himself, you know, I'd never have had that experience with Brian before, that it was always easy go kind of chat, and there

was never this kind of -- whatever this was, you know. So I thought, you know there's something going on, you know, so at this point, you know, kind of Barry and the wife -- and the fiancée sorry, had come in. And Willie was coming and going and I said "do you know, would you mind if we go somewhere else to talk, I'm still, you know, kind of conscious that there's people listening", and I said "no problem." So Willie came in, and Brian asked him for a key for a room and a bottle of wine. And I hadn't actually drank my vodka and orange, again, it was the same, just wetting my lips. And that was fine, and we went and got in the lift there behind reception. … So all that was going through my head at this point was what's he going to tell me, why me, like, and really how am I going to get out of drinking this bottle of wine, like, you know it was just purely -- there was nothing else going on in there, like. So then we got up to the fourth floor, and you can see there where we would have come out of the lift. … And we turned right and came down the corridor, so we came down, and we went into the presidential suite. Now, I opened the door, Brian was holding the bottle of wine and the two glasses. … [I opened the door with the key card] … And in we went to the presidential suite. … Yes, I walked in and I went and I sat on the couch. And I took … I took off my boots, like, as -- I didn't mention this, but when I was in the nightclub earlier on, I was wearing heels, and they were toe out shoes, and they cut my toes. So I was putting on my flats and when I got up to the room, my obviously I had no socks, so what happened was my the cut was hurting, so I took off the boots anyways is the main thing. … So I was sitting there any ways, took off my boots, and Brian came in and we'd the bottle of wine then on the table in front of us. … So I turned on the telly, and he was very quiet, and I just thought, whatever this is, it's big, do you know, and I kind of thought, oh why am I sitting here, I'm 17, do you know, why is this man confiding in me. But nevertheless, you know, I was genuinely concerned. So I was sitting there, and he was quiet and he had told me to "shut the fuck up." But I just thought that this is what made me think. … In the room, it happened in the room, and then it was passed as a remark and I thought nothing of it. … I was sitting down, had the telly on, boots off, sitting kind of thinking "what's going on, what's this." And I said something. … Yes, and he said "shut the fuck up." … So I was flicking through the channels on the TV, and I said something like, "Jeez can you imagine this is on this hour of the morning" and he said "shut the fuck up", and I passed no heed. … It was just, "Shut the fuck up", that's it wasn't, and I just thought this is really horrible, what he must be having to say, and you know, like, any of us, if we're trying to we're irritable, like, and that's where I thought this was coming from. So I passed no heed and that was that. And I said something then, "What time is it." And he said it this time, "Shut the fuck up", and I thought he means this, you know. This is no joke. And he went on and pushed me down on the couch. … He pushed me down on the couch. He pushed me down, and he was on top of me, he had me by the shoulders, and his full weight was on top of me. … So I was sitting here, I'd just been pushed back onto it. And do you know, he had his I was pushed back and he was on top of me, and he had my by the shoulders, and his full weight was on me, and he took his hands from my shoulders, but put his it was like dead weight and moved his hands down to my pants, opened the button on my pants and pulled them down. What happened as he was actually trying to pull them down was I didn't like, my first thing was kind of, this is going to sound a bit vulgar, but if you kind of open your legs you can't get the pants down, if that makes sense. And I did that, and I felt completely exposed, it was like the reality of what was actually happening hit in. So I closed my legs and that's when he pulled off my pants. He then pulled down my knickers to just above my knee. I didn't even notice that he had opened his pants, like, I I genuinely can't say when that happened, because I don't I didn't, but next thing he stuck his penis into my vagina and he started moving around and saying "Mmm", like kind of moaning, and I was just saying, "Get off me, get off me", and he was … he was moving and I couldn't move,

> and he just said "Mmm", and he kept saying, "Come into the bedroom, come into the bedroom", and I was just saying "no." … And then I was like, do you know you hear of them mothers lifting the cars when their children are trapped under it, they get this superhuman strength, and, I mean, because I had been struggling, I couldn't -- that's all I can kind of describe it as, that next thing, I was upright and he was back and I just said -- you know, like, I was just -- I didn't know, like, what to say, or what, like -- what do you do, like. And I just said, you know, "What about your wife and kids", and he just looked at me, as if what about them, do you know as if he just it just, like, do you know by saying this, I nearly thought that he had forgotten that he had a wife. And I said this, expecting some reaction and there was no reaction, like, it was just like "and" kind of thing. So at that point anyways, I got up, and of course had to pull back on my clothes, and as I was … While I was getting dressed, he was sitting on the couch, kind of sitting up on one arm kind of sitting back. And as I was putting on my boots, he said "I'll call you a taxi." And I said "I don't want a taxi", and he said, "No, no, I'd like to make sure you get home okay." And I thought, really, no, I'll walk. So I insisted I was walking, that was that, and as I gathered my stuff, and as I was leaving the room, he called me back, and I stuck my head in, as if, what, like, and he said "[Name], I love you." And I just closed the door and I left. So I left back out that door…. He was he didn't seem to care what was going on around him, I mean, he was he was do you know sometimes, you can just -- like, he smelt like drink and fags, and he was greasy, and sweaty, and …Yes, it was completely changed. I mean, previous to that, it was like a family member, he was like an uncle kind of that you trusted and you could have those kind of little chats with, not little chats but, "How are you [Name]", kind of, and "Oh will you do us a favour, come out and mind the kids." And I suppose that's what brought me into that comfort zone, and brought me up to the room. And when he was on top of me, Jesus, did I realise he wasn't like a family member, or like what I had him down to be. [As to how long I was in the presidential suite I have] No idea. I mean, like, I walked in there and it was more or less straight away that things happened, like, you know, that I kind of left him for a few minutes, you know, in the idea that he was finding this courage or whatever to say … I suppose, courage to tell me whatever this was, you know, this secret that I thought. So that probably -- you know, I went in and sat down. So I'd say, really I wasn't there that long, 20 minutes, half an hour, yes. I literally got up and pulled up my pants and put on my shoes and went, and that's [As to when I left, it is vague] But it was roughly around 5 am. … I went down in the lift … And I walked down and I could see [Mr Greene] through the reception area. And he was mopping the floor, so … I passed him and I said "good night", and he said "good night", and I walked, … I walked until where I thought he couldn't see me anymore and I ran, and I ran out and went home. … Ran/walked ... Dad was up… He was, and I obviously knew I was in for an eating, given the hour of the morning it was. But I decided I'd deal with it all I couldn't face him there and then. … So I just went up to bed and that was that, he didn't come up after me, so.

5. The next day, meeting a close friend at a place for nature walks, she told him what had happened. It was some months later that her mother realised that she had developed an emotional aversion problem with the accused and on being asked why she disclosed what had happened. Cross-examined, it was put to the young woman that there was no statement made by Brian Shaughnessy about the accused wanting to talk to her as a friend and not as an employee. As to what the invitation to go to the presidential suite was, in place of what was denied, was not put to the complainant as part of his counsel's questions to her. This extract from the cross-examination indicates the accused's case, such as it was:

Q. Yes. Now, I'm suggesting to you that what happened on the evening in question was that you went to the presidential suite, that in the course of the evening you had a number of conversations with Mr Shaughnessy. You say he wanted to discuss something with you, I'm disputing that, but that you made a number of assumptions; that there was something serious going on in his mind that he wanted to discuss with you. And you mentioned before lunch in answer to Ms Murphy, "Why would he want to talk to a 17 year old like me"?
A. Yes.
Q. And so forth?
A. I never said "like me", but, a 17 year I mean, a 45 year old man
Q. Want to talk to a 17 year old?
A. Yes.
Q. Is that an assumption you made on the night?
A. No -- well it was, as I was going leaving the bar, I kind of thought, "why me?"
Q. Yes?
A. Because I was full sure it was that to tell me something.
Q. He was going to discuss some intimate?
A. Yes, that there was something going on. And I just thought, do you know, is there nobody more suitable.
Q. Yes?
A. That you could because at that point.
Q. Yes?
A. I had -- well, thought I realised it was something big.
Q. Yes. Well in my event, I suggest that what happened is that you did go up to the presidential suite, but that there was some hugging, but that it never it never reached the stage of sexual intercourse?
A. Hugging?
Q. Yes?
A. I don't I don't understand.
Q. And that you made sexual advances to him?
A. That sorry, can you explain that?
Q. Yes, certainly. I suggest to you that you went into the room and you both sat on the couch?
A. Yes.
Q. And that you placed your hand on his trouser in his trousers area and touched his penis?
A. That I did this?
Q. Yes?
A. No.
Q. And that you both hugged, but that it never went any further than that?
A. No.
Q. And that this encounter lasted a period of seconds, certainly no more than a few minutes. That he was very, very tired, and wasn't interested, for what it's worth, in sexual activity at that time?
A. Absolutely not. I mean
Q. What happened to the bottle of wine when it was brought into the room?
A. I didn't drink it. There was two glasses poured on the table.
Q. Yes?
A. And I didn't touch mine.
Q. When he attacked you --?

6. Questions on behalf of the accused then touched on the issue of time:

Q. -- in this case. How long do you stay do you say you were in that room?
A. I genuinely don't know, it's a really an estimate to say 20 minutes, half an hour.
Q. Yes. Well, I have to you that it is about a half an hour?
A. Mm-hmm.
Q. Did you make any texts from the from the room?
A. I'm not entirely sure.
Q. I have to suggest to you that you texted on a number of occasions in the room?
A. Okay. I don't see any problem with this.
Q. I'm not, Ms [Name], suggesting there's problem with it. I'm trying to establish as a fact whether you did or not?
A. Okay.
Q. The barman downstairs made a number of phone calls for taxis?
A. Okay.
Q. For you?
A. Yes.
Q. At the request of Mr Shaughnessy?
A. Okay.
Q. The last one would appear to have been at 4.40, if I'm not mistaken. In any event, I'll deal with that, I'll give you the precise time in a moment from the records. Do you remember I think you did confirm that Mr Shaughnessy telephoned downstairs
A. He telephoned William, he did.
Q. and told Mr Greene to get you a taxi?
A. Yes, but I said I didn't want one. Now, I wasn't actually aware that Willie had -- or William had rang a taxi, I wasn't aware that he did. I just knew that Brian had used the telephone to contact William downstairs about a taxi.
Q. Do you know how many times Mr Shaughnessy contacted Mr Greene?
A. No.
Q. To get you a taxi?
A. No. …
Q. When you went down to leave the hotel, did you ask Mr Shaughnessy did you make any reference to a taxi?
A. No.
Q. Mr I beg your pardon, Mr Greene?
A. Mr Greene, no.
Q. I have to suggest that you did --?
A. Okay.
Q. -- make some reference to a taxi at that stage. But in any event, what I suggest is that after the attack you've described, you stayed in the room for the best part of half an hour, made three texts, and Mr Greene downstairs made several phone calls for taxis. Did anything like that happen?
A. Well, not that I would have been aware of. I mean, I know that he did ring William about a taxi, and whatever else. But I wouldn't have thought that there was such a lengthy
Q. You see, as I understand your evidence, he when you got up to presidential suite, you opened the door?
A. Yes.
Q. And that you went into the room, and that the attack occurred fairly soon after you went into the room?
A. Yes, well, I was sitting there and I left him for a few minutes.
Q. Yes?

A. That he wasn't speaking and he was flustered -- or not flustered but quiet and not himself. So I mean, I don't know what that amount of time was, like I said it was
Q. And you you say you messed around with the television and so forth?
A. I did, yes.
Q. How long did all of that take?
A. I've no I can't -- do you know, I don't know, it was nearly three years ago. But I would have thought not long.
Q. Yes. Well, after the attack then, do you not recollect making any attempt to text in the room, from the room?
A. No. I know I did make a phone call on my way home. But in the room, I don't remember texting.
Q. Yes?
A. I could well have, don't get me wrong.
Q. And I suggest to you that there are three texts from you before you meet Mr Greene on the way out, and after he has made his last phone call for a taxi for you?
A. That's I don't -- I'm not saying that didn't happen, because I mean I was 17, and the first thing you do when you pick up your phone, regardless of anything, you're constantly on your phone and you're going to do that. …
Q. Yes. And what I want to put to you is this: it's a highly unlikely state of affairs or would be a highly unlikely state of affair that you would be attacked the way you were attacked and that you would remain in the room long enough to make three texts or for Mr Greene to make the number of phone calls he made over a period of time; that you would want to get out of that room as quickly as possible?
A. Well, I mean, three texts don't take a long time to send. I'm not I don't know what time, do you know, they might have been spaced out texts or whatever. But the state of mind I was in, the shock I was in, I would not be surprised if I did in fact spend a few minutes -- do you know, I wouldn't be surprised. And I understand completely where you're coming from in saying that in normal circumstances, you're going to run straight from your attacker, but it was just the betrayal of trust and the complete confusion that I wouldn't be surprised if I did.
Q. Well, now you've said a number of things there. That the inclination would normally be to get away from your attacker?
A. Absolutely.
Q. And that's what you said happened in reply to questions from ?
A. Yes, well that would be my
Q. my colleague for the DPP?
A. Yes.
Q. Now, if if that's what happened, is there any room for the making of three texts?
A. There is. I mean, if you're I'm not aware of what time my texts were sent at or whatever. But if --
Q. 5.14?
A. At 5.14.
Q. Yes, is the first one?
A. Okay.
Q. Then 5.17, and then 5.33?
A. And -- but the last taxi was rang at 20 to 5. Is that I'm not, I'm just trying to clarify.
Q. Sorry, it's 20 to 6?
A. Oh 20 to 6.
Q. If I misled you there, I'm sorry?
A. Absolutely, it's all right. Nevertheless, messages could have been sent before the attack.

Q. Well, it's at 5.41 actually is the last ?
A. 5.41.
Q. taxi call?
A. Yes.
Q. And 5.07 is the first?
A. Okay. …
Q. Yes. Now, if this attack occurred, I suggest to you that it lasted a very short period?
A. And I accept that, yes.

7. Cross-examination of the young woman on behalf of the accused then returned to the sexual attack without putting any definite alternative scenario beyond the questions above to the complainant. It also touched on why a complaint was not made to the young woman's mother until November that year, on whether the accused could smell of smoke, as she said, when he had been a non-smoker for years, allegedly, how she resigned from her job minding children in the children's club in the hotel, working a few days in emergencies when asked, and whether she had been somehow coached by the Rape Crisis Centre. A case was put to her, in clear terms, that she had made sexual advances on the accused, but in what circumstances or what the verbal context of that might be was not specified. If there was any issue to be made as to an ostensible missing hour, that was not there made. As to the invitation to come to the room, alternative to the one the complainant described, was neither specified nor put to her.

8. In terms of verifiable timings this emerges: at 03:23 hours the accused asked Mr Greene, the night porter, to prepare a key for this room. That request was made not at reception but in the bar, which is close by. Mr Greene says that having given the key, he did not see them again. Thereafter, either immediately or at some stage, the accused and the young woman went up to that suite with a bottle of wine. In her evidence, she describes the key being given in the bar by Mr Greene to the accused. This is how it was put:

> And [Mr Greene] was coming and going and I said (sic: but this clearly refers to what the accused said) "do you know, would you mind if we go somewhere else to talk, I'm still, you know, kind of conscious that there's people listening", and I said "no problem." So [Mr Greene] came in, and Brian asked him for a key for a room and a bottle of wine. And I hadn't actually drank my vodka and orange, again, it was the same, just wetting my lips. And that was fine, and we went and got in the lift there behind reception.

9. No one asked if she went up straight away or how long it took for the key and the bottle of wine to arrive or whether they stayed in the bar for some time before heading up. Mr Greene only describes the young woman and the accused as not being in the bar at a wide interval of checking, sometime between 04:00 and 05:00 hours. While in the suite, according to records, the young woman sent texts from her phone at 05:14, 05:17 and 05:33 hours. From the accused, calls were made to Mr Greene. These may have been requesting a taxi for the complainant between 05:07 hours and, the last, at 05:41 hours. Mr Greene does not specify what time the young woman left the hotel but does describe her as not stopping to talk, using a phone on the reception desk to attempt, apparently, to call a taxi and moving swiftly away, looking panicked. Mr Greene, understandably, was vague as to times, seeing Brian Shaughnessy and the young woman "between 3 and 4", serving them a drink in the bar, them being the only customers in the bar when he went about other duties and then an hour later not seeing them in the bar when he locked up which could be as late as 05:00, because he had a lot to do. It was normal for the accused to sometimes sleep in the presidential suite. Mr Greene thus quite often prepared an electronic key for him. That night he prepared one. He did not say that immediately after making up the key, the accused and the young woman got into the lift and went up to the suite. He was recalled to give the time from

the machine that the key was prepared for the presidential suite. Seeing the young woman in the early hours of the morning, he said:

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

10. The accused did not give evidence in his own defence. The defence consisted of testing the prosecution case by probing questions. What the jury heard of Brian Shaughnessy's case comes from interviews conducted with the gardaí after he had been arrested on 22 December 2010. The substance of his case was to be extracted from those interviews thus:

> It was … a party night for the staff. We'd a barbecue, karaoke and a disco. I was in charge of the barbecue and cooked for all the staff. At about 1 am, the party was pretty much over… the party was pretty much over. I was talking to [the complainant] and [she] was talking to me. I was going upstairs to get a drink, and she said that she would come with me. There was nothing happening in the bar, so I asked her if she wanted to come upstairs for two glasses of wine and she said she would. We just chatted upstairs, we talked about Play Town and how it was going for her. We talked about the kids. We chatted about [my wife]… And I got emotional at this stage, as [my wife] and I had gone through a tough time. She held my hand at this stage. We talked for another while. Then we had a small shift. After that, she held my hand, rubbed my back and opened the button of my trousers. We chatted again for another while, and we had another shift. I asked her twice did she want a taxi home and she said no. She was texting someone on the phone for about 10 minutes and then she left. …Absolutely 100 % not [we did not have sex]. [As to saying "shut the fuck up" to her …That's 100 % not true. I would expect that if I said that to someone, they would leave the room. We would have been friends, we would have been comfortable in each other's company, someone I could talk to. [asked if he kissed her] …I was upset with what happened with [my wife] and she gave me a hug and a cuddle. … I was upset and crying. It was just a hug, it was not sexual, no questions about it, and it's not true. … We talked for a while, hugged, kissed. She had her arm on my leg, held each other for another while. She opened the button of my trousers, had no intention of being with her in that way. … We shifted for about three minutes and I said to her, 'You need to get home'. How will you … How will you get home?' … She said she was okay. She was on her phone for 10 minutes and then she left, we left on good terms. … She opened the button of my pants and she touched my penis, nothing else happened. I didn't want it to. [She did not take down my pants]…No. In between these two things we just talked. … [She was touching my penis for] Not long, less than a minute. … [I was not aroused]. [As to why such an allegation might be made] I don't know, it's a serious allegation. Her father owes me €17,500 for the last year, and I can't get the money off him. I went to a concert with her father a few weeks ago; she has been working for the last few months in the hotel. … On the couch, all that is supposed to have happened is 100% inaccurate … Yes, it's a damning statement, but it didn't happen, it's 100% untrue.

11. The girl's father testified that the accused in fact owed him some €25,000, although after the exchange of some equipment, it was agreed that the father owed Brian Shaughnessy just €10,000. Finally, it is worth quoting an interview with the accused, of which there were two, in question and

answer form as it demonstrates little difference between the girl and the accused as to the time, shows a similar vagueness, and further indicates that neither were capable of being definite but placed little store on the issue:

> Question: "Why would she make these allegations?"
> Answer: "I have no idea why she ... " " ... I have no idea why she would make this allegation. Why she would make it now confuses it even more."
> Question: "Basically your versions are the exact same until you get to the couch in the presidential suite. Everything is okay until then. She says you opened her trouser, and you are saying she opened yours?"
> Answer: "The allegation she is making there are very untrue. Her behaviour the six months up to it and after it is different. It didn't happen."
> Question: "From the time you went up to the room and to the time she left, how long was it?" Answer: "To the best of my knowledge, three-quarters of an hour. She spent ten minutes on the phone before she left."
> Question: "She claimed that she never had sex before this night?"
> Answer: "She had no sex on this night either."
> Question: "She says, and you both agree on that, that you would call her a taxi?" Answer: "I asked her twice did she want a taxi."
> Question: "She says that when she was leaving, that you called her back and you told her that you loved her, and this was around 5 am?"
> Answer: "Absolutely not, I didn't tell her I loved her."

Closing speech and consequences

12. Despite the absence of cross-examination by counsel for the accused of the complainant as to timings, much was in fact made in his closing speech to the jury on behalf of the accused, thus making what had not been an issue into an issue:

> Now … [Mr Greene prepared] the first key at 3.23 and then he went off about his business, and when he comes back to [the bar, the accused and young woman] are gone, and he cuts his next key at 3.34. Now, that would suggest very strongly, ladies and gentlemen that [the accused and young woman] were in the room by that time, by 3.34 or thereabouts. And the phone calls then that come down to Mr Greene to make phone calls, he says he made about 20 calls. But certainly, he certainly made many calls, and the last phone call is 5.41 am, the last phone call for a taxi. And he thinks he got two, at least maybe three calls from Mr Shaughnessy to get taxis. Now, this raises the question, this is the question: what was [the complainant] doing in that room all that time if she'd been attacked, because her own evidence was that after the attack she left almost immediately, but the only delay was to put her pants back on and her boots. And that as she's going out then, he's on the phone. But on one occasion, she says he's on the phone which is on the table in the corner. And then later she seemed to say that he was back sitting on the couch. But at that stage, she leaves, and this is just after the attack. But yet, the objective evidence suggests that she was in the room for a much longer period of time after the attack, because Mr Greene didn't see her until he had finished with the phone calls. So this is very, very difficult, I would suggest to you, ladies and gentlemen, this evidence is difficult to reconcile with [the complainant's] account of what happened. In fact, I would submit to you it's impossible to reconcile it. She can't be right in her description that they went into the room, a few minutes later things turn nasty, then the attack, and then she leaves. That's a very short period of time. She can't be in the room for as short a period of time as that if the records as to the phone calls and as to the cutting of the keys is correct. And there's no suggestion

> that that evidence is not correct. In my submission to you, ladies and gentlemen, those records, those electronic records are not lying, they are hard facts. They are the truth, the objectively establishable truth. And they do not accord -- they are completely out of harmony with [the complainant's] account of the event. These records cannot be correct if [the complainant] is telling the truth, the whole truth and nothing but the truth. And I would submit to you, ladies and gentlemen, that this is the problem, and this cannot be described as peripheral I would submit to you, on any reasonable view.

13. The emergence of a timing issue only in the closing speech for the accused, where questions at to time had been put in a vague way only to the young woman, led to a stern protest from the prosecution:

> … there's a misconstruing, if I might put it that way, of this Loughrea Hotel record, Which again was not put to Mr Greene. He refers to the entry on the 26/7 at 3.23, which is room 415, the presidential suite. And the evidence of Mr Greene was he gave Mr Shaughnessy that card in The Lir Bar and he went away about his business and he didn't see [him] again. Mr Giblin has then extrapolated from that, that by 3.34, which is when there's an entry saying "key assigned, reception" and I don't know what that means, that Mr Shaughnessy must have gone to the presidential suite by that time. There is no evidence of that. Any key that's issued is issued at reception. And there is no evidence, Mr Greene wasn't asked that, about, "When you came back at 3.34, was he gone?" And so there's an unfair extrapolation to try and convey the impression that they were in the presidential suite for longer than the evidence suggests. [The young woman] herself said she thought a half an hour. It's interesting that in Mr Shaughnessy's memo of interview, he says 45 minutes. If what [counsel for the defence] is now extrapolating from, it's over it's nearly two hours. So, it's a misconstruing of the evidence that's in the case in my submission, and I'd be asking the Court to put it right.

14. To that, counsel for the accused simply replies "if I went if I your lordship can correct anything I said." And the judge says "It's a matter for the jury, the times are a matter for the jury." For the prosecution to emphasise that "the fact of there's no evidence that Mr Greene would have known one way or the other whether they were still in The … Bar at the time" the submission was made that there was no evidence that immediately the key was prepared for the presidential suite, the accused and the young woman went up: "But there is a suggestion that they must have been gone by 3.43, because that's when Mr Greene was next at the key code on a key assigned, and there's no evidence of that. And it's misleading to suggest that they were in that presidential suite for longer than either of them has said." The young woman's evidence, however, appears to suggest that on getting the key, both went up in the elevator. But is that the way it was? A question could have resolved the matter. The matter was not explored because counsel for the accused made nothing of it and the prosecution did not, in consequence, explore the issue more than was necessary on the state of the evidence.

15. In his closing legal directions and summary of key facts, Sheehan J did not invite the jury to disregard the timescale emphasised for the first time in closing by counsel for the accused. Rather, the trial judge simply drew the jury's attention to his note of the evidence:

> And you'll recollect, Mr Foreman, I just might as well mention it here, that in the closing, one of the in the closing address yesterday, [counsel for the defence] may have invited to you consider a timeframe. And that while it may have been possible in terms of the interpretation of the evidence, it wouldn't be correct to say that the evidence established that particular time. In other words, you'll recollect that while Mr Greene cut the key for

> the presidential suite at 3.23 am, he gave it to Brian Shaughnessy in The … Bar, and he said -- told you that whenever he returned to the bar, they weren't there at the time. Then again, I suppose in all of this context, you have to remember about what I said about drawing inferences and what the law says about that in relation to interpretations of the evidence. … The key was cut at 3.23, Mr Greene -- I thought I told you in my summary, Mr Greene doesn't go back to the having given that to Mr Shaughnessy at that time, he doesn't go back to The … Bar, he said, till either 4 or 5, when there's nobody there. So that's – that's the evidence, the evidence on that.

16. Some six years after the conviction a notice of proposed amendment to the notice of appeal was lodged by the accused in which it was asserted that during the currency of the trial, before Sheehan J and a jury, he had said to his then lawyers: that the timescale in the presidential suite was of the order of two hours; that, instead and contrary to his instructions, a lesser time of 30 minutes or 45 minutes had been suggested; that this was wrong and that the wider 120 minute time scale would have raised a doubt as to the credibility of the young woman's testimony; in consequence that the cross-examination of the girl was not competent; as a result, the accused's legal representatives had not presented the case in a satisfactory manner; and the conviction was unsafe. Mr Greene had checked on the bar sometime around 04:00 or 05:00 hours and there was no one there, implying that the young woman and the accused had to be upstairs. On leaving the hotel, the young woman was seen by Mr Greene and was described as panicked or panicky. This was addressed by the trial judge as possibly, if the jury accepted the evidence and a negative inference from it, amounting to corroboration, albeit weak corroboration. The interpretation of that evidence, it was pointed out, was for them.

Summary

17. This has been an exhaustive trawl through the evidence. But this exercise has been necessary to re-establish focus. To summarise:

> a. The young woman was uncertain as to times and would not be held to 30 minutes upstairs in the presidential suite, but the attack was not long and the time spent in the presidential suite was not claimed to be extensive.
> b. The accused did not give evidence; but his answers to the gardaí indicate perhaps 45 minutes as to timing in the presidential suite and a claim that the complainant was relaxed, which she did not accept, and that she had sent texts, which she accepted she might have.
> c. The key was asked for by the accused in the bar and given to him in the bar where he was with the young woman and she with an unfinished drink.
> d. At some stage they went to the suite with the bottle of wine two glasses and the key, which was given to the accused in the bar. When that happened, how soon or not so soon after the key was prepared, no one explored.
> e. Nonetheless, the timing of the key was emphasised as if significant to the jury by counsel for the accused and was not specifically discounted by the trial judge save to point out the actual evidence. This emphasis on timings was not evident in the cross-examination, on behalf of the accused, of the young woman. Nor did the timing, or any possibly missing time, emerge in any questions put on behalf of the accused to any other witness.
> f. The cross-examination of the complainant has every appearance of merely testing credibility in relation to peripheral matters, though the essence of the account of the accused is put. Those peripheral matters touch on failing to complain to her mother, why she did not go to the gardaí when she told her friend the day after the attack, and what role the Rape Crisis Centre might have had in somehow preparing her for her court appearance.

Corroboration

18. There was an early complaint in this case; that very day. Evidence was given by the young woman and by her close friend not as corroboration, which it is not since it offends the rule against self-corroboration, but rather to reflect the consistency in her evidence. Consistency is demonstrated by showing that a complaint was made at an early stage and not in answer to suggestive questioning. See Ní Raffertaigh, *Doctrine of Fresh Complaint in Sexual Cases* [1994] 12 ILT 160. Consistency is not corroboration. Distress in the aftermath of a sexual encounter may be, as may marks on the body inconsistent with consent.

19. While the testimony was challenged by the accused from the point of view of opportunity for the observation of Mr Greene seeing the young woman and assessing her as panicked, and of his testimony that she left very hurriedly, that was the evidence. It was for the judge to rule if this could, as a matter of law, constitute some independent evidence from the complainant and be logically probative evidence connecting the accused with the commission of an action of sexual violence against her. The procedure for corroboration is set out in detail in this Court's decision in *The People (DPP) v FitzGerald* [2018] IESC 58. The prosecution, in the absence of the jury, identifies what items of evidence it contends independently tend to demonstrate the commission of the crime by the accused: the defence may make submissions; the judge rules which item or items could legally be corroboration; the defence and prosecution may argue this before the jury as to whether any item should be accepted as corroboration; and the trial judge points out the item or items and leaves to the jury the issue of whether these pieces of evidence tend to demonstrate independently of the account of the complainant that the accused committed the offence. Then, the jury is to analyse all of the evidence together and decide which they accept to be corroborative. How much weight to give to the corroboration, how much weight to afford the account to be corroborated, is a matter for the jury.

20. What can be corroboration depends on the building blocks of the case. That is the first consideration and a central one. Thus, being seen near the scene of a burglary may corroborate what an accomplice says as to the accused being a participant where the accused has denied being anywhere near the location. What tends to show that the accused committed a crime varies with the facts of each case but in each circumstance the test is: does this tend to demonstrate that the accused committed the crime? Secondly, there does not need to be proof in itself beyond reasonable doubt which is independent of the testimony to be corroborated the accomplice, the confession statement, or the person asserting lack of consent to sexual conduct. Simply it is evidence which tends to demonstrate commission of the crime by that accused in those factual circumstances. Thirdly, it is wrong to consider the evidence to be corroborated, or in respect of which a warning has been given as to the dangers of proceeding to conviction absent corroboration, on its own. That defeats the entire purpose of corroboration, which is to see if there is anything else whereby the evidence warned of, or legally requiring corroboration, is sound in the light of independent supporting evidence. Thus requiring the corroboration to prove the prosecution case on its own is wrong. Requiring that the jury be certain as to guilt on the complainant's evidence, or accomplices evidence, before considering the corroboration is wrong. Both should be looked at together and it is usually best to consider how strong the corroboration is or is it corroboration at all. The jury might start and ask, as in this case, has it been proven by an independent person that the girl was panicked and left suddenly? They might then ask what inference might be drawn from that, and then they might go on to consider her testimony and how it could support evidence of a non-consensual sexual attack.

21. Corroboration is a simple concept and the procedures for dealing with it have been time-honoured. All this is set out in *FitzGerald* and in Charleton & McDermott's *Criminal Law and*

Evidence (2nd edition, Bloomsbury Professional 2020) chapters 2 and 11. Corroboration is not to be made technical, as it is essentially a jury matter once it passes the judicial filter, though it helps to check the law since it is so often disputed or contrived as a ground of appeal. It has always been the law that where consent is in issue on a sexual violence charge, distress after the event can be corroboration, but it is not regarded as strong corroboration; *The People (DPP) v Mulvey* [1987] IR 502. This is precisely the definition given by the trial judge to the jury. Distress is a circumstance which may be due to simple regret but which may also relate to being the victim of sexual violence. The reason the authorities describe distress, panic, running away, as weak corroboration is because such circumstances could speak either way and it is for the jury to sort out their view in the light of all of the evidence which they accept. But, a circumstance can be corroboration. In *The People (DPP) v Gilligan* [2006] 1 IR 107, 142 Denham J on behalf of the Supreme Court ruled on the nature of a circumstance as corroboration thus:

> Circumstantial evidence may be corroborative evidence. Thus in *Attorney-General v O'Sullivan* [1930] IR 552, the court was of the opinion, having considered the evidence, that there was a body of circumstantial evidence of a material kind which supported the boy's story, including the commission of the offence, and which directly implicated the accused. Thus, corroboration may be obtained in a body of circumstantial evidence, more than one piece of circumstantial evidence, which has a cumulative effect and establishes corroboration. Not every piece of the independent circumstantial evidence may implicate an accused with the offence, but the collection of circumstantial evidence as a whole tends to implicate the accused.

Burden of a claim of incompetence

22. In our legally aided system, with a free choice of lawyers, it is always to be assumed unless the contrary is demonstrated that legal representation at trial is of at least a competent standard. In the Court of Appeal, the claim of incompetence on the part of the two barristers and the solicitors firm acting for the accused was adjudicated as if it were fresh evidence that was sought by the accused to be introduced. Hence the test from *The People (DPP) v O'Regan* [2007] 3 IR 805 as to fresh evidence being adduced on appeal when that evidence was available at the time of the trial was applied. That is incorrect. Reasonable diligence in seeking out evidence prior to a trial has nothing to do with the circumstance of an accused watching while, and this is the allegation here, during the trial his lawyer goes and makes a complete mess of putting forward his defence. *O'Regan* is not applicable. Instead, it must be explored what the applicable test should be. In addition to affidavits from the accused and from his former solicitor, the Court of Appeal allowed the accused's former representatives to be represented. This is not mentioned in the judgment or referred to in the written submissions and was only revealed late in oral argument before this court. While that approach was clearly done in aid of the protection of the right to a good name, it had the effect of turning a criminal appeal into a three-party hearing, two of whom were arguing against the accused. This approach has occurred in other cases and the Court of Appeal was diligent in following what seemed to be precedent. While mentioned in other cases, no legal justification for the practice of complicating a criminal appeal by also considering the good name of any legal representatives is offered in any decided case.

23. Article 38.1 of the Constitution provides: "No person shall be tried on any criminal charge save in due course of law." The idea of due process goes as far back as the Book of Daniel, is reiterated in the Magna Carta, *nisi per legale judicium parium suorum vel per legem terre*, as requiring there to be a law for deprivation of liberty and other rights, and finds expression in the 5th Amendment of the Constitution of the United States in a similarly broad way:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

24. In that document, the point was to ensure a limited form of due process which in England saw those charged with misdemeanour and treason represented but those charged with felony unrepresented at trial up to 1836; see Donahue – *Effective Assistance of Counsel on Appeal: Due Process Prevails in Evitts v Lucey* (1985) 35 de Paul Law Review; the reference by Kenny J in *Conroy v AG* [1965] IR 411, 415 to the Great Charter of Ireland of 1216; and *Kelly: The Irish Constitution* (5th edition, Bloomsbury Professional 2018) chapter 6.5. While the simple words in Article 38.1 guaranteeing a criminal trial in due course of law have generated a wide range of rights, at issue here is the entitlement on a serious criminal case of an accused to be represented; *State (Healy) v Donoghue* [1976] IR 325. There is an entitlement for an accused on a serious criminal charge to be legally represented at trial at State expense if that accused lacks means. Criminal litigation is a complex matter and expert assistance in defence acts as a necessary counterbalance to the investigative resources and prosecutor expertise of the State. An accused will generally depend on his or her legal representatives for advice and for general guidance as to what the trial involves and as to the choices for participation. Legal representatives will meet the accused beforehand and take factual instructions as to what contrary case he or she wishes to have put to relevant witnesses and as to what possible ramifications any factual scenario put forward may have on the building blocks of the prosecution case. The point of such a meeting is discussion as to what is important, what needs to be put to what witness, what the factual answer to a particular allegation is and what flaws might be perceived in the prosecution's construction of a case.

25. The accused's case may be one of consent or that he or she was not there or that someone else is criminally responsible. Requiring discussion prior to trial is also the legal nature of any defence that might arise due to duress, or self-defence, or provocation or mistake or infancy or mental infirmity. Criminal defences are technical legal constructs for which advice is needed. But even simple factual answers to a case, that the accused has an alibi or that the accused is being mistaken for someone else, require meetings and precise instructions. That is why Article 38.1 guarantees legal representation. In this case, Brian Shaughnessy was represented, by a solicitor, a barrister and by a senior barrister with a patent of precedence admitting him to the inner bar. There is no public defender element to our system: a solicitor is chosen by the accused from the panel of those certified to do legally aided cases and in a case of this seriousness, two barristers are funded. That level of representation necessarily imposes on an accused a serious burden of establishing incompetence in a legal team supplied, almost invariably, at State expense. Appearing in court is not easy, experience comes into play as does the inescapable ethic of only pursuing the case that the advocate is there to represent as the speaker for the accused in seeking justice. Criminal law and procedure have to be known as do the rules of evidence so that, fairly, such points as may be to the advantage of the accused are pleaded. But the skill of an advocate is recognisable but hardly definable. The English case of *Rondel v Worsley* [1961] 1 AC 191 on a principled recognition of the perils of pleading in court, suggested that advocates were immune from liability for negligence in court but not in preparatory or advisory work, a distinction confirmed by the decision in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.

26. In the United States of America, operating on a funded public defender system, legal representation on a criminal charge does not in itself satisfy the due process clause or the Sixth

Amendment right to assistance of counsel, since utter incompetence or, for example, being high on drugs or drunk on alcohol, may nullify the effect of such representation. The standard is that the accused must have the effective assistance of counsel; *Evitts v Lucey* (1985) 469 US 387. The leading analysis is that of the Supreme Court in *Strickland v Washington* 466 US 668 (1984). There an accused pleading guilty to murder was sentenced to death when psychiatric or other routine evaluations might reasonably have resulted in a reduction in seriousness leading only to a custodial sentence. O'Connor J posited this test where a claim of incompetence was argued to amount to a denial of due process:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
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> …
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> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).
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> …
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> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

27. Further, in the context of helpful comparative analysis, the Privy Council decisions suggest that leaving a capital case in the middle so that the accused was unrepresented for the rest of the trial, or failing to explain to an accused at consultation on another capital case that it was very hard to succeed on a plea of self-defence without the accused testifying, resulted in convictions being overturned; *Dunkley and Robinson v R* [1994] UKPC 32, *Sankar v State of Trinidad* [1994] UKPC 1. Earlier, the English courts had set a standard of "flagrant incompetence" to be demonstrated before a represented accused could have a conviction overturned by reason of poor representation, warning, in *R v Gautam,* The Times, (1987), quoted in *R v Ensor* 1 WLR 497, 502, that "it should clearly be understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for appeal." An ill-judged attempt at humour in closing a criminal case is not incompetence; *R v Ekaireb* [2015] EWCA Crim 1936. More recently, the emphasis has not been on a particular standard of failure, effectively requiring a catastrophic collapse, but rather whether in the context of whatever want of application or skill that is demonstrated on appeal the conviction remains safe and satisfactory; see *R v Clinton* [1993] 1 WLR 1181, 1188.

28. The standard text, *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2021) [7-83], outlines how English courts have approached questions of an unsafe conviction due to incompetent legal representation:

> The Court of Appeal has on occasion sought to prescribe particular tests to be applied in alleged incompetence cases. Thus, in *Donnelly* [1998] Crim.L.R. 131, it was said that nothing less than flagrant incompetence would do; in *Ullah* [2000] 1 Cr. App. R. 351, it was said that a proper and convenient approach is to apply the test of reasonableness in *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223; in *Bolivar*; *Lee* [2003] EWCA Crim 1167; (2003) 147 S.J. 538, it was said that not only must there be Wednesbury unreasonableness, but it must have been such as to affect the fairness of the trial; and in *Chatroodi* [2001] 3 Archbold News 3, it was said in relation to counsel's advice to the defendant not to give evidence, that the question was whether the advice given was within the acceptable exercise of counsel's judgment, and, if it was, whether it had been acted upon with a full understanding of the consequences. It should be noted that this was a case in which counsel had failed to heed the practice recommended by the court in *Bevan* (1994) 98 Cr. App. R. 354 (Appendix C-54).
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> This approach was, however, firmly rejected in *Day* [2003] EWCA Crim 1060; [2003] 6 Archbold News 1, CA, where it was said that the test is the single test of safety, and the court does not have to concern itself with any such intermediate questions; but in order to establish lack of safety in an incompetence case, the appellant has to show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe. See also *Clinton*, above, where it was said that since the sole issue is the safety of the conviction, a qualitative assessment of counsel's alleged ineptitude is going to be less helpful than an assessment of its effect on the verdict; *Teeluck v State of Trinidad and Tobago; John v Same* [2005] UKPC 14; [2005] 1 W.L.R. 2421, where it was held that the focus of the appellate court ought to be on the impact which counsel's errors had had on the trial and the verdict, rather than on attempting to rate his conduct according to some scale of ineptitude; *Campbell v The Queen* [2010] UKPC 26; [2011] 2 A.C. 79 (to similar effect); and *Ekaireb* [2015] EWCA Crim 1936; [2016] Crim.L.R. 291 (preferring *Day* to *Bolivar; Lee*). In Good [2016] EWCA Crim 1869 and *Ekaireb*, below, the court has confirmed that the focus will be on the safety of the conviction as made

> clear in *Day*, above. In *Davies* [2018] EWCA Crim 327, the conviction for robbery was safe where counsel had made a tactical decision with the defendant's agreement, not to apply to discharge the jury after the victims named a person relied on by the defendant in his alibi as an additional suspect. It was a decision that could reasonably have been made in the circumstances and was not incompetent.

29. Most usefully of the analyses coming from other jurisdictions, in Scotland, in *Anderson v HM Advocate* 1996 JC 29 the Senators proposed principles as to how claims of incompetent representation cases might be dealt with. These may be summarised thus:

> 1. Although it cannot be asserted as an absolute rule that the conduct of the defence by an accused's counsel or solicitor will not be a ground of appeal, the circumstances in which this will be permitted must be defined narrowly;
> 2. The conduct complained of can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. This, in turn, can only be said to have occurred where the conduct of the case was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence he wished to be presented, or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him;
> 3. The principle of finality demands that the right to a fair trial should not be viewed as involving a right to a re-trial simply because things at trial might have been done differently. It that were so, there would be no end to the process of putting an accused on trial for his offence;
> 4. While an accused has the right to have his defence presented to the court, his counsel or solicitor is not subject to direction by him as to how that defence is presented. In other words, although the representative must act according to his instructions as to what the defence is, the way in which he conducts the defence within those instructions is a matter for him. As a general rule, an accused is bound by the way in which the defence is conducted on his behalf.

Hindsight and reasonable competence

30. In this context, as the Scottish analysis practically demonstrates, it is necessary to remember that there are a wide range of decisions that might be made within the realm of competent advocacy, especially, or even in such simple circumstances as where a single witness alleges an offence and the accused has instructed his lawyers that the facts were both different and innocent in character. At a minimum, the accused's case in that regard must be put and it is for the trial judge to see that that is done and avoid a cross-examination conducted at large. A simple reminder to counsel from the judge of "what case are you putting to this witness" suffices. Factual issues relevant to a witness's testimony if contradicted by the instructions of the accused should be put as part of cross-examination. Counsel may regard it as correct also to challenge credibility on essentially peripheral matters or to emphasise the lateness of a complaint rather than asking detailed questions on the nature of the alleged offence. In other cases, attention may be focused on how a complaint came about or whether suggestion may have generated details. What is required on appeal is an overall analysis of the case on the entirety of the evidence. Since so many decisions may legitimately be made by counsel, identification of what is supposed to amount to be incompetence must be specifically identified in what is a wholly exceptional jurisdiction; *R v Clinton*. A standard must be set. Although *The People (DPP) v O'Shea* [1982] 384 was concerned with a trial judge out-ruling evidence, so that a jury in coming to a conclusion would consequently be acting

on only part of the evidence, the observations of O'Higgins CJ at 405 contain a statement of principle:

> It should be remembered that the Constitution is concerned with justice and, in the context of this case, with criminal trials being fairly conducted in due course of law. While these considerations provide safeguards for the person accused, they also guarantee to the State which accuses him, and which has a duty to detect and suppress crime, that he will be tried fairly and properly on the evidence adduced against him and in accordance with law. If, as a result of an error made by the trial judge, the jury is not permitted to consider the evidence or the charge brought against an accused or to pronounce on his guilt or innocence, can it be said that justice has been accorded to the State and to society? In my view, it cannot and, if this be so, a situation would exist which the Constitution prohibits.

31. In that context, counsel appear in a case to sift out what may be of importance in the prosecution and defence cases, to consult factually so as to have the instructions of the accused and to pursue that factual case with relevant witnesses. Hence, advocates appear in a criminal case in order to test the factual evidence adduced by prosecution witnesses and to challenge it with defence evidence if available or by relevant questions to relevant witnesses based on the instructions of the accused. Of course, a question is not evidence only the answer is; but a question may raise a doubt as to the reliability or veracity of what a witness is saying. Therefore, any evidential material, whether it comes from the client or the prosecution, must be assessed to see if it can damage the prosecution case or strengthen the defence case. If the accused has provided evidential material, including instructions in consultation, it will have to be considered and where necessary discussed with the client. Counsel has a wide area of professional judgment and may often come to a reasonable view that the accused is overestimating the significance of particular material or underestimating the prosecution evidence. However, if it would in fact help the case, and is not inconsistent with a strategy already embarked upon, counsel must ordinarily ensure that it is put before the court in an appropriate way. That includes the obligation to put it to the relevant prosecution witness. If this is not done, the accused may justifiably feel that his defence has not been put to the court.

32. Hindsight is a counsel of perfection and many barristers think that the best question is the one that came into their heads when the case was over; others consider that questions to which the answer is not known are dangerous and others seek counsels of perfection in minimum intervention. In many cases, experience will demonstrate that an acquittal is unlikely without the benefit of an accused's testimony to the jury while in others calling the accused may be adjudged dangerous. Whatever the approach, circumstances will differ and the range of decisions that might be made is ample. An accused who is advised to give evidence may be unwise to enter the witness box and one advised to not testify but rely on testing the prosecution case on the basis of his or her instructions is entitled, nonetheless, to give evidence. Once the matter is discussed, the decision is that of the client and not that of the lawyers advising. As O'Connor J said in *Strickland v Washington,* an analysis of the point claimed to be incompetence may be dismissed on an initial stage as one that could have made no difference to the outcome of the trial. Thus there is a wide margin of appreciation to be afforded to decisions made by an accused's advocate. There is a standard to be met: that of a reasonable advocate in a criminal trial. There is the burden which the accused must discharge: to show that the relevant conduct was misconduct outside the range of what any competent advocate would engage in; and that the defence of the accused was conducted with such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice. This standard is set in the judgment of Keane CJ in *The People (DPP) v McDonagh* (2001) 3 IR 411 at 425:

> It has already been noted that, when delivering the judgment of the court on the hearing of the second interlocutory application in this case, Murray. J said that the conduct of a trial, including steps taken preliminary to the trial by an accused's legal advisers could, in exceptional circumstances, give rise to a ground of appeal. That view is clearly consistent with the requirements of Article 38.1 of the Constitution that no person is to be tried on any criminal charge "save in due course of law." A criminal trial in which the defence of the accused was conducted with such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice, could not be regarded as a trial in "due course of law." That would apply as much to steps taken by the accused's legal advisers prior to the trial as it would to the conduct of the trial itself.
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> That is not to say, however, that what might properly be regarded as an error by the accused's legal advisers is, of itself, sufficient to justify the setting aside of the verdict and the ordering of a retrial. As was pointed out by Rougier J., giving the judgment of the English Court of Appeal in *R v Clinton* [1993] 1 W.L.R. 1181, 1188:-
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> "It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged inaptitude, but rather to seek to assess its effect on the trial and verdict."

33. In *The People (DPP) v Doherty* (Court of Criminal Appeal, unreported, 26 February 2009), Macken J added that on an appeal where incompetence is alleged to have resulted in a conviction, a court should sensibly look at the basis for the complaint made and its contended effect on the trial. An appeal should scrutinise whether the decisions made or the conduct complained of were proper and reasonable and were for the benefit of the accused person's defence and whether the conduct was open to criticism and that it might have had an adverse effect on the result of the trial.

Representation of original lawyers

34. A further question that arises is how such an appeal is to be conducted. Necessarily, to claim such incompetence as to deprive an accused of a trial in due course of law, he or she will have to point to some specific error that is identifiable and pivotal to the case or some defiance of instructions that was crucial to the outcome. This does not make an appellate hearing into a tripartite contest. A criminal appeal is not to morph into, or be confused with, a negligence action or a tribunal of enquiry in vindication of the right to good name of the lawyer targeted with an unpleasant allegation. The scope of the application of principles derived from *In re Haughey* [1971] IR 217 is very limited and is certainly not applicable to a contest between the prosecution and a particular accused as to the commission of an offence against the people, which is what a crime is, as well as being a wrong against a particular victim. Article 30.3 of the Constitution provides:

> All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose.

35. Nowhere does the Constitution contemplate that any party other than the prosecution and the defence should enter into criminal proceedings in contesting whether the prosecution have discharged the burden of proving the commission of a crime beyond reasonable doubt. Certainly, it will be upsetting for a lawyer to be accused of drunkenness during a trial or some specific incompetence, but the issue on appeal is the safety of a conviction. It is not the reputation of even

a respected and qualified person. Furthermore, the representation on appeal only of the prosecution and the defence has been central to the way that courts operate in not considering the interests of those who are not parties where the contest is as to liability or as to proof sufficient for a conviction. It may be obvious, for instance, from a jury's verdict, that the prosecution's forensic pathologist was not considered sound enough as a witness to base a conviction or, as in a sexual violence case, that there was a doubt about the truthfulness of the main prosecution witness. That does not give to anyone any right to turn the balanced process of a criminal trial or a criminal appeal into pitting the accused against two represented parties. A quote in that regard from Charleton J, in *Shatter v Guerin* [2019] IESC 9 is apposite:

> 30. If there is an analogy to be drawn in that regard, which proposes that *Haughey* rights should be confined to their original setting, if not otherwise inapplicable or properly modified by statute, it is with the court procedures. While in a court action, the plaintiff and defendant, or applicant and respondent, will define for each other the issues between them and each will have an opportunity to engage the other through cross-examination, or the exchange of affidavits with possible leave to cross-examine, and to make submissions before an independent court, this does not at all mean that in the necessary process of sifting through evidence with a view to reaching a judgement that every single person who appears in court and who may be criticised is entitled to those same *Haughey* rights. They are not. Witnesses, who are not the plaintiff and defendant, or applicant and respondent, regularly have their testimony rejected. They may be ordinary witnesses as to fact. Their evidence can be rejected. That happens without them having any right to represent their position beyond giving evidence. The only rule protecting them is the legal requirement on counsel for the other party to put any opposing case or relevant set of facts claimed by contrary witnesses to them so that they may comment; see *Browne v Dunn* (1893) 6 R 67 and *McDonagh v Sunday Newspapers* [2017] IESC 46. That rule applies also to expert witnesses, someone who may be commenting on an arcane discipline and apparently assisting the court through an opinion. In a medical negligence case, for example, an expert will be called as to, for instance, the kind of explanation as to risk appropriate to give to a patient before a particular operation or the correct method of treating an illness. It is commonplace in those situations, and in the everyday throughput of personal injury litigation, for experts to take different views based upon the same material. On occasions, a court may question whether the experts are really independent or whether they are witnesses to truth.
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> 31. A court is entitled to reject such a witness's testimony, even though that person is not represented. Judicial restraint, no doubt, will mean that in many judgments one witness's evidence will simply be preferred over the other. But sometimes it is necessary to actually say unpleasant things, such as that a person lied or that an expert witness lacked objectivity or skill or deceitfully adopted a point of view. That witness is unrepresented and his or her inability to exercise the defence of his or her reputation is a necessary and inevitable consequence of the trial process. Not everyone can be represented because the consequence would be for cases to become unmanageable. Damage to the reputation of a witness may thus be an inevitable consequence of the trial process. But, for the proper pursuit of justice that is unavoidable. The judicial arm of government would, otherwise, be rendered unworkable were aspects of rights derived from the 1971 *Haughey* decision to become universally applicable.

36. On appeal by an accused to the Court of Appeal, the issue is always the conduct of the trial and the application of the law. It is not whether some lawyer's reputation may be besmirched. To allow representation to those accused of incompetence is to potentially divert the course of the

appeal away from the case to be made by the accused and by the prosecution. Thus, the former solicitors for the accused should not have been represented before the Court of Appeal. They should not have been allowed to address the court and they should not have been anything other than witnesses. That would also be the case with counsel. On being required to give evidence, the first port of call is the limit of any waiver of legal professional privilege by the accused. Ordinarilly, what is alleged against them, if contradicted by what occurred privately, may be revealed. It is essential that all of the documents or attendances or notes relevant will be gathered and called in aid in any replying affidavit, or if it comes to it, evidence in court.

Correct procedure

37. The extent of former legal representatives' potential testimony is in issue when these are accused of incompetence or drunkenness or some other conduct or neglect. Hence, it is necessary to turn to the correct procedure and summarise the appropriate test on an application to overturn a conviction on the ground of incompetent representation. The Court of Appeal did not hear evidence concerning whether an instruction to question the young woman as to how long she was in the presidential suite and as to any detail as to what any such amount of time might have been spent on. Instead, on appeal the issue of incompetent representation was resolved by reference to surrounding circumstances. The Court of Appeal, in that regard, applied the four-part test in *O'Regan* in dismissing the application:

> 21. We make three observations at this point; firstly, the issue concerning the time spent in the presidential suite was not an issue which was dependent upon expert testimony or some intricate analysis, but, was something which was directly within the knowledge of the appellant from a very early stage. Indeed, he avers in his affidavit that having read the book of evidence, it became apparent to him that he had spent much longer than three quarters of an hour in the presidential suite. Therefore, this material was known to the appellant prior to trial.
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> 22. Secondly, as the appellant was present at his trial, he must have been alert to this issue and consequently aware of any deficit in the cross-examination for which he now contends at the time of trial. This aspect is, in this Court's view, central to the issue of the admissibility of this material on appeal.
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> 23. The third observation we make is that no appellant has an automatic right to further particularise or amplify a ground of appeal. The notice of appeal sets out the grounds of appeal and an appeal is ordinarily confined to those grounds. Whilst this Court may entertain new grounds or expanded grounds of appeal, this is only in limited circumstances.
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> 24. Insofar as the second observation is concerned, the appellant has sworn an affidavit on 28th November 2019 and lodged in the Court of Appeal in December 2019. The notice of motion seeking to particularise ground (2) of his grounds of appeal is dated 3rd December 2019. When we are assessing the credibility of the appellant's assertions on affidavits, we take into account the period of time between the original notice of grounds of appeal (16th October 2013) and the date of the notice of motion seeking to particularise ground (2) of the grounds dated the 3rd December 2019. Therefore, the period of some six years elapsed before the appellant sought to set out the actual alleged deficiencies on the part of his previous legal team.
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> 25. In that affidavit, he avers that he instructed his legal team in relation to the significance of the periods of time. He says:-

"I instructed my legal team in relation to the importance of the times in this case and that the complainant's version was unlikely to be true if it was the case that she had been in the room for a period in excess of two hours, during which time she had made calls and sent some texts and where the evidence was that I had made various attempts, over a period of more than half an hour, to organise a taxi to take her home." He further avers: – "My firm instructions to my legal team were that we got the key and a bottle of wine from WG and that we then went straight up to the room and, accordingly, where there was evidence that the complainant left approximately 5.00 or sometime after –this matter was central to my instruction and to the defence of the case. The documentation I provided was central to establishing my defence."

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

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

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

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

30. Significantly, the appellant avers as follows: –

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

31. The appellant continues as follows: –

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

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

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

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

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

35. Clearly, a conflict therefore arises on the affidavit sworn on appeal. Such conflict cannot be resolved by this Court on affidavit evidence alone. Mr Hartnett, SC on behalf of the appellant makes the point that this affidavit was not served on his solicitor and was only received on the morning of the hearing of this appeal.
36. However, we are satisfied that we can address the issue by virtue of an examination of the surrounding circumstances in order to test the veracity of the appellant's assertions.

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

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

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

1.The issue regarding the time the key card for the presidential suite was cut was not raised by counsel for the appellant in the initial cross-examination of WG, but WG was cross-examined on the cutting of the key card and the evidence established that the key was cut at 3.23am.
2. In cross-examination of the complainant, it was suggested to her that she was in the presidential suite for half an hour.

> 3. The issue regarding the contended time period of two hours is addressed in closing argument by counsel on behalf of the appellant.
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> 38. Rather than considering the reputation of the accused's lawyers, the application on appeal should have been resolved into a simple contest: the accused claimed to have instructed his lawyers that his original estimate of 45 minutes in the presidential suite was wrong; that he in fact left the bar immediately on getting the key and that two hours were spent in the suite upstairs; and that the accused's former lawyers claim that this was not his instruction. This was not an issue that could have been resolved by reference to the *O'Regan* principles for evidence not called at trial or not sought out prior to trial. This was something that happened during the trial. As the Court of Appeal, however, analysed what was the issue on appeal:
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> 41. It is clear that the appellant has failed to meet the requirement that the evidence he now seeks to rely upon was not known at the time of trial or could not reasonably have been known at trial.
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> 42. It is contended that there was a misstep or mishap on the part of the previous legal team. Insofar as an alleged failure on the part of a previous legal team is concerned, this Court will only intervene where there is a serious risk of a miscarriage of justice; that requires a consideration of the effect, if any, of the alleged failure on the part of the legal team on the outcome of the trial.

39. The appropriate test is not that set out in *The People (DPP) v O'Regan*, though part of those principles as to credibility can be helpful to a degree. Prior to trial, and at trial, it is for the accused to give instructions and, since he or she will have a solicitor, it is professional practice that any instruction of importance should be noted in an attendance. A trial takes place, save for extreme exceptions, in the presence of the accused and that physical appearance in the courtroom is partly so that ongoing instructions may be taken and noted. The public interest requires the conduct of trials with efficiency and dispatch. On appeal, a case of incompetence concerns what happened at trial and during consultations which are ordinarily, unless the privilege is waived, legally privileged.

Proper analysis

40. On the decisions herein analysed as to an application to overturn a conviction due to inadequate representation, the following principles emerge. Firstly, the accused seeking to make out any case of wrongful conviction by reason of incompetent representation bears the burden of proof. In a jurisdiction with an effectively free choice of legal representation from a legal aid panel of professional lawyers, that requires a heavy burden to be discharged. Mere assertion does not satisfy this requirement of proof and an accused will thus be obliged to present evidence to the appeal court. That evidence is not in the category of evidence at the trial or evidence that would have been presented at the trial had diligence been exercised. It is to be expected that an accused will fully state his or her case by way of a comprehensive affidavit and, while the decision is for the accused, any holding back of instructions, of attendances and of legal notes of consultations, on an assertion of legal professional privilege, may tend to undermine any such case made. Delay in making a case of incompetence may, depending on the reason, be a factor in considering how weighty the point or points made may be. The test for improper representation is that which so undermines the trial that it is no longer one in due course of law, as the Constitution at Article 38.1 requires. Any alleged misconduct or incompetence must, consequently, be of substance. The test cannot be: would a different approach have made a difference? If that were so, many trials would become suspect. And unnecessarily so since all trials have high and low points for both the

prosecution and defence, many better approaches or questions might be summoned up in more tranquil circumstances outside the forensic contest and, furthermore, it should be recalled that insignificant errors or wrong approaches tend to balance with their opposite. Nor can the test require the accused to prove his or her innocence or any test amounting to that which posits that but for the incompetence or misconduct they would not have been convicted. Instead, what is required to overturn a conviction on the incompetence or misconduct ground is for the accused to establish such a denial of the function of counsel that the trial ceases to be one in due course of law.

41. Secondly, while incompetence may not be fully appreciated during the currency of a trial, given that for an accused being on trial may be stressful and they most probably do not, understandably, have knowledge of criminal law rules, evidence and procedure, there must nonetheless be a credible and identifiable factor or factors pointed out in the initial affidavit evidence of the accused on appeal which demonstrates incompetence of counsel or some specific neglect of duty that undermined the ordinary effectiveness of representation. Either some specific incompetence should be explicitly stated or, in a case such as this one, a detailed and comprehensive affidavit is required as to what factual instruction was given which was disregarded and how crucial that is alleged to have been in relation to the building blocks of the prosecution and defence cases. An appellant must outline in detail what evidence there was of intoxication or other misconduct or incompetence or neglect, or how a definite and identified error led to a crucial turning point in the trial which was not to the accused's benefit and which may have been contrary to his factual instructions.

42. Thirdly, the aspect of the *O'Regan* principles in requiring that the evidence thus put forward be credible are generally applicable where an appellate court is required to hear testimony or to consider affidavit evidence. It is for the appellate court to assess the credibility of any such evidence. This should be done in the context of the evidence at the trial. Such matters as delay and any unjustifiable limitation on the ability of an appellate court to properly explore the accused's allegations in a meaningful way may here become relevant.

43. Fourthly, such evidence as may be accepted on appeal must relate to a decision that is claimed to have had a material and important influence on the result of the case. That assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation from the detailed run of the case and the building blocks of the prosecution and defence cases made. For completeness, it might also be mentioned that the arguing of law is a matter at the discretion of advocates at trial. While a case might possibly be made in that regard, a wanton disregard of what is both obvious and beneficial and for no good reason must be demonstrated. An appellate court should bear in mind that it is to be expected that lawyers may make a range of decisions as to fact and as to legal argument. Thus, the fundamental standard as to law and as to fact is that it is only such incompetence or neglect or misconduct as falls outside the ordinary standard of competence that could possibly invoke a jurisdiction to overturn a conviction based on a denial of a trial in due course of law.

Procedure

44. As to procedure, in the first instance, where a case of incompetence is put forward by a full affidavit by an accused on appeal, an appellate court should give an opportunity in the ordinary way to the prosecution to seek to counter the accused's affidavit. Waiver of privilege has not been argued on this appeal and nor has any application of the principle of implied waiver. The prosecution may clarify the extent to which the accused has waived privilege, which is a matter for the accused since that privilege inures solely for a client's benefit, not that of his or her lawyers, or

any claims the accused may make to adhere to the client's right not to have confidential discussions as to legal advice disclosed. That may be done by an exchange of letters. It follows as a matter of good sense, however, that where the accused has dismissed his legal representatives at trial and alleges a contrary instruction or incompetence or intoxication, that it necessarily follows that the prosecution may answer that case through his former solicitors and counsel being contacted by the prosecution and thereby making whatever case is required to specifically refute that allegation. It is for the prosecution, however, not the accused's former lawyers, to present any such answer on the appeal.

45. In this regard, an affidavit may be sworn by the former instructing solicitor and any necessary attendances exhibited or notes of counsel or draft witness statements should the accused at trial have considered testifying, but only such as are relevant to the allegation of incompetence made. Here, caution must be exercised so that the identity of third parties, perhaps accomplices to crime or those alleged by the accused to be such, or those who might be endangered by identification, should be excised. Normally this would not be a problem. Should there be a dispute as to privilege or the extent of waiver thereof, any issue, in the ordinary way, can be brought to the court's attention, as in a discovery and privilege claim in a civil case, and dealt with by the court considering a document and ruling. There must be a proper trawl for documents and this must be put on affidavit. It is insufficient, as on this appeal, for assertions to be made that no attendances or notes appeared on the former solicitor's file. There must be a search and the results of that search must be verified by affidavit and be subject to checking.

46. The next procedural step is for the appellate court to consider the material by way of affidavit and exhibits on each side and to hear submissions on the contest as joined. The primary test is whether a sufficient case of such incompetence as would render the trial one that was not in due course of law has been demonstrated by the accused. This has to go beyond the ordinary choices that are made in the course of a criminal trial and the kind of decisions that hindsight might have wished were made otherwise. For instance, if an allegation is made that a particular witness was not called, and that witness is minimal significance, there is no necessity for an appellate court to proceed further. Similarly, a question to a witness may be unwise or mistaken but that is part of the ordinary run of a criminal case. On the case made by the accused, the appellate court will consider was there reasonably effective legal assistance at the trial or was there a particular factor which potentially demonstrates a falling below the objective standard of representation so as to render it so ineffective or counterproductive as to amount to the denial to the accused of a trial in due course of law. That must be considered by removing the distortion of hindsight and should be analysed in the light of a standard which requires only reasonable professional conduct.

47. If there is a genuine point of contest, for instance, that the accused instructed his lawyers at trial that a particular fact was crucial to his or her defence and that such instruction was ignored, or that a point should ordinarily and reasonably have been realised and discussed with the accused, and the lawyers say that no such instruction was given or that for good reason the accused was advised against emphasising a point and concurred in the advice, this is a clash of primary evidence. That can only be resolved by oral evidence. No appellate court should proceed to hear oral evidence, however, unless the accused first passes the standard of demonstrating that the error or incapacity or ignoring of a factual instruction met the objective standard of incompetence. If it does not, oral evidence or any contest by cross-examination is not needed. If a primary case is made out, the issue on which oral evidence is needed must be properly defined and any examination confined to that point and not allowed to meld into a general and unfocused traverse of the inevitable peaks and troughs of a trial. On hearing any relevant testimony, the trial court should first decide if a credible case is made out. If such is demonstrated as a matter of fact, the

appellate court will then decide if there was in consequence of what is found as a fact an absence of proper representation.

48. That wrong of incompetent representation on a key element in the case having been identified by credible evidence, the conviction should only be overturned if that conduct or neglect was such as to have been demonstrated as reasonably to have so affected negatively the outcome of the trial having regard to the totality of the evidence before the jury or, in the case of the Special Criminal Court, the panel of judges, so as to the trial as not being in due course of law. This analysis requires a summary.

Summary

49. The accused who alleges incompetence of representation at trial denying him or her a trial in due course of law bears a heavy burden of proof. To reiterate: in our legally aided system, with a free choice of lawyers, it is to be assumed that legal representation at trial is of at least a competent standard. That is what is expected; and a contrary case must be demonstrated by the accused. At a preliminary level, such an allegation must raise a serious issue. What is concerned must be more than a hindsight reanalysis of how perfection of approach might have improved on competence. Criminal trials are full of ups and downs. A point must be identified which potentially demonstrates how a trial went wrong because of some serious want of competence. To use the words of Keane CJ *The People (DPP) v McDonagh* (2001) 3 IR 411 at 425, the papers lodged must demonstrate at least the potential for demonstrating "such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice". There is no necessity to proceed further than a consideration of whatever papers are lodged if it is clear that no realistic case has been made out by an accused that there was incompetence of this level. On analysis by an appellate court, if there is no such realistic case, the application should go no further.

50. If the potential for such a high level of incompetence is initially found to be present, any evidence on which it is based should be analysed as to whether that evidence is believable. There must be credible evidence. That credible evidence may be assessed in the light of such factors as the degree of delay in making the case, the detail with which a claim is made and the extent of any necessary disclosure that ordinarily would be expected. Where there is a contest as to, for instance, drunkenness in court or not, or any claimed failure to pursue an important and central factual instruction with relevant witnesses, and that is explained by the accused's former lawyers or is denied, it will be for the appellate court to consider whether, on ordinary principles, evidence should be heard, in the ordinary way, to resolve a primary clash as to fact. That evidence must be assessed as to credibility. If no credible case is made out whereby a factual scenario potentially amounting to incompetence is actually made out on the evidence, the application should go no further.

51. If a credible case is made out, an appellate court should analyse in the light of the evidence at the trial whether the appellant has made out a sufficient case whereby it may realistically be ruled that the level of incompetence was such that thereby the accused was denied a trial in due course of law. If not, the conviction stands.

The contest here

52. Having been convicted in March 2013, Brian Shaughnessy changed his solicitors and the new firm put in a notice of appeal dated 10 October 2013 asserting that "his previous legal representatives failed in numerous material aspects, to adequately or properly prepare and conduct his defence". That notice of appeal continues that on review by the new lawyers, this will be further

particularised. If the point was that the complainant was in the presidential suite for two hours but his instructions in that regard were ignored, that could perhaps have been then stated. To the holding notice of appeal, if it might be properly so called, by motion of 3 December 2019, two grounds were sought to be added: that Mr Greene's evidence was incapable of amounting to corroboration; and that the accused's "defence was not presented in a satisfactory manner during the course of his trial having regard to material and instructions provided" by him "prior to and during the course of the trial." His accompanying affidavit is dated 28 November 2019. That affidavit claimed that Brian Shaughnessy had instructed his legal team as to the alleged importance of times and that this had been ignored. He claims that he had, pre-trial, met his legal team and told them the time the key was validated for entry to the presidential suite. He said that, at trial, his then senior barrister had put it to the young woman in cross-examination "that she had been in the room for half an hour and failed to put the issue of the two-hour period to her." Nor was this issue of two hours raised with any other witness, he asserts. Mr Greene, however, in cross-examination had indicated the time the key was validated but, it is claimed, too little was made of this. He claims to have protested to the senior barrister that this was important but was ignored. Implicit is that the complainant should have been cross-examined on the two-hour timeframe in the presidential suite and not on the basis of the accused's own statement to gardaí putting the timeframe at 45 minutes approximately. At no stage in the affidavit does the accused say that he and the young woman had been in the presidential suite for two hours and nor is any account given by him as to how that time was spent. Implicit in his assertion is that immediately on receiving the key, he and the young woman went up to the suite, but how the timeframe supposedly unfolded is left unspoken. On the appeal to this Court, any apparent shortcomings in the evidence for the accused were sought to be supplemented by instructions on the spot. That does not suffice. All the material evidence must be laid before the court. Furthermore, it was asserted on appeal that all attendances taken from the accused were no longer on the file of his current solicitor. What happened to these documents and what is now available must be explored.

53. This affidavit of Brian Shaughnessy was replied to by his then solicitors in an affidavit of 26 February 2020. This affidavit was made, it is asserted, "without sight of the original file". Where is that file? The trial solicitors claimed to have no original instructions sheet or set of attendances as to the accused's account. The original solicitor said all "reasonable and necessary steps" had been taken in defence of the accused. The statement to the gardaí of the accused said there had been talk in the presidential suite about the accused's marital difficulties, that he had bought the young woman several alcoholic drinks in the bar downstairs, and that this private matter was what was to be further discussed in the upstairs accommodation. The relevant timeframe was of a key being prepared, that being given to the accused in the bar and of Mr Greene being unaware as to when the young woman and the accused left the bar. When they went to the presidential suite, the instructions of Brian Shaughnessy stated that there was kissing or shifting, touching and the young woman went after him in a sexual way, that he did nothing more than cuddle. In the next few days, the complainant had resigned any employment in the hotel and had not ever again spoken to the accused. The prosecution did not make the case, the affidavit states, that the rape had occurred at a particular time, or between any two definite points in time. The jury had evidence of the texts, on the defence case sent after the alleged rape by the young woman but nothing to do with that, and of the taxi requests and times was central. The solicitor said that the accused was "very engaged in the case and the meetings we had were very lengthy and detailed." The accused, he claimed, expressed during the trial how well matters were going. There is no detail as to what information was available beyond recollection, and that several years later, the solicitor had to consult with counsel "and thrall (sic) through my computer records to enable" the preparation of that affidavit of 26 February 2020 answering that of the accused.

54. There was delay in crystallising the time point. In the affidavits of the accused there is no explanation of why he or the young woman were in the presidential suite, and if the key was given to him immediately upon it being prepared, if they went up to the room immediately, she not apparently having finished her drink, and how the time was spent in the presidential suite. Brian Shaughnessy's delay in raising the time point may or may not be a factor contributing to either a lack of relevant papers being disclosed or as to what were the actual instructions and as to whether these were ignored and were central to his case. No comment is made on any of this. As this case was set out, however, it is manifestly not possible to decide whether or not counsel for the defence was actually incompetent without more evidence pertaining to the instructions actually given or what the accused's version of events entails. This is a genuine contest and thus requires that an appellate court should hear oral evidence focused on this point.

Result

55. A serious matter has been raised as to whether there was an issue as to times and whether there was a failure to follow the accused's instructions. That serious issue having been raised, the next issue is whether it is supported by credible evidence. A contest of a stark nature has been joined on this. No appellate court could assess that issue of whether there was any failure to follow a central factual instruction without hearing oral evidence. On the resolution of the credibility of that oral evidence for the prosecution and the defence, the next issue is whether on whatever evidence, if any, an appellate court finds to be credible, a case has been made out by the accused that there has been that degree of incompetence of representation as to amount to a denial of the right of an accused to a trial in due course of law under Article 38.1 of the Constitution.

56. This case is far off that resolution. What is apparent, however, is that an issue has been raised by the accused as to which there is a factual contest. If, and this cannot be resolved by this Court, the accused had instructed his lawyers that he and the complainant had left the bar immediately upon the key being prepared, and that, in consequence, he and the young woman had spent two hours in the presidential suite, and that the time in the presidential suite had been spent in a particular manner, under the rule in *Browne v Dunn* (1893) 6 R 67, HL approved in *McDonagh v Sunday Newspapers Ltd* [2018] 2 IR 1 and the subject of useful guidelines in *The People (DPP) v Burke* [2014] IEHC 483, that would ordinarily have had to have been put to the complainant. This does not require either a parroted repetition of the instructions of the accused or that the accused formulate questions to be asked, but it does require that the essential factors in defence that a witness contradicts be put to that witness. As to the time point, it was not put to Mr Greene that the key was delivered immediately upon it being prepared, nor that the accused and the young woman left the bar immediately and spent two hours in the presidential suite. As to what this may or may not indicate, or as to what the former solicitors for the accused's notes and attendances may demonstrate, if found, is not a matter for comment.

57. There is a stark clash of accounts that is not capable of being resolved on the current papers. Evidence from the accused needs to be tested as to credibility on hearing oral testimony. As to whether any contrary instruction or different factual scenario was put to his former lawyers, requires their evidence as led by the prosecution. Such attendances and notes as are directly relevant, and in respect of which privilege is impliedly waived, subject to issues as to third parties as set out above, should be part of the prosecution reply. Further searches should be made.

58. Thus the matter should be returned to the Court of Appeal, the applicable test having here been set out. A potential issue has emerged, as to which this Court is not in a position to judge and can make no comment. This hinges on the credibility of any evidence of the accused and the resolution of any factual matter in reply on oral evidence by both sides. Depending on the

resolution of that factual contest, it may be necessary for the Court of Appeal to consider was there such a failure of competence in representation as to deny the accused a trial in due course of law.