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THE COURT OF APPEAL

Record No: 161/2019
Neutral Citation No: [2022] IECA 136

Edwards J.
McCarthy J.
Kennedy J.

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

M. A. (No 2)

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 21st of June 2022.

Introduction

1. On the 13th of May 2019, the appellant came before the Circuit Criminal Court charged with one count of rape contrary to section 48 of the Offences Against the Person Act

1861, and section 2 of the Criminal Law (Rape) Act 1981; and one count of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990. Both counts were alleged to have occurred on the 29th of October 2015, at Dollymount Beach, Clontarf, Dublin. The appellant pleaded not guilty to all charges.

2. On the 24th of May 2019, following a deliberation period of seven hours and three minutes, the jury returned an 11-1 verdict of guilty in respect of the count of rape, and a 'disagreement' in respect of the count of sexual assault. The DPP subsequently entered a *nolle prosequi* in respect of the sexual assault charge.

3. On the 11th of July 2019, the appellant was sentenced to 8 years' imprisonment, the final 18 months of which were suspended conditionally.

4. The appellant appealed against his said conviction on the basis that: -

(i) The trial judge erred in law in her rulings and/or in her directions.

(ii) Without prejudice to the generality of the foregoing, the trial judge permitted evidence which should not have been permitted, in particular evidence of recent complaint.

(iii) The verdict of the jury was contrary to the weight of the evidence and was perverse.

5. The Notice of Appeal also contained a fourth ground of appeal which complained that:

(iv) The sentence imposed was excessive in all the circumstances.

6. As frequently occurs in cases where both conviction and sentence are appealed against, the Court determined that it would hear only the appeal against conviction in the first instance. If that appeal were to be successful on any of the grounds relied upon then the appeal against sentence would simply fall away. However, and conversely, if the conviction

was upheld, the appeal against sentence could, and would, be addressed later at a separate hearing.

7. The conviction appeal was heard before this Court on the 16th of July 2020 following which judgment was reserved. The Court issued its judgment on the 22nd of December 2020 and dismissed the appeal against conviction on all three grounds. See the judgment in *The People (Director of Public Prosecutions) v M.A.* [2020] IECA 367.

8. Following delivery of this Court's said judgment in respect of the appellant's appeal against his conviction, the concurrent appeal against the severity of the appellant's sentence remained extant and in due course that sentence appeal was listed for hearing on the 15th of October 2021. In the meantime, however, the appellant had changed legal teams and a different solicitor and a different counsel, from those who had represented him previously were then instructed to act on his behalf.

9. By a Notice of Motion dated the 19th of July 2021 the appellant, represented by his new legal team, now seeks (in effect) to re-open the appeal against the appellant's conviction. The Notice of Motion seeks:

> *"an Order amending the Grounds of Appeal herein to include the following ground:*
>
> > *'Having regard to the issues highlighted by the defence regarding the reliability of the second "recent complaint" witness that the prosecution proposed to call, the learned trial Judge erred in refusing to hold a voir dire in relation to that evidence before ruling it inadmissible'."*

10. Leading counsel for the appellant, Barry McGrory Q.C. has sought to emphasise that while it is an attempt to reopen the appeal against conviction, it is not an attempt to re-open or re-litigate a ground or grounds of appeal that have already been rejected, but rather that the leave of the court is being sought to argue a further ground that was not argued at the hearing on the 16th of July 2020.

11. In response to this motion, we indicated that we wished to be addressed as to whether it was open to this Court, in any circumstances at all and, if so, in the circumstances of the case, to permit an additional ground of appeal against conviction to be canvassed after the court had already given judgment upholding the conviction and rejecting the complaints made in the Notice of Appeal in respect of it (in circumstances where there was no suggestion that some new or newly discovered fact had since come to light). We invited the parties to file submissions addressing these issues. We indicated that we would hear oral arguments concerning them on the 16th of November 2021, and to facilitate this the Court would further adjourn the outstanding sentence appeal to a later date (to be fixed in due course).

12. Accordingly, this judgment is in respect of the issues arising on the appellant's said motion dated the 19th of July 2021.

Evidence in support of the motion

13. The motion was grounded upon an affidavit of Mr James MacGuill, solicitor, sworn on the 19th of July 2021. In paragraphs 4 to 7 inclusive Mr MacGuill makes the following averments (with appropriate anonymising redactions by this Court):

> 4. *By way of a brief synopsis of the argument to be made if leave is granted, I say that the second 'recent complaint' witness was Garda [K.G.]. She was called by the prosecution on the premise that the complaint made to Garda [K.G.] was part of the same continuum as the complaint that the complainant made to her friend [S] immediately after the incident. The value of Garda [K.G.]'s evidence to the prosecution would be that the complainant did not tell [S] that the Appellant had performed oral sex upon her, but Garda [K.G.] would say that the complainant did make that complaint to her during their first meeting. The reliability of Garda [K.G.]'s evidence was called into question by the defence on the basis that Garda [K.G.] made only the most perfunctory note*

in her Garda notebook regarding her meeting with the complainant on 29th October 2015; she then attended the Sexual Assault Treatment Unit with the complainant and was present when the complainant told a nurse that oral sex had not occurred; and she (Garda [K.G.]) did not make a detailed statement setting out what the complainant told her during that first meeting until at least ten months later. The defence requested the trial judge to hold a voir dire to test the reliability of Garda K.G.'s evidence in this regard before ruling her 'complaint' evidence admissible, but the trial judge declined.

5. *The background to this enlargement application is as follows. In or around March 2021, after his conviction appeal had been dismissed, the Appellant contacted me and I subsequently came on record for him and sought to recover his file from his previous solicitors, which took a considerable period of time. Thereafter, upon reviewing the materials of relevance to the appeal and upon consulting with counsel, I became concerned that a significant procedural flaw in the trial process had not yet been considered by this Honourable Court. I say and believe that the trial judge's refusal to hold a voir dire represents an important procedural defect in the trial process, and that it has consequences of such gravity as to call into question the overall fairness of the trial and, by extension, the conviction.*

6. *Supplementary written submissions addressing this issue are being settled at present and will be ready to file by 30th July 2021 – the date previously envisaged for the filing of supplementary submissions on severity. I say and believe that the issue is net and, if granted leave, lengthy oral argument will not be required. I say and believe that the*

Respondent will have ample time to prepare relying submissions, if desired, in advance of the resumed hearing on 15th October 2021.

7. *I acknowledge that the proposed supplementary ground of appeal could have been pleaded and argued by the Appellant's previous legal team. I am unaware of why that did not occur. However, the Respondent has received a very substantial prison sentence. He has lost his reputation and his livelihood, and his relationship with his children has been severely affected. If his conviction is not overturned, he will remain subject to the requirements of the Sex Offenders Act 2001 for the rest of his life. I say and believe that, having regard to the devastating and lifelong impact of the impugned conviction on his liberty, livelihood and reputation, it is in the interests of justice for him to be given an opportunity to ventilate this issue before this Honourable Court.*

Submissions on behalf of the Appellant

14. In both his written legal submissions concerning the issues arising on this motion, and in oral submissions, counsel for the appellant has acknowledged that there is a strong public interest in the finality of litigation, including criminal litigation. It was however, submitted that, if the justice of the case so requires, the Court has jurisdiction to enlarge the grounds of an appeal at any time up to the final determination of the appeal. It was submitted that the appeal would not be finally determined until the Court had ruled on all aspects of the appeal, including the appeal against sentence. It was submitted that the powers of the Court in this regard are not in any way limited by statute; on the contrary, s. 12(1) of the Courts (Supplementary Provisions) Act 1961 stated that *"[t]he Court of Criminal Appeal shall […] have full power to determine any questions necessary to be determined for the purpose of doing justice in the case before it"* (emphasis added). Similarly, it is provided in s. 30 of the

Courts of Justice Act 1924 that *"The Court of Criminal Appeal shall […] have full power to determine any questions necessary to be determined for the purpose of doing justice in the case before it*."

15. Those powers were, of course, vested in the Court of Appeal upon the coming into force of the Court of Appeal Act 2014.

16. It was further submitted that the general rules with regard to the filing of pleadings before the Court are set out in Order 86C, rules 3, 4 and 5 of the Rules of the Superior Courts ("RSC"). It is clear from those rules that a notice of appeal is to be lodged within 28 days from the date of the determination appealed against. Order 86C, r. 3(1) RSC further provides:

> "*[…] An appeal against a conviction may be argued only on grounds which have been set out in the notice, save where the Court of Appeal, on application made to it not less than 14 days before the date fixed for the hearing of the appeal, directs the addition of grounds of appeal*."

17. It was submitted that this Court has recognised in *The People (Director of Public Prosecutions) v. Walsh* [2017] IECA 111 (at para. 76) that although these rules represent the law of the land and that there is a general expectation that they should be complied with, "*the interests of justice are not ultimately to be sacrificed on the altar of rules of court, and that in an appropriate case flexibility may be shown in respect of non-compliance with the rules where not to do so might create a real risk of injustice*." Furthermore, the Court went on to hold (at para 77) that:

> *"[…] it has always been recognised that non-compliance with the rules is not always malign and that benign non-compliance can sometimes occur for different reasons, be it genuine error, inadvertence, misinformation, oversight or for some other understandable reason. Accordingly, the rules themselves have always had built into*

them the facility for an appeal court to be flexible in its approach and to forgive non-compliance with the rules where it appears just and equitable that it should do so."

18. It was submitted that it is apparent from the *Walsh* judgment that the provisions of O. 86C, r. 3(1) RSC are not absolute. The time limit is subject to enlargement pursuant to O. 86, r. 3(2) RSC, which is of general applicability. The relevant parts of O. 86, r. 3 RSC provide:-

(1) "The Court of Appeal may at any time and from time to time:

(i) […]

(ii) on the application of a party by motion on notice to the other party or parties,

give such directions and make such orders for the conduct of proceedings before the Court of Appeal, as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.

(2) Without prejudice to the generality of sub-rule (1), the Court of Appeal may give directions and make orders:

(a) […]

(b) extending or shortening any time limit set by these Rules (unless to do so would be contrary to any provision of statute).

(3) An application for an extension of time may be made after the time limit has expired."

19. The appellant maintains that the provisions of O. 86C, r. 3(1) RSC must also be read together with O. 86, r. 10 RSC, which is also of general applicability. It provides:

"(1) A notice of appeal, or any other document used in an appeal to the Court of Appeal, may be amended at any time on such terms as the Court of Appeal thinks fit.

(2) An application for leave to amend shall be made by motion on notice to the other parties who would be affected by the amendment."

20. Our attention was also drawn to the wide discretion afforded to the Court by O. 86, r. 11(3) RSC, which provides:

"*[…] non-compliance on the part of an appellant or applicant with the rules of this Order or, as the case may be, of Orders 86A, 86B, 86C, 86D and/or 87, or with any rule of practice for the time being in force, does not prevent the further prosecution of the appeal or application unless the Court of Appeal so directs, but the appeal or application may be dealt with in such manner and on such terms as the Court of Appeal thinks fit*."

21. It was submitted that there is no indication in the Rules of the Superior Courts but that the Court's overarching powers under O.86 apply up to the point when an appeal is finally determined. In the appellant's contention, this occurs in criminal appeals when notice of the order is given to the various parties by the Registrar in accordance with O. 86C, r. 20 RSC. Since the fourth of the appellant's original grounds of appeal (re: severity) has not yet been heard or determined, this has not yet occurred in the present case.

22. We were further referred (*inter alia*) to the cases of *The People (Director of Public Prosecutions) v. Kelly* [1982] I.R. 90; to further passages from the *Walsh* case already referenced; to *The People (Director of Public Prosecutions) v. Redmond* (Unreported, Court of Criminal Appeal, 21st December 2000); *The People (Director of Public Prosecutions) v. Cronin (No2)* [2006] 4 I.R. 329; *The People (Director of Public Prosecutions) v. Synnott* [2016] IECA 270; *The People (Director of Public Prosecutions) v. Noonan* [1998] 2 I.R. 439 and *The People (Director of Public Prosecutions) v. Sweetman* (Unreported, Court of Criminal Appeal, 23rd October 2000), and we have had regard to the judgments in each of them.

23. The case of *Kelly* was concerned with the jurisdiction to extend the time to file a Notice of Appeal. We were referred specifically to the following passage from the judgment of Gannon J. in the Court of Criminal Appeal, where he said:

> "*By its rules the Court seeks to regulate the orderly conduct of its work in a manner consistent with the interests of justice. Bearing in mind that the rules are a representation to all who may be concerned that the work of the Court will be regulated in the manner declared in the rules, the binding effect of the rules remains in the discretion of the Court. In reference to the matter of enlargement of times prescribed by the rules, there are illustrations to be found in reported cases of the nature of the circumstances to which the Court will have regard in the exercise of its judicial discretion. The maxim interest reipublicae ut sit finis litium* [which translates as, 'it is in the public interest that there should be an end to litigation' – see Hilary Delany and Declan McGrath *'Civil Procedure in the Superior Courts'*, 3rd edn (Round Hall: Dublin) , at 32-02; alternatively as, 'it is in the interests of the state that there should be an end to litigation' – see John Gray, *'Lawyer's Latin, A Vade Mecum'*, 2006 edn (Robert Hale: London)] *has a validity in relation to criminal matters, but the considerations are different from those in civil matters. On the civil side, the successful party has obtained a right which should not be taken away lightly. In criminal matters, an application for leave to appeal should be approached not as if there were an issue inter partes to be considered but upon the basis of the public interest in justice in criminal matters. The basic principles would seem to be that no person should be unjustly convicted and that it is in the public interest that crime should not go unpunished."*
>
> [Commentary in square brackets added by the Court of Appeal]

24. The appellant submits that in the Supreme Court, O'Higgins C.J. (with whom Walsh and Hederman JJ. concurred) noted these findings with apparent approval at pp. 105-106, but went on to find that the test applied thereafter by the Court of Criminal Appeal was formulated in error. He held as follows, at p. 104-105, referring to O. 86, r. 8 RSC, as it was then drafted: -

> *"It is clear that under this rule an enlargement may be applied for either before or after the expiration of the appropriate time limit and that, in considering whether to exercise the power, the Court of Criminal Appeal is to be guided by what is required by the justice of the case. This indicates a flexibility in the exercise of the power of enlargement which is unrestricted and unhampered by any consideration other than that which is required by the justice of the particular case in which the application for enlargement is made."*

25. It is contended by the appellant that, although O. 86, r.8 RSC - as it applied at the time of the *Kelly* case - was drafted somewhat differently, it remains necessary for the Court to have regard to the justice of the case under O. 86, r.3 RSC as it currently applies: the Court must consider what appears to be *"convenient for the determination of the proceedings in a manner which is <u>just</u>, expeditious and likely to minimise the costs of those proceedings."*

(Emphasis added)

26. O'Higgins C.J. had gone on to say in *Kelly,* at p. 105*:* -

> *"That the present Court of Criminal Appeal is intended to exercise its powers with considerable flexibility is also made clear, in my view, by the present rule which deals with non-compliance."*

27. There, counsel for the appellant suggests, he was referring to O. 86, r. 40 RSC as it then applied, which is essentially the same as O.86, r. 11(3) as it presently applies.

28. It was submitted that having found that the tests applicable in civil cases are inappropriate in a criminal case, O'Higgins C.J. went on at p. 107 to hold that *"the court's approach must be flexible and its discretion guided not by any general test or criterion but by what appears to be just and equitable on the particular facts of the case in question".* He continued thus at pp. 107-108:

> *"In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of the appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the 'justice of the case may require'."*

29. It was submitted that while Henchy J. (with whom Kenny J. concurred) had issued a judgment which concurred on the result, but by a somewhat different route; he resisted the formulation of any narrow or rigid set of criteria for assessing when time should be extended and held that "*there should be presented to the Court for consideration all the relevant circumstances of the particular case. Otherwise, injustice might result by worthy extensions of time being disallowed or by unmeritorious extensions being allowed*" (p. 112).

30. It was accepted that both this Court and its predecessor have consistently reiterated that appellants are expected to bring forward all of their grounds of appeal in their Notice of Appeal, and that in so far as there is a jurisdiction to depart from that, it will not be exercised lightly. In so far as the rationale for that is concerned, the *Redmond* case is relied upon for the passage (at para 42) in the judgment of Hardiman J. in which he observed:

> *"An Appellant, whether the original prosecutor or original Defendant, is not necessarily confined to his written grounds and may be allowed to argue a point which occurs to him later. However, we would repeat an observation often made by this Court, and indeed by counsel for the Director of Public Prosecutions, in Defendants' appeals. This is that one would expect any statement by a trial judge which is erroneous and clearly significant to strike a party or his advisers as such at the time of the trial or hearing."*

31. In conclusion, it was submitted on behalf of the appellant that the intended supplementary ground is cogent and clear, and that the appellant had put forward a basis in law and in fact to demonstrate *'a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted'* (to use the expression employed by O'Higgins C.J. in *Kelly*). In the circumstances, it is contended that the interests of justice favour the appellant being given an opportunity to ventilate the intended supplementary ground of appeal against his conviction before this Court.

Submissions on behalf of the Respondent

32. In written submissions filed on behalf of the respondent issue is taken with the procedural history of the case as interpreted in the grounding affidavit of Mr MacGuill. The point is made that while Mr MacGuill complains that the trial judge refused a defence application to hold a *voir dire* to test the reliability of Gda. [K.G]'s 'recent complaint' evidence before admitting that evidence, that is not entirely correct. According to the respondent, and the transcript of which we have an electronic copy seems to bear this out (ref: transcript 20/05/2019, pp 33 – 40), what in fact occurred was that the trial judge held an initial *voir dire* in which the admissibility of Gda. [K.G]'s 'recent complaint' evidence was considered. The *voir dire* that took place proceeded on the basis of consideration of a witness statement rather than the *viva voce* evidence of that witness. Counsel for the appellant neither

raised issue with the *voir dire* proceeding on this basis, nor with the reliability of Gda. [K.G]'s proposed evidence as to the complaint that she received.

33. The trial judge held that the proposed evidence of this witness of the 'recent complaint' made to her by the appellant's victim was admissible (ref: transcript 20/05/2019, pp 39 – 40). Following this ruling, counsel for the appellant sought to reopen the *voir dire* (ref: transcript 20/05/2019, pp 40 – 43), informing the trial judge that he had looked back over Gda. [K.G]'s notebook which made no reference to the detail of the complaint. She had first recorded these details in her witness statement made months after the complaint was made. The trial judge refused to reopen the *voir dire*, determining that any failure to make contemporaneous notes was a matter for cross-examination, not a matter upon which to determine whether her evidence was admissible (ref: transcript 20/05/2019, p 43).

34. Addressing the "justice of the case" argument advanced by the appellant, the respondent accepts that s.7A of the Courts (Supplemental Provisions) Act 1961, as inserted by the Court of Appeal Act 2014, entrusts to the Court of Appeal "*full power to determine any question necessary to be determined for the purpose of doing justice in the case before it.*" However, the respondent nevertheless points to Order 86C, Rule 3(1) RSC, which requires that:

> "*A convicted person who wishes to appeal to the Court of Appeal in criminal proceedings shall lodge with the Registrar a notice of appeal […]. The completed notice lodged shall answer the questions and comply with the requirements of that form. An appeal against a conviction may be argued only on grounds which have been set out in the notice, save where the Court of Appeal, on application made to it not less than 14 days before the date fixed for the hearing of the appeal, directs the addition of grounds of appeal."*

35. Further, and more generally, Order 86, Rule 11(3) RSC provides:

> *"[…] non-compliance on the part of an appellant or applicant with the rules of this Order or, as the case may be, of Orders 86A, 86B, 86C, 86D and/or 87, or with any rule of practice for the time being in force, does not prevent the further prosecution of the appeal or application unless the Court of Appeal so directs, but the appeal or application may be dealt with in such manner and on such terms as the Court of Appeal thinks fit."*

36. The respondent therefore accepts that there exists, in principle, a facility within the Rules to allow for grounds of appeal to supplement those contained in a notice of appeal where an application to add those grounds is brought no less than 14 days before the hearing of the appeal. Further, it is accepted that where an application is made outside of that time, it is a matter for this Court to determine how the interests of justice are best served.

37. It is further accepted that, consistent with this acknowledged flexibility, the Rules also allow the Court to extend (or shorten) time limits set by the Rules and, upon the application of a party to the proceedings, to give such directions or make such orders as appear convenient for the determination of the proceedings in a manner which is just and expeditious.

38. Referencing the passage from paragraph 76 of this Court's judgment in the *Walsh* case upon which the appellant relies, quoted already at paragraph 17 above, we are asked to note that the Court had gone on in the same paragraph to say:

> *"By the same token, however, rules of court and the time limits and procedures provided for therein, exist for very good reasons. They represent the law of the land and the general expectation is that they should be complied with, in the interests of the efficient administration of justice, in the interests of equality of treatment of litigants, and in the interests of ensuring certainty and finality with respect to the outcome of proceedings (reflected in the legal maxim interest reipublicae ut sit finis*

litium to which Gannon J., giving judgment for the Court of Criminal Appeal in Kelly, specifically adverted).”

39. The respondent contends that while this Court in *Walsh* had recognised that the RSC have always had built into them the facility for an Appeal Court to be flexible in its approach and to forgive non-compliance with the rules where it appears just and equitable that it should do so, it recognised that it would be inimical to these legitimate aims if the rules of court, which have the status of secondary legislation, were permitted to be ignored haphazardly or inconsiderately. It was submitted that the interests referenced by this Court in the passage just quoted represent all the more pressing countervailing factors where, as in this case, the appeal against conviction has been heard and determined. That having been said, the respondent acknowledged that this Court is obliged to consider the ‘justice of the case’ when asked to exercise its discretion in a motion such as the one presently under consideration.

40. We are asked to note with particularity certain observations of O’Higgins C.J. in the *Kelly* case, i.e., where he stated (at pp 107/108 of the report):

“In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of an appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the ‘justice of the case may require’.”

41. The respondent submits that this passage prescribed an approach that transcends the subject matter of that appeal. It recognised that the Court must be alert to what the ‘justice of the case’ may require. This is not limited to a consideration of where the appellant may claim

that his/her trial was unfair. A significant feature of the 'justice of the case' is the public interest in criminal matters. An aspect of that interest is the need for expedition in the conduct of criminal cases and for finality so that those adversely affected may be allowed to distance themselves from the trauma of the offence, and the trial.

42. The respondent's submissions then move to a consideration of the specific ground that it is sought to introduce and the circumstances in which it is raised.

43. The point is made that the appellant was represented both at his trial and at the hearing of his appeal against his conviction, by experienced counsel. It is accepted that there was a change of senior counsel between the trial and the appeal. However, the senior counsel representing the appellant on both occasions had been very experienced. Moreover, the same junior counsel and solicitors had acted throughout. The admissibility of the 'recent complaint' evidence given by Gda. [K.G.] was challenged at trial and had been a central aspect of the appellant's appeal against conviction. The transcript was available to the appellant and his legal team in advance of the appeal, and during the crafting of their written legal submissions. The application to have the trial judge reopen the *voir dire* occurred shortly after it had concluded and begins on the same page that the trial judge's ruling ends.

44. It was submitted that this ruling could not have been missed by the experienced junior counsel who represented the appellant at his trial and who had drafted the notice of appeal, nor by the senior counsel who conducted the appeal against conviction on the appellant's behalf. Reliance was placed on the fact that no explanation was offered to this Court concerning why the point now sought to be made was not raised either in the notice of appeal, or at the hearing of the appeal against conviction, beyond present counsel's speculative suggestion that it may have been "overlooked".

45. In that context the following observation of Hardiman J. at para. 44 in *DPP v. Redmond* [2000] WJSC-CCA 3164 is commended to us as being particularly apposite in the circumstances of the present case:

> *"We are, of course aware that the Director, like a Defendant/Appellant, has normally to formulate his grounds of appeal without having seen a transcript of the proceedings. This fact has clear drawbacks for an Appellant. But it has the often discussed advantage that the grounds of appeal will normally reflect what struck the parties as important at the time of the hearing, and distinguishes between these points and other points which may be the result of a subsequent "trawling" of the transcript."*

46. It is suggested that there are three obvious potential reasons that counsel might have tactically or strategically elected not to raise the ground of appeal now contended for where the admission of 'recent complaint' evidence was the subject of appeal: First, the trial judge was entitled to consider that having made her ruling, it was conclusive. Secondly, that counsel representing the appellant at the time may ultimately have had no faith in the point, and had been of the view that the trial judge had been correctly unconvinced of the basis on which the application to re-open the *voir dire* was made. Thirdly, it is difficult to see how a cross-examination of Gda [K.G.] in a *voir dire* (assuming it was similar to that ultimately conducted before the jury) could have altered the trial judge's ruling. While these possible explanations were also speculative, it was permissible for the respondent to offer such speculation *in arguendo* because, unlike in the case of the appellant, because the respondent bore no onus to provide an explanation for why the point at issue was not raised.

47. The respondent says that the absence of an explanation is significant. This Court has repeatedly expressed its reluctance to entertain grounds of appeal that have not been raised at

trial, and to require an explanation for the failure to raise the point. As held by Kearns J. in the *Cronin (No. 2)* case:

> *"It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken…*
>
> *Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J. when this case was in the Court of Criminal Appeal, this court should abhor the practice and strongly discourage it."*

48. It has been submitted that whatever about the cut-and-thrust of a trial where the significance of a ruling may in some cases be lost on counsel who may be focussed on a cascade of other matters arising, it is more difficult to explain how such a ground was absent from the appeal against conviction if it held the significance attributed to it by the appellant's present legal representatives. Unlike a sitting trial, in an appeal setting counsel will have had time to consider a transcript of the trial being appealed, to craft their written submissions, and to reflect on how best to make their case on the basis of the material they have. Here counsel did so with skill, albeit unsuccessfully.

49. It was submitted that the absence of an explanation for why the point now sought to be pursued was not pursued in the appeal against conviction heard and determined already by

this Court, should weigh heavily against the appellant's application to revisit his appeal against conviction.

50. In her submissions, written and oral, counsel for the respondent also relied upon a public interest argument. It was emphasised that in the *Kelly* case, while the Supreme Court had prescribed an approach recognising the centrality of what the 'justice of the case' may require, it had also recognised that the public interest was a factor to be taken into account in determining what the justice of the case might require. In that regard, there is a need for expedition in the conduct of criminal cases and for finality so that those adversely affected may be allowed to distance themselves from the trauma of the offence, and the trial. The cases of *The People (Director of Public Prosecutions) v. P.C.* [2017] IECA 71, and *The People (Director of Public Prosecutions) v. Lingurar* [2021] IECA 185 were proffered as examples of where the public interest had proven to be a decisive or tipping factor against the granting of an extension of time.

51. In conclusion, the respondent submitted that the cross-examination of Gda. [K.G.], upon which the appellant stakes his claim that her evidence was unreliable, was conducted before the jury. There is no reason to believe that they were less equipped to assess the reliability of her evidence than the trial judge. Had that evidence been as unreliable as the appellant suggests, it would not have been accepted by the jury. The acceptance or otherwise of that evidence (for the limited purpose for which they were permitted to have regard to such evidence, namely to demonstrate consistency) was a matter for the jury.

52. Finally, it was submitted that the appellant has not shown an error of substance giving rise to an apprehension that a real injustice occurred. When this is weighed in the balance alongside the absence of an explanation for the failure to raise the point which it is now sought to canvas, and the late stage at which it is now sought to raise it, it must be seen as

wanting by contrast to the interests of the community and the victim in this case, the expeditious administration of justice, and appropriate finality to these proceedings.

The Court's Analysis and Decision

53. The importance of there being finality to litigation has long been recognised. It is reflected on the civil side in the jurisprudence, typified by *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, which requires a party to bring forward their entire case at once and not seek to litigate on a drip feed basis. The concerns that may arise are encapsulated in the Latin maxims *"interest rei publicae ut sit finis litium"* (referred to earlier in this judgment) and *"nemo debet bis vexari pro eadem causa"* [which translates as, 'no one should be sued twice in respect of the same cause'– see Hilary Delany and Declan McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed., (Round Hall: Dublin), at 32-02; alternatively as, 'nobody should be twice troubled or jeopardized for one and the same matter' – see John Gray, *Lawyer's Latin, A Vade-Mecum*, 2nd Revised Ed., (Robert Hale: London, 2006)].

54. While the position on the civil side does not obtain *mutatis mutandis* on the criminal side, the desirability of finality in criminal litigation is none the less an important value to which a court must have regard, *inter alia*, in determining issues such as whether time should be extended in particular circumstances, whether a late amendment to a Notice of Appeal should be allowed, whether points not argued in the court below should be permitted to be argued on appeal and whether a party should be permitted to re-open an appeal already determined. We accept that ultimately on all these issues the court must be guided by what the justice of the case may require, but that is not to gainsay that considerable weight must nevertheless be afforded to the value that legal certainty represents.

55. The importance of the principle of finality in the context of criminal appeals is discussed in a scholarly article by Kate Malleson entitled "Appeals against Conviction and the Principle of Finality", (1994) 21 *Journal of Law & Society* 151.

56. We note that in the specific context of criminal appeals in England and Wales Blackstone's *Criminal Practice* (2022) states (at D26.10 *et seq*) that there is a single right of appeal and, citing *R v. Pinfold* [1988] Q.B. 462, that once an appeal has been dismissed the unsuccessful appellant usually has no opportunity to bring a further appeal in the matter. Moreover, this applies even if the point it is sought to raise at the second appeal is different from that unsuccessfully relied upon at the first. The Court may exceptionally permit a further appeal if (i) its previous ruling was for some reason a nullity, or (ii) there was a defect in the earlier procedure that might have led to a real injustice. Unless either of those circumstances apply, an unsuccessful appellant's only remedy is to ask the Criminal Cases Review Commission (CCRC), of which there is no equivalent in Ireland, to refer the case back to the Court of Appeal.

57. In the *Pinfold* case the Court of Appeal (Criminal Division) dismissed the appeal of Mr Pinfold against his conviction for murder. He subsequently applied for leave to appeal a second time and the central point at issue, accepted by all concerned, was whether the court would have jurisdiction to determine a second appeal, in light of its dismissal of the earlier one.

58. The Court considered s.2(1) of the (English) Criminal Appeal Act 1968 which set out the jurisdiction of the Court of Appeal (Criminal Division) to hear an appeal against a conviction on indictment. Having done so, Lord Lane C.J. said:

> *"... there is nothing there on the face of it which says in terms that one appeal is all that an appellant is allowed. But, in the view of this court, one must read those provisions against the background of the fact that it is in the interests of the public in*

general that there should be a limit or a finality to legal proceedings, sometimes put in a Latin maxim, but that is what it means in English. We have been unable to discover, nor have counsel been able to discover any situation in which a right of appeal couched in similar terms to that, has been construed as a right to pursue more than one appeal in one case."

59. Other cases cited by Blackstone to similar effect are *R v. Yasain* [2015] EWCA Crim 1277, [2016] QB 146; *R v. Hockey* [2017] EWCA Crim 742; and *R v. CC* [2019] EWCA 2101, [2020] 1 Cr App R 15. In *CC* the Court of Appeal approved and reiterated the approach commended in the earlier case of *Yasain* to applications to reopen a decision of the Court of Appeal. The authors of Blackstone comment [at p.2419]:

"Thus, save for decisions that are a nullity, the usual exercise of the Court's jurisdiction is to be confined to correcting 'procedural errors' that are clear and undisputed and when there is no alternative effective remedy. The Court said that it did not wish to close the door entirely on exceptional circumstances, when the lack of an alternative effective remedy, or some other reason, may lead the Court to re-open a decision in order to avoid manifest injustice."

60. In the present case it is argued that the appellant in the present case is in a different situation. It is said that his appeal has not yet been concluded, and therefore it is not a case of him seeking to re-open that which has been determined. We accept, of course, that his counsel is technically correct in saying, that for so long as the appeal against the severity of the sentence imposed in his case remains extant, his appeal, which was against both conviction and sentence, has not been fully determined. However, when this proposition is examined closely the distinction contended for and relied upon is more apparent than real. The reality is that the conviction aspect of the appellant's appeal has been fully heard, considered and determined, with the court having delivered a reserved judgment running to

37 A4 pages. While the sentence aspect of the case remains outstanding it was not to be expected that the Court would seek to revisit its ruling on conviction, or allow the conviction aspect of the matter to be re-opened, barring (i) demonstration that there had been some clear and undisputed procedural error, or (ii) the emergence of some new or newly discovered fact(s) tending to show that there had been a miscarriage of justice, which would allow the appellant to seek to avail of s.2 of the Criminal Procedure Act 1993, or (iii) the existence of some exceptional circumstances suggesting that a decision to reopen the previously determined conviction issue was necessary to avoid manifest injustice. The jurisdiction to reopen, which we accept exists in the situations mentioned, is one to be exercised sparingly. While the interests of justice will always be paramount, a Court faced with an application to reopen either a fully concluded appeal, or a concluded module within an appeal, must also afford significant weight to the important value of ensuring that there is finality and certainty in criminal litigation.

61. We do not think that the appellant here has come close to vaulting the bar which he must traverse to persuade us to re-open the conviction aspect of his case. We have given careful consideration to the circumstances in which the trial judge refused to revisit her admissibility ruling concerning the proposed complaint evidence of Garda [K.G], and not to allow the reliability of the witness's evidence to be tested in a *voir dire*. We are satisfied that her decision in that respect represented the valid exercise of a legitimate discretion vested in the trial judge. The witness in question, who was a police officer, was not a witness as to the central facts. She had not witnessed the crime. She was being called to give evidence of a complaint said to have been received by her from the complainant a short time afterwards, for the limited purpose only of demonstrating consistency on the part of the complainant. There was no reason to believe that she was inherently unreliable. Yes, she had made a statement some months after the fact which included details of the complaint she had received which

went beyond those she had recorded in her police notebook at the material time. That was a matter upon which she could, and indeed was, cross-examined before the jury. The point is well made by the respondent that the trial judge would have been no better equipped than the jury to determine her reliability. There was no reason why her evidence should not have been called before the jury, and for her to be subjected to cross-examination before the jury, as was in fact done. We see no basis for suggesting that there could have been any injustice created by the trial judge's ruling.

62. Moreover, it remains the case that no exceptional circumstances have been pointed to. No explanation has been provided for why the point was neither raised nor pursued during the conviction appeal if it had the importance now being contended for.

63. Accordingly, we do not believe that the appellant has crossed the threshold required to justify this Court in re-opening the previously determined conviction issue. There are no exceptional circumstances, there is no adequate explanation for the matter being raised at this late stage, and there is nothing that persuades us that intervention is necessary to avoid manifest injustice.

64. The relief sought in the motion of the 19th of July 2021 is therefore refused.