**THE SUPREME COURT**

**Record No: S: AP:EE: 2022:000127**

**Court of Appeal Record No.: 72/2021**

**Central Criminal Court Record No.: CCDP0105/2017**

**[2024] IESC 26**

**Between:**

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

**Respondent**

**AND**

**C. P.**

**Appellant**

**Dunne J.**

**Charleton J.**

**O'Malley J.**

**Woulfe J.**

**Murray J.**

**Judgment of Ms Justice Iseult O'Malley delivered on the 20th of June 2024**

## Introduction

**1.** On the 25th February 2019, the appellant was convicted in the Central Criminal Court of three counts of sexual assault and nine counts of rape under s.4 of the Criminal Law (Rape) (Amendment) Act, 1990. The complainant in the case was his daughter. He was sentenced on the 25th of March 2019. In respect of each of the rapes under s.4 the sentence imposed was 15 years with the final two years suspended, with lesser sentences being imposed on each of the other counts.

**2.** The appellant sought to appeal against conviction, but did so at a time when it was too late to lodge a notice of appeal within the period stipulated in the Rules. He therefore needed, and applied for, an order from the Court of Appeal enlarging the time within which to appeal. The Rules require that such an application must be accompanied by an explanation for the delay, and also by the proposed grounds of the appeal. The appellant lodged affidavits dealing with the delay issue but also sought his trial transcript for the purpose of preparing his grounds of appeal. After granting him access to a part of the transcript, the Court of Appeal ultimately dismissed the application for enlargement of time, because the appellant had failed to formulate sufficient grounds of appeal.

**3.** Trial transcripts are not normally provided to appellants until they have submitted grounds of appeal. The case made by the appellant in this Court is that, in the particular circumstances of the case, the Court of Appeal should have given him access to the full transcript of his trial before requiring him to lodge his grounds. His argument is, in essence, that since he is represented in the appeal by a new legal team who have not been furnished by his previous lawyers with detailed notes of the evidence in the trial, the interests of

justice require that the transcript should be made available so that proper grounds of appeal can be prepared. The respondent accepts that, should this Court consider that the application in respect of the transcript should have been allowed, it would follow that the Court should also allow the appeal in respect of enlargement of time so that the case can be remitted to the Court of Appeal for further argument.

### Background facts

**4.** The matter before this Court is not an appeal against conviction and it is not necessary to describe the alleged offences in any detail. However, it is relevant to note that all of the offences were alleged to have been committed between June 2008 and June 2014, while the complainant was between seven and thirteen years of age. Her parents had separated when she was about seven, but the appellant had frequent access to his children and they often visited him in his parents' home. Three different addresses were involved in the charges, with nine of the offences being alleged to have been committed between June 2008 and September 2013 in the home of the appellant's parents, two between June and September of 2012 in an apartment occupied by the appellant and his then partner, and one between September 2013 and June 2014 in the home of the complainant, her mother and her siblings.

### The Court of Appeal

**5.** Some brief observations about the appeal process may be helpful. Pursuant to O.86C of the Rules of the Superior Courts, an appeal must be lodged within 28 days of the final order of the trial court. Notices of appeal must set out the grounds of appeal, but this is often done

in very brief form. They must be signed personally by appellants. It is possible for the solicitor on record to file the notice (provided it has been signed by the client), but it is also possible for the convicted person to lodge it themselves. Where they have been sentenced to a term of imprisonment, they can obtain forms for this purpose from the prison authorities. As a matter of principle, the grounds of appeal must relate to points raised and argued in the trial. The purpose of this rule is, as Hardiman J. said in *People (DPP) v Cronin* [2003] 3 I.R. 377, to ensure a proper relationship between the conduct of an appeal and the task of the appellate court – that task is to say whether or not the trial was safe and satisfactory. However, the rule is not entirely rigid. As this Court said in the appeal in *Cronin*, it can be argued on behalf of an appellant that its application is inappropriate in their case because of an apprehension that a real injustice has occurred.

**6.** In this case, time for the purpose of an appeal ran from the 25th of March 2019 (the date on which the applicant was sentenced) but no appeal was in fact sought to be filed until over two years later. On the 7th April 2021 the applicant, through a new solicitor, filed a notice of appeal against conviction and sentence and an application for an enlargement of time within which to appeal. He also brought an application to be furnished with a copy of the trial transcript.

**7.** An application for enlargement of time requires would-be appellants to explain their delay and also to specify the grounds on which they propose to base their appeal (O 86C r.5(2)). Under O 86C r.9, transcripts are provided free of charge to appellants who have been granted a legal aid (appeal) certificate, but the registrar may list the case before the Court of Appeal for directions without obtaining a verified transcript if the notice of appeal does not show any substantial ground of appeal (r.8). The Court may make such orders and give

such directions as to the conduct of the proceedings as seem to it to be appropriate. Thus, the standard rule is that transcripts are not provided until grounds of appeal have been lodged. As will be seen, the rationale for this is the prevention of the practice of "transcript trawling", whereby lawyers (typically practitioners who did not act in the trial), have meticulously combed trial transcripts for potential grounds of appeal relating to matters that were not were not argued in the trial. However, the Court has a discretion to make an order for the transcript where it considers it to be appropriate.

**8.** In filling in the prescribed form for enlargement of time in April 2021, the appellant stated that the reason for his delay in lodging an appeal was that he was unable to read or write and that the solicitor who had acted for him in the trial had neither given him legal advice nor lodged an appeal on his behalf. His proposed grounds of appeal were three entirely non-specific propositions – that favourable evidence that would have assisted the defence was not presented in the trial, that misleading evidence was presented on behalf of the prosecution and that the verdict was unsafe.

**9.** Affidavits in support of the application were not lodged until April 2022. At that stage one affidavit was sworn by the appellant, who deposed that he had always maintained his innocence and that he had instructed the solicitor who acted for him in the trial that he wished to appeal. He further deposed that the solicitor told him that he could lodge an appeal at any time and did not advise him to do so personally from the prison. He said that if he had been advised to do so he would have. It is stated in the affidavit that he believed that his case was being examined by his then lawyers for grounds of appeal and that an appeal would be entered. However, this statement is immediately followed by an

acknowledgement that his first solicitor had told him that he had no grounds of appeal. In his letter of instruction to his current solicitor (dated in November 2020) he said that his former solicitor had told him that he was out of time and not entitled to appeal and that he (the solicitor) would not represent him in an appeal.

**10.** Despite this, the appellant maintained in his affidavit that it continued to be his understanding that he could appeal at any stage. He said that he only became aware through a conversation with the prison chaplain in October 2019 that no appeal against his conviction or sentence had in fact been lodged. He then received a letter from the original solicitor later that month confirming that he would not act in an appeal and giving him a list of other potential solicitors. He says that he contacted his current solicitors on receipt of that letter (they say it was November 2020, he says it was "well before" that). The appellant also accepts that he remembers that the senior counsel who acted for him in the trial advised him that he had no grounds of appeal.

**11.** The appellant further accepted that his memory of the trial might not be entirely reliable. However, he stated that he believed that the presentation of his defence had been inadequate in three specific respects. The first claim made was that the complainant was not confronted with untruths and inconsistencies in her accounts as to where in the house certain events were alleged to have taken place and whether other persons were present. The second was that the appellant believed that the absence of medical evidence of sexual assault should have been emphasised. However, he accepted that he had been advised that such a course could be disadvantageous to him. Finally, he said that he believed that the social workers should have been called to adduce certain evidence in their reports suggesting that he was

a good influence on his daughter. (Due to difficulties experienced by the complainant's mother, the family was under social worker supervision for a period of time and the complainant herself was in foster care for a while.) Again, he accepted that he had been advised against doing this.

**12.** As noted above, the appellant's notice of appeal as lodged, contained a ground to the effect that evidence favourable to the defence had not been adduced. In his affidavit, he stated that this related to material in the social work reports about a previous complaint made by the complainant – no further detail was provided.

**13.** The second affidavit was sworn by the appellant's current solicitor, who averred that the appellant first gave her instructions in November 2020. She then entered into correspondence with the original solicitor seeking the client's file. She received the book of evidence and disclosure materials in early 2021 but there were no attendance notes from the trial. The affidavit exhibits a letter from the original solicitor dated the 8th of October 2021 in which he stated that it was his invariable practice to tell clients to enter their own appeals and that this had been his advice to the appellant on the day of sentence (i.e., the 25th March). He also stated that he had visited the appellant in prison some weeks later and had told him that he would not prosecute an appeal, as senior counsel had advised that there were no grounds, and he would therefore have to engage another solicitor if he wanted to appeal. The solicitor said that he had offered to assist him in finding another representative.

**14.** The affidavit also exhibits a letter to the original solicitor from the senior counsel who acted in the trial, written the day after the appellant was sentenced in March 2019. Senior counsel

stated her opinion that the appellant had received a fair trial, and that no rulings had been made in the course of the trial that could be the subject of a stateable appeal. Further, she advised that an appeal against sentence would likely not be successful, as the sentence imposed was within the expected range for cases of a similar nature. She was happy to visit the appellant if that was desired, but she noted that "all of the above" had been discussed with him on the previous day.

**15.** A consultation note made in the course of the trial is also exhibited. It covers matters that do not appear to be germane to this appeal.

**16.** On the first occasion that the matter was considered by the Court of Appeal, counsel now acting for the appellant submitted that the complaints made by his client could not yet be fully assessed and put forward in an appeal because of the limits of the client's recollections and the absence of a transcript. He therefore asked that the transcript be made available. He said that, as things stood, he was not in a position to inform the client that there either was or was not some basis for his complaints.

**17.** Counsel for the respondent pointed to the fact that, notwithstanding certain contradictions in the evidence, it was clear that the original solicitor had written to the appellant in October 2019 but new solicitors were not instructed until November 2020. The matters raised by way of complaint by the appellant were either not significant or had been the subject of discussions between him and his representatives arising from which decisions had been made as to the approach to be taken in the trial. The victim in a case such as this had an interest in finality.

**18.** Members of the Court referred to the rationale behind the principle that the transcript should not be provided until grounds of appeal were lodged – to prevent the practice of trawling the transcript in order to find grounds. It could not be the position that a change in legal representation was a sufficient ground for disapplying that principle. In this respect counsel for the appellant emphasised the absence of any notes from the trial as a ground for distinguishing the case. The Court decided, with some hesitation, not to finalise the matter but to grant access to the transcript of the complainant's evidence.

**19.** When the matter next came before the Court, counsel for the appellant stated that on examination of the portion of the transcript that had been provided no basis for a complaint about the cross-examination of the complainant had been found. However, there was another issue to be considered which, through an error on their part, his lawyers had not previously raised. The appellant had asserted to them that the complainant's mother had, in the course of her evidence, agreed with the proposition that there were a number of years where the appellant and the complainant had no contact. That was said to give rise to concern about certain of the convictions. In light of that development, counsel argued that the full trial transcripts would be necessary to see whether there had been an application for a direction on the counts in question and how they had been dealt with in speeches, charge and requisitions. He sought an adjournment for the purpose of filing an affidavit explaining the situation. The Court of Appeal stated that it had already departed from its usual practice and was not prepared to go any further. An extension of time within which to appeal was refused.

**20.** Leave to appeal to this Court was granted on the 5th of April 2023. The Court noted in its determination that it was not satisfied that the proposed appeal went beyond the particular facts of its case such that a matter of general public importance arose. However, the Court granted leave in the interests of justice having regard to the circumstances of the case. In particular, the Court referred to the possibility that there was a ground of appeal against some of the convictions, arising out of the possibility that there might have been an absence of contact at relevant times.

**The available information about the trial**

**21.** The Court has available to it, as had the Court of Appeal, the transcript of the full evidence of the complainant. In addition, the Court asked, in the course of case management, that the respondent should consider, on a voluntary basis, providing some information to the appellant's legal representatives concerning the way in which certain matters were dealt with in the trial. Although it is not the practice of the respondent to share trial attendance notes with other parties, in this case she very helpfully did so before the hearing of the appeal.

**22.** The main question posed on behalf of the appellant to the respondent was whether there was evidence in the trial consistent with the proposition that he had no contact with his daughter between 2009 and 2013, and, if so, how that evidence was dealt with in the trial. Accordingly, the relevant parts of the transcript of the complainant's evidence and the prosecution trial attendance notes will be considered here.

**23.** The complainant said that after her parents separated in or around 2007, she, her mother and her siblings lived briefly with her mother's mother and then got a house of their own. Her father was living with his parents. He saw the children most weekends and often brought them to stay in his parents' house. She said that she was visiting there and staying over at least every two months and would stay for longer periods during school breaks. She described being subjected to sexual assaults by the appellant there on frequent occasions. While it was difficult for her to date events, she was able to say that it began before her First Communion. She was also able to connect one occasion with the death and wake of a family member, which took place in September 2013.

**24.** The complainant also said that she had visited the appellant in an apartment that he was living in with his then girlfriend and their baby. She described assaults that occurred there.

**25.** In September 2015, the complainant spoke with one of her aunts and as a result made a complaint to the gardaí shortly afterwards.

**26.** The complainant was cross-examined about the detail of some of her allegations, about her contact with various social workers and schoolteachers over the years and the absence of any complaint to them, about her relationship with her mother and her father, and about her possible motives in making a complaint against her father. Of note, she was also asked about, and explained, a reference in the reports to a separate allegation that she had made against a different individual in 2014 – this was a one-off matter, not at all comparable with the charges against the appellant.

**27.** It is not necessary to go into detail on these matters but what is relevant for present purposes is that it was put to the complainant, based on her mother's statement to the gardaí, that the appellant had no contact with her from some date in 2009 until 2013. She accepted that he had been away for a long time but said that she continued to see him in the city he had moved to. It was further put to her that her mother had told the gardaí that the appellant did not live in the locality for a period of about four years, which she (the mother) dated from 2010, 2011 or 2012, and that the children did not see him during that time. The complainant disagreed, saying that there was "no way" that she did not see him for four years, but she seemed initially to accept that she would not have visited her grandparents' house if her father was not there.

**28.** This issue was taken up by counsel for the prosecution in re-examination. The complainant stated that she had visited her father in both Dublin and in his parents' home during the period when he was not living locally. She recalled being given lifts to her grandparents' house by one of her aunts (the aunt in question was also a witness in the case) and going there by bus on one occasion when no lift was available.

**29.** It appears from the attendance note that the complainant's mother said in evidence that from about March 2007 the appellant had access to the children. He would often take them for the weekend to his parents' house or to his apartment in the town. This might have happened once or twice a month. This witness appears to have said in her statement of proposed evidence that the appellant lived in Dublin for four years. In evidence, she said that she had not been aware that he had moved until he told her, she could not remember when. In cross-examination she accepted that this meant that there were four years when he did not see the children although she recalled one occasion when he came down and

wanted to take the children to his parents' house. Ultimately, she said that while she had only ever gone to the parents' house when she was with the appellant, her children had no problem going there and she could not be sure that they did not go.

**30.** The former partner of the appellant, who was living with him in 2012, said that she had been in a relationship with him in 2007. They broke up for a while. He moved back to his parents' house and lived with them from early 2010 to early 2012. The relationship then resumed, and they moved into a flat together in the summer of 2012. His children came to visit while he was with her.

**31.** Defence counsel made an application for a direction that was based in part on asserted vagueness and inconsistencies in the evidence about dates. It was submitted that, taking the evidence of the complainant and her mother together, the appellant was absent at a time covered by at least one of the counts on the indictment. Prosecution counsel pointed out that some of the counts were connected to specific events for which the appellant was certainly present, such as the complainant's First Communion and the wake of a family member. The complainant had said that she was going to her grandparents' house every two months while the appellant was living away from the area. The partner's evidence made it clear that he was living in the locality in 2012 and that his children visited him.

**32.** The trial judge pointed out that the appellant's own account in interview with the investigating gardaí was that he had moved away in 2013. The judge accepted that the evidence of the mother was inconsistent with that of the complainant but considered that that was not a reason to withdraw the matter from the jury. Referring to *R. v. Galbraith* [1981] 1 W.L.R. 1039 and *People (DPP) v M.* (unrep., CCA, 15th February 2001), she said that any weaknesses or inconsistencies were a matter to be assessed by the jury.

**33.** *Galbraith* is, of course, the leading authority on the circumstances in which a trial judge should withdraw a case from the jury and direct a verdict of not guilty. It has been endorsed many times in this jurisdiction. The well-known passage encapsulating the relevant principles is as follows:

> "*How then should a judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends upon the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.*"

**34.** In the *M* case, the appellant relied heavily on certain inconsistencies in the complainant's evidence. The Court of Criminal Appeal ruled that while some inconsistencies existed, they

went to the issues of credibility and reliability which, as matters of fact, were the duty of a jury to determine. Giving the judgment of the Court, Denham J. cited *Galbraith* and said:-

*"If there was no evidence that an element of the crime alleged had been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the situation here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is its duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to the issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge therefore was correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and law the learned trial judge did not err in refusing to withdraw the count in respect of sexual assault from the jury at the conclusion of the prosecution case."*

**35.** In this context it may also be helpful to refer to *People (DPP) v Leacy* [2002] 7 JIC 0301, where Geoghegan J referred to the commentary on *Galbraith* in the 1991 edition of Blackstone's *Criminal Practice* for the following propositions.

> *"(a) If there is no evidence to prove an essential element of the offence a submission must obviously succeed.*
>
> *(b) If there is some evidence which - taken at face value - establishes each essential element, then the case should normally be left to the jury. The judge does, however, have a residual duty to consider whether the evidence is*

*inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases, ...)*

*(c) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey) where the inconsistencies (whether in the witness's evidence viewed by itself or between him and other prosecution witnesses) are so great that any reasonable tribunal would be forced to the conclusion that the witnesses is untruthful. In such a case (and in the absence of other evidence capable of founding a case) the judge shall withdraw the case from the jury."*

69. On the facts of the case before the Court, Geoghegan J said:

*"…There is absolutely no doubt that there was evidence establishing each essential element in the offence and that being so it would only be in very exceptional cases that the case would be withdrawn from the jury. The nature and degree of the inconsistencies in this case which all relate to peripheral matters however important they may be as to credibility would not justify any court taking the exceptional step of withdrawing the case from the jury. It was for the jury to work out in this case whether the complainant was telling the truth as to the essential elements and in that connection as to whether any of the inconsistencies destroyed her credibility. It would have been quite wrong*

*for the trial judge to impose her view on the matter whatever that may have been.*"

**36.** In the instant case, both counsel and the judge dealt with the issue of the inconsistent evidence when addressing the jury. Prosecution counsel emphasised the evidence of the complainant, the evidence of the former girlfriend and the appellant's own account to gardaí in support of the proposition that the appellant was living in the area and had access to the complainant at all material times. Defence counsel emphasised the general issue of vagueness in the evidence, and the evidence of the mother in particular. The trial judge refused to give a corroboration warning but did agree to give a modified form of delay warning. She warned the jury that they had very little detail in respect of some of the counts and that this situation meant that the charges were difficult to defend against. The only requisitions were in respect of minor factual matters.

**Submissions in the appeal**

**37.** In written submissions, the appellant contended that the Court of Appeal erred in law by refusing to make the full transcript available in circumstances where the new legal team had not received any notes from the former legal team, and where a fundamental ground was raised which was not new and had been canvassed in evidence. It was argued that the complainant did admit that for periods of time between 2009 and 2013 she had not been in contact with the appellant and these periods overlapped with some of the convictions. It was further said that, according to the appellant, the complainant's mother confirmed this in her evidence. It was argued that the interests of justice required an examination of the transcript to see whether there had been an application for a direction and to consider how the relevant counts were dealt with in closing speeches and the trial judge's charge.

**38.** The appellant has referred to the test set out in relation to applications for enlargement of time by the Supreme Court in *People (DPP) v Kelly* [1982] I.R. 90. The references in that decision to the requirements of justice and "*the possibility of an injustice*" have, it is suggested, been narrowed more recently by the caselaw of the Court of Appeal. The appellant says that the criteria now being applied are more demanding, particularly in cases involving sexual offences against vulnerable or young persons, at least where there has been a long delay on the part of the applicant for enlargement. There may now be a need to identify "*a discrete ground with a strong chance of success*" in a manner analogous to the high standard applied to a bail application after conviction on indictment. On this issue, the appellant points to the case of *People (DPP) v Lingurar* [2021] IECA 185.

**39.** It is argued that this situation gives rise to the question whether, if an appellant must show a good case to the effect that there was a miscarriage of justice, and the case is one where there is a paucity of notes from the trial and sentencing proceedings, the accused should be permitted access to the transcript before formulating grounds of appeal.

**40.** The appellant submits that it may be necessary for the Court to reiterate that the test set by this Court in *Kelly* means that it is not necessary to show a strong chance of success for the purposes of an application to extend time to appeal. The Court had emphasised that the *Éire Continental Trading Company Limited v Clonmel Foods Limited [1955] 1 I.R. 170* criteria did not apply to such applications. An appellate court was bound to act as the justice of the case might require, having regard to the particular facts of the case. Where there was a possibility of injustice, the absence of an intention to appeal or delay in making the

application should not prevent the court from taking action simply because of the conduct of an appellant.

**41.** The appellant submits that whether it is the *Kelly* test, or the more onerous test currently being applied by the Court of Appeal in relation to applications to extend time to appeal, it remains necessary for the appellant to have the transcript so that his application to extend time can be determined fairly.

**42.** It is submitted that this application does not contravene the principles discussed in the case of *People (DPP) v Cronin (No.2)* [2006] 4 I.R. 329, where this Court reiterated that an appellate Court will be hesitant to allow new grounds to be relied upon in an appeal unless it is necessary to do so to ensure that justice is done. In his judgment (at p.346), Kearns J. referred to the necessity to demonstrate some error, sufficient to ground an apprehension of that a real injustice had occurred, where it was sought to raise a new point on appeal that had not been argued in the trial. He observed that without some such limitation, "*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"*. The appellant says that in the particular circumstances of his case no such adverse public policy considerations arise. It is simply not possible to fully assess the issues he has raised, and their bearing on a potential appeal, in the absence of transcripts.

**43.** Having received from the respondent the information outlined above, the appellant accepted in oral submissions at the hearing that significant light had been cast on what happened in the trial. Counsel now maintains that it is "clear" that a direction should have been granted in relation to some of the counts on the indictment and says that there is a

"real possibility" (in the words used in the judgment in *Kelly* – this is contrasted with the phrase "a real risk") that there was a miscarriage of justice. Although he accepts that there is a wide discretion relating to corroboration and delay warnings on the part of a trial judge, he says that he would be entitled to argue both of those issues (but is prepared to leave the question of delay aside if it is problematic). With the information he now has, he could now formulate grounds of appeal, but he says that he nonetheless needs the full transcript because he still cannot say whether the appellant's complaints about the trial are well-founded.

**44.** Counsel submits that there is an obligation on solicitors to ensure that there is a note of trial evidence on the file. Where that does not happen, and where an appellant has grounds for concern but no other source of information, they should be entitled to a transcript.

**45.** The respondent contends that the appellant has failed to sufficiently engage with the facts of the case and formulate grounds of appeal in an appropriate and timely manner which would justify the full transcripts being released to him for the purposes of enlarging time to appeal against his conviction and sentence, and that the release of the full transcript is not required in the interests of justice.

**46.** Since, as noted above, the respondent accepts that the matter should be remitted if the Court finds in the appellant's favour on this issue, the submissions are focused on the issue of whether allowing the appellant access to the transcript is just and equitable in the factual circumstances of this case.

**47.** The delay from October 2019 (when the appellant became definitively aware that no appeal had been entered on his behalf) until November 2020 (when he first instructed the current solicitors on record) is emphasised, as is the fact that no explanation for that delay has been offered by the appellant. It is noted that the evidence of the complainant's mother was in accordance with her statement in the book of evidence, which was available to the appellant at all times. The question of his absence was also dealt with in the appellant's interviews with investigating gardaí. The appellant was at all times in possession of this material. The height of the appellant's argument is said to be the fact that different witnesses gave different evidence, and that fact would not have been sufficient as a ground for a direction.

**48.** The respondent refers to the requirement in the Rules to specify grounds of appeal when seeking an enlargement of time as a positive obligation. It is argued that in general the rules in relation to the release of transcripts in Order 86 make it clear that there is a requirement that grounds of appeal are demonstrated prior to such release.

**49.** The respondent rejects a suggestion by the appellant that legally aided individuals may be placed in a more disadvantageous position when seeking transcripts, submitting that there is nothing in the Rules which would disadvantage a legally aided applicant compared to a privately funded applicant. It is asserted that all applicants must demonstrate that their request for a transcript is related to the relevant appeal. The Court of Appeal enjoys wide discretion to order the release of transcripts in a given situation.

**50.** With reference to *Kelly*, it is accepted that the appellate court's approach must be flexible and not constrained by any general test, considering rather what is just and equitable on the facts at issue in a particular case. The respondent has identified various propositions which

emerge from the Court of Appeal's jurisprudence – for instance, that the overriding consideration is the interests of justice, that regard must be had to the proper administration of the courts to ensure finality and the interests of the victim, and that general or vague statements cannot be relied upon.

**51.** The respondent argues that the requirement that an applicant engage at a basic level with the facts of the case in order to formulate a ground of appeal is a reasonable requirement to avoid the practice of 'transcript trawling' as described in *Cronin*. If the appellant is correct in law, then there is little more that needs to be done by a prospective applicant who has delayed lodging an appeal and has changed legal representation than to state that they would like to appeal but do not have adequate records.

**52.** Some emphasis is laid on the rights of victims. The respondent submits that where there is an identifiable victim a stronger case must be made for enlargement of time. Ultimately, it is the respondent's case that there is no automatic requirement for a transcript to be released where there has been no engagement with the facts of a case, even on a very rudimentary level, in asserting a ground of appeal. It is submitted that it would not be in the interests of justice or in the interests of victims to facilitate appellants receiving transcripts in the hope, rather than expectation, of discovering a potentially viable ground of appeal against conviction and/or sentence.

**Relevant authorities**

**53.** The leading authority is *People (DPP) v Kelly* [1982] I.R. 90. That was a decision of this Court on the question, certified by the Court of Criminal Appeal, of the appropriate criteria for determining an application for enlargement of time within which to appeal. At that time, such an application was governed by rule 8 of O 86, which provided that the Court could enlarge the time for the doing of any act upon such terms, if any, as "the justice of the case" might require. The appellant had absconded during trial and only returned after his co-accused had succeeded in an appeal. The Court of Criminal Appeal had refused the application for enlargement, primarily because it found that there was no evidence that the appellant had formed the intention of appealing, on substantial grounds, within the prescribed period of time after his conviction.

**54.** The majority judgment was that of O'Higgins C.J. Referring to the jurisdiction to enlarge time under O 86 (as it then stood), he stated that it was clear that, in deciding whether or not to exercise the power, the Court of Criminal Appeal was to be guided by what was required by the justice of the case. This indicated a flexibility that was unrestricted and unhampered by any consideration other than the justice of the case. The Court of Criminal Appeal had erred insofar as it appeared to have applied criteria similar to those set out for civil appeals in *Éire Continental Trading Co. Ltd v. Clonmel Foods Ltd.* What was necessary was an assessment of what was just and equitable on the particular facts of the case. It was wrong to apply any general, preconceived test or rule.

> *"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'."*

**55.** Henchy J. (with whom Kenny J. agreed) reached the same conclusion – that the appeal should be allowed – and the differences between the judgments are not of great relevance for present purposes. He noted that even in civil matters the *Éire Continental* criteria were not intended to confine the discretion of the Court. All relevant circumstances should be presented, since otherwise injustice might result by worthy extensions being refused or by unmeritorious extensions being allowed. He accepted that time should not be extended unless the court was given reason to think that the verdict might be such that it should not be upheld, but that view should be formed upon the totality of the case as presented at the time of the application rather than merely on the state of mind of the appellant. It was not possible to set out precise criteria that could be universally applied, given the "infinite variety" of circumstances in such applications.

**56.** Henchy J was extremely sceptical about the conduct of the appellant but the similarity between his case and that of the co-accused created the suspicion that his confession (the only evidence against him) should have been ruled inadmissible. He therefore considered that, despite the conduct of the appellant, there was a real risk of a miscarriage of justice, and time should be enlarged.

**57.** The parties have referred the Court to a number of decisions of the Court of Appeal in recent years. In no case did the Court suggest that the principles outlined in *Kelly* required alteration and the decisions are in fact examples of the application of those principles. Thus,

in *People (DPP) v Walsh* [2017] IECA 111, the Court held that consideration of the justice of the case might require some consideration of the proposed grounds of appeal. That may be seen as illustrating the obligation of the Court to consider the totality of the case. The Court said:

> "*We consider that where a putative appellant is out of time, and is seeking an enlargement of time within which to appeal, it is incumbent on him to do more than simply demonstrate that he wishes to pursue intelligible grounds of appeal that appear to be arguable in principle. He must, it seems to us, engage with the actual evidence given, and rulings made, as disclosed in the transcript of the trial and, in relation to any intended ground of appeal, show that the matter complained of is sufficiently grounded to justify at least some optimism that the appeal, if allowed, would succeed.*"

**58.** However, the Court also stressed that *Kelly* made it clear that even in a case of clear non-compliance with the rules, and perhaps even in the case of an egregious intentional disregard of the rules, the Court could, and indeed should, enlarge the time where that was required by the interests of justice.

**59.** The requirement that an applicant who is out of time must engage with the facts of the case, rather than putting forward vague or generic propositions with no clear connection between the matters proposed and the outcome of the trial, is a recurring theme in the judgments – see *People (DPP) v Cashin* [2017] IECA 298, *People (DPP) v Dewey* [2019] IECA 29 (a "*singular lack of engagement with the facts of the case*"), *People (DPP) v Crane* [2019] IECA 35 ("*…we are satisfied that he has not made out an arguable ground of appeal. An arguable ground must have some substance*"), *People (DPP) v Quinn* [2019] IECA 39

("*The reason why a court requires some engagement with the facts or the merits of the appeal is that the court will not grant an extension of time particularly when the time is as long as it was in this case, which is a year, unless it is satisfied that the interests of justice do suggest that a person should be entitled to ventilate a ground of appeal which is at least arguable in some way*").

**60.** A good explanation for delay can mean that a less strict approach will be taken to the merits of the proposed appeal. In *People (DPP) v Barry* [2019] IECA 31, the Court was not particularly impressed with the proposed grounds (describing them as "not utterly unarguable") but granted the application because the explanation for the delay was very strong. Similarly, in *People (DPP) v Hricko* [2019] IECA 36 and *People (DPP) v Black* [2019] IECA 46 the Court granted applications in sentence appeals because there was an adequate explanation for the delay, even though in *Black* the proposed grounds were vague and generic.

**61.** The Court has undoubtedly referred on a number of occasions to the rights of victims – for example in *People (DPP) v. Ellahi* [2019] IECA 152 ("*In seeking to identify where the justice of the case lies, when the request is to extend time in a case involving sexual offences and the application to extend time is made greatly out of time, the Court has to have regard to the interests of the victim. A victim is entitled to see matters finalised and brought to a conclusion*.") However, in no case has this consideration been determinative of outcome.

**62.** *People (DPP) v Lingurar* [2021] IECA 185 is the case on which the appellant lays most emphasis as representing a shift in the jurisprudence. In that case, the applicant, who had been convicted of manslaughter, sought an enlargement of time in circumstances where the

Court of Appeal was prepared to accept that he was not to blame for the delay post-conviction and sentence. However, he was responsible for a lengthy pre-trial delay of some three years. He had failed to appear at trial, had obtained travel documents in breach of his bail terms and had left the jurisdiction. He later returned and was using a false identity when arrested.

**63.** In assessing the merits of the proposed grounds, the Court indicated its approach in the following terms:

> "***18.*** *So far as the grounds of appeal proposed to be relied on are concerned, it seems to us that it is necessary to make an assessment of the strength of grounds and the prospect of success.*
>
> ***19.*** *In the context of an application for bail post-conviction, the Supreme Court spoke of the need to identify a discrete ground with a strong chance of success (DPP v. Corbally [2001] 1 I.R. 180). In the context of a case where there has been very considerable delay, much of it caused by the appellant's own actions, and where there are victims of crime who would be very significantly affected by any decision to extend time and so further prolong the proceedings, it seems to us appropriate to apply a similar threshold.*"

**64.** The Court then considered each of the proposed grounds of appeal. One related to the issue of the admissibility of prosecution evidence based on retained telephony data, in the light of the jurisprudence of the Court of Justice of the European Union. Although the CJEU had not, as of the date of the judgment in *Lingurar*, given its decision in the reference from this Court in *Dwyer v Commissioner of An Garda Síochána* [2020] IESC 4, the Court of Appeal

did not consider that there was a strong case for believing that an appellate court would exclude such evidence in the circumstances of the case. Similarly, the Court applied the *Corbally* test in determining that an argument relating to the admissibility of certain memoranda of interview was not likely to succeed.

**65.** However, the Court did grant an enlargement of time in respect of the appeal against sentence, because it considered that there was a point of substance to be made in relation to the youth of the appellant at the time of the offence. It subsequently reduced the sentence imposed upon Mr Lingurar from nine years to eight. It may be noted that in its consideration of the appropriate sentence, the Court endorsed the view of the trial judge that the breach of bail terms and absconding were aggravating factors, because of the additional impact caused by the delay to the family of the victim.

**Discussion**

**66.** The order against which this appeal is taken is one dismissing the application for enlargement of time. That, in principle, obliges the Court to consider the totality of the case in order to determine whether or not the interests of justice require enlargement. It is true that in the particular circumstances of the case the Court might decide to allow the appeal simply on the basis that full access to the transcript should have been facilitated, and to then remit the matter to the Court of Appeal. However, since the release of a transcript to an appellant who has not complied with the Rules is a matter for the discretion of the Court, to be exercised in the interests of justice, the question whether it should have been released in this case can in my view only be answered by reference to the entirety of the information put before us.

**67.** I would not, for that reason, be inclined to adopt any general or abstract rule about the entitlement to the transcript, before lodging grounds of appeal, of an appellant who has changed legal representation and does not have what he considers to be adequate records of the trial. The issue is part of the broader process of the application for enlargement of time, and must be addressed within that context. The overriding obligation on the Court is to act in the interests of justice, having regard to the totality of the case as presented to it. That does not involve drawing an automatic distinction between those who do not change lawyers and those who do, to the advantage of the latter.

**68.** The original grounds put forward by the appellant in April 2021 were that the complainant had not been adequately cross-examined, that the absence of medical evidence should have been emphasised and that the social workers should have been called in evidence. The first of these complaints has been abandoned in the light of the transcript of the complainant's evidence – it is abundantly clear that there is no ground for criticism. The second is not a matter of consequence, since the absence of medical evidence is not significant in relation to the kind of acts alleged by the complainant some period of time after they had ceased. It would have been gravely dangerous to call a social worker, in a trial of a father charged with sexually assaulting his daughter, in the hopes that they would adhere to an earlier view that he was a good parent. All of this was explained to the appellant at the time.

**69.** Subsequently, in the affidavit sworn by the appellant in 2022, the subject of a separate allegation made by the complainant against another person was raised. That matter was, in fact, raised in the trial and was dealt with.

**70.** Having seen the transcript of the complainant, the appellants' representatives then sought the transcript of her mother's evidence. It might be thought that this is, perhaps, the strongest element of the case made – if counsel had raised it on the first occasion in the Court of Appeal, then, since the Court was prepared to grant the transcript of one witness it might well have given the transcript of the other. I fully accept that this was because of an oversight, rather than an afterthought. However, again, I am of the view that this Court has to look at the issue in the light of the fact that more information is available to us than to the Court of Appeal.

**71.** The appellant's representatives were aware of his account to investigating gardaí in interview, and were also aware of the mother's statement to the gardaí. They wished to see if the issue of the appellant's potential absence from his daughter's life for four years had been explored and whether or not an application for a direction had been made. They are now aware that it was fully explored and that it was a major part of the direction application. They are also aware of the reasons why the trial judge refused a direction. There was undoubtedly a conflict of evidence on this point between the complainant and her mother, but as *People (DPP) v M* and *People (DPP) v Leacy* make clear, that fact is simply not a sufficient ground for a direction on its own.

**72.** It is clear that the complainant's evidence covered all of the times material to the charges and that she was supported by the evidence of the appellant's former partner. It was a matter for the jury as to whether or not they believed her. It is equally clear that the appellant never made the case himself that he was away and out of contact for a prolonged period of time during the relevant years. He did not do so in either in his interviews with the investigating gardaí or in his initial proposed grounds of appeal. This is not, of course, to suggest that he was not entitled to take advantage of any confusion in the prosecution case, or to make a

case that the evidence did not establish his guilt, but I do not see a viable argument to the effect that a direction should or could have been given.

**73.** I would not, in those circumstances, hold that the Court of Appeal erred in refusing to release the transcript.

**74.** The question then is whether this Court should allow the appeal against the refusal of an enlargement of time. The principles to be applied are those in *Kelly*. The decision in *Lingurar* is not of direct relevance, in that there is no suggestion in this case that there was any action by the appellant that caused significant pre-trial delay to the detriment of other persons. I would, in any event, have some concerns about the *Lingurar* approach even in cases within that category. It is not clear to me that the analogy with *Corbally* is necessarily appropriate – *Corbally* was concerned with the limited question whether the appellant should be entitled to bail pending the substantive hearing of his appeal, and not with whether or not he should be permitted to appeal at all. I also do not think it clear that pre-trial behaviour can determine the question whether or not issues arising in the trial have rendered the conviction unsafe or unsatisfactory. These, however, may be matters for another day.

**75.** The only question in this case is whether the Court considers that an enlargement of time is necessary in the interests of justice. In answering that question, the Court is of course entitled to consider the post-trial actions of the appellant and assess the reason for the delay. It must also have regard to the proposed grounds of appeal – they must not, in the words of O'Higgins C.J., be a "late and stale" complaint of irregularity with nothing to support them. Equally, having regard to Henchy J.'s formulation, one must ask whether the Court has been given reason to think that the verdict might not be upheld after a substantial appeal.

**76.** My view is that what has to date been put forward on behalf of the appellant is indeed "late and stale" and that there is nothing to support it. The delay in putting in the appeal has not been adequately explained. I find it very difficult to accept that, despite the advice of his lawyers on the day of sentence, despite the visit by his solicitor some short time later, and despite the letter sent by the solicitor in October 2019, he still believed that an appeal would be put in on his behalf. Even if that were so, the delay between then and the lodging of the notice of appeal in April 2021 (followed by a further, unexplained delay until the affidavits in April 2022) is extraordinary. I find the position of the complainant to be relevant here – it is simply unfair to other participants in a trial to prolong matters in this way without good reason. However, I would not ground a refusal on that consideration alone. From the point of view of the court process, the important feature of the case is that the actual issues put forward have all, in fact, fallen away in the light of fuller consideration and the additional information provided.

**77.** It is now suggested by counsel that he could in fact formulate grounds of appeal now but that he would need the transcript in order to be able to stand over them. With respect, that is not a position open to appellants who have complied with the Rules and I do not see that it is open to those who have not. It is further suggested that the appellant would be entitled to raise grounds of appeal on the issues of delay and corroboration. No point of substance has been raised on these issues and (in the absence of any argument to the effect that counsel in the trial should have requisitioned further on them), I do not see as causing any concern as to the safety of the convictions.

**78.** I would therefore dismiss the appeal.