THE COURT OF APPEAL

Edwards J.
McCarthy J.
Ní Raifeartaigh J.

Bill No. 32/2018
Appeal No: 29/2022

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

Respondent

V

G.D.

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 3rd of November 2023.

Introduction

1. The appellant was originally tried before the Central Criminal Court in December 2021 on three counts (Nos. 1, 2 and 7) of rape contrary to s. 4 of the Criminal Law (Rape) Amendment Act 1990 (i.e. "the Act of 1990"), two counts (Nos. 3 and 4) of sexual assault contrary to s. 2 of the Act of 1990, and three counts (Nos. 5, 6 and 8) of sexual assault contrary to s. 2 of the Act of 1990 as amended by s. 37 of the Sex Offenders Act 2001. On the 21st of December 2021 the appellant was convicted by unanimous verdict by jury of all counts in the indictment record, excluding count no. 4 in respect of which the appellant was acquitted.

2. On the 24th of January 2022 the appellant was sentenced to 8 years and 6 months' imprisonment on each of the s. 4 rape counts, and to 2 years' imprisonment on each of the sexual assault counts. All sentences were ordered to run concurrently and to date from the 21st of December 2021.

3. The appellant has appealed to this Court against both his convictions and sentences.

4. This judgment deals with his appeal against his convictions.

Background:

5. The alleged sexual offending the subject matter of the complaint was said to have occurred during the period from the 1st of January 1998 to the 31st of December 2002. It was alleged by the complainant – the appellant's younger brother – that the appellant had sexually assaulted and/or raped him in various locations including in the family home, at the home of an aunt and in a caravan at a seaside resort. The appellant was aged 14 to 18 years old at the time of the alleged

offences, and the complainant was aged 9 to 14 years old. The offences, as particularised in the indictment, alleged that the appellant had on a number of occasions touched the complainant's penis both inside and outside his clothes, that he had penetrated the complainant's mouth with his penis on two occasions, and that he had anally raped the complainant on one occasion.

Grounds of Appeal:

6. On the 24th of January 2022, the appellant lodged a Notice of Appeal in which he outlined the two grounds on which he now seeks to appeal his conviction:

(a) That the trial judge erred in fact and in law in restricting the scope of cross examination of the complainant with regard to his previous sexual history.

(b) That the trial judge erred in fact and in law in permitting into evidence the testimony of a Mr. C.

First Issue: The s. 3 Application

Evidence and Procedural History

7. The complainant gave evidence-in-chief on the first day of the trial, following which there was some cross-examination of him by counsel for the appellant for the remainder of that day, with the balance of his cross-examination then being adjourned until the following morning. On the second day of the trial, counsel on behalf of the appellant made an application to the Court under s. 3 of the Criminal Law (Rape) Act 1981 ("the Act of 1981"), as amended by s. 13 of the Act of 1990, seeking leave to cross-examine the complainant as to his sexual history. This section provides:

> "*(1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person; and in relation to a sexual assault tried summarily pursuant to section 12—*
>
> *(a) subsection (2) (a) shall have effect as if the words "in the absence of the jury" were omitted,*
>
> *(b) subsection (2) (b) shall have effect as if for the references to the jury there were substituted references to the court* [...]
>
> [...]
>
> *(2) (a) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person.*
>
> *(b) The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced*

> *or the question to be asked, that is to say, if he is satisfied that, on the assumption that the if the evidence or question was not allowed the jury might be reasonably satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.*
>
> [...]"

8. As is provided for under s. 4A of the Act of 1981, as inserted by s. 34 of the Sex Offenders Act 2001, the complainant was afforded the right to be heard in relation to the application, and was independently legally represented for that purpose.

9. It was intimated by counsel on behalf of the appellant, in his application, that he wished to raise matters with the witness which, the defence would argue, had "*provoked or motivated the allegations*" of sexual offending made by the complainant as against the appellant. These included the following:

(i). A phone conversation the appellant had with his mother in late August 2015 during which he informed her that he was concerned about the complainant for a number of reasons. Those reasons being that he had seen a profile of the complainant on a gay dating website with the caption "[complainant's name]*, willing to do anything*". Further to this, the appellant claimed in this conversation that the complainant had had male strangers in the family home without the knowledge of the appellant or their parents, and that further to this the complainant was meeting males at a specified hotel.

(ii). The fact that the parents of the complainant and appellant were, it was claimed by the appellant, "*distressed*" by this information, leading to a phone conversation with the complainant about it. The complainant learned that the information had come to their parents from the appellant. Further, that in that phone conversation the complainant had denied the appellant's implicit suggestion that the complainant was homosexual, and he had further claimed to his parents that the appellant was lying.

(iii). That the following weekend, a fracas had erupted between the complainant and appellant at the family home over the disclosures the appellant had made to their parents. The defence maintained that in the course of this argument, the complainant allegedly said that "*he would destroy* [the appellant] *for telling lies about him*".

(iv). That the appellant was subsequently told to leave, and that when he had left the complainant allegedly "*continued to give out and was angry about what* [the appellant] *had said and said that* [the appellant] *was telling lies about him*."

(v). That some short time after this, the complainant followed the appellant to his home, allegedly threatening to kill him. The father of the two men had followed the complainant in his car. Further, that at the appellant's home, the appellant had showed both the complainant and their father a photograph of the complainant on the gay dating website with the caption "*Willing to do anything*".

(vi). That thereafter, the father had had to separate the two men who were arguing about the photograph, and that he took the appellant away in his car. Further, that as the father and the appellant were leaving the scene, the complainant allegedly "*was banging on the car saying that he would ruin [the appellant's] life*".

(vii). That the following week, the parents of the two men had spoken with the complainant and offered reassurances to the effect that "*it was okay to be gay*" and that they did not have an issue with him being gay. Further, that notwithstanding such support, the complainant maintained his denial that he was gay.

(viii). That in the wake of these events, the complainant left the family home on several occasions to make a number of trips to England, claiming that he wanted to be on his own. Further, that his parents, concerned at this, perused his social media whereupon they discovered photographs of the complainant with an older male taken on a Parisian bridge. Amongst the photographs was one depicting a lock (amongst numerous other locks, that would later be suggested as being love locks) affixed thereto. The photographs further displayed rings on each respective man's left hand, perhaps indicating (the defence would suggest to the witness) engagement, and that the caption of one photograph had said that they were "*Mr. and Mr*."

(ix). That having returned home, the complainant had maintained (falsely, the defence would be suggesting) that he was present in England on his own during the time in which he was away from the family home.

(x). That in the immediate period prior to Christmas 2021, and just before the complainant made his initial disclosure of alleged abuse by the appellant, and having learned that the appellant was to be returning to the family home on Christmas Day, the complainant indicated his discomfort with the appellant returning home during the festive period, and had said that if the appellant was coming home then the complainant was going to leave the house. Further, that the parents had not given in to the complainant's demands and had insisted that everyone should come home for Christmas.

10. These matters having been outlined to the trial judge, counsel on behalf of appellant submitted, in support of the application under s. 3 of the Act of 1990, as amended, that

> "*And, as I have pointed out already, Judge, or certainly the case we're making is that when the -- following the receipt of the information given by [the appellant] to their parents, and they in turn informing* [the complainant] *of it, he intimated that he was going to -- or said that he was going to destroy* [the appellant] *for telling lies about him. And therein, Judge, we say is the motive or potentially a motive for fabricating these allegations against his brother. And, as I say, Judge, if we were not permitted to adduce such evidence, Judge, then the situation would be that the jury would be left with only one possible explanation as to why these allegations were being made against his brother, namely that simply because they happened. And if the jury had this particular information or if this evidence was adduced, Judge, then the jury would have an alternative explanation, Judge, which might lead them to reach a different conclusion, which, in essence, Judge, is the premise upon which the section is founded in terms of what the Court has to do, and the ultimate consideration and judgment that the Court has to make in relation to this particular application. And it's ultimately a matter of fairness to the accused, as I say, rather than any unfairness to the complainant.* [...]"

11. Counsel representing the complainant and counsel for the prosecution both requested, and were afforded, time to take instructions in relation to the matters outlined. The learned trial judge adjourned the matter until the following day, the third day of the trial, on which day the complainant and the prosecution objected to the appellant's application. It should be noted at this juncture that upon the application resuming counsel for the appellant indicated that he was no longer seeking leave to question the complainant in relation to the profile and accompanying caption on the gay dating website.

12. The submissions on behalf of the complainant in relation to the s. 3 application may be summarised as follows.

(i) In relation to the disclosure that the complainant was hosting male strangers in the family home, this area of questioning was "*deeply intrusive* [...] [and] *not necessary to advance the defence that's being pursued.*"

(ii) In relation to the disclosure that the complainant was meeting males at the specified hotel (implicitly for sex), this was said to not be relevant to the trial and did not relate to the motivation defence that had been outlined. Counsel further emphasised "*the very, very personal nature of questions such as that.*"

(iii) In relation to the alleged conversation between the complainant and his parents during which the complainant was said to have denied being gay, counsel indicated the complainant's consent to being questioned in respect of this conversation.

(iv) In relation to questions regarding the complainant's whereabouts when not at the family home – whether he was indeed in England as he claimed or rather in Paris as allegedly depicted in a photograph published on his social media, counsel on behalf of the complainant emphasised that the photograph of the love lock merely depicted that item and did not depict either the complainant or the older gentleman with whom he allegedly visited Paris. On this basis, counsel stated that the complainant's position was such that the photograph of the alleged love lock had no relationship to the defence being pursued by the appellant, and that he was happy to answer any questions that the court might direct. However, the complainant was nonetheless of the view that the purpose of this intended area of questioning was to discredit him "*as somebody who's in a relationship with another person at a time when he was 27 years of age and perhaps it wouldn't be unusual for somebody of that age to be in such a relationship.*"

13. Counsel on behalf of the complainant drew the trial judge's attention to the "*Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*" (2020, Department of Justice), by Prof. Tom O'Malley, at pp. 65-66:

> "*Any statutory provision restricting the questioning of victims about their sexual history must attempt to strike a balance between ensuring a fair trial for the accused and respecting the victim's rights to personal privacy and human dignity. An outright ban on such questioning could create the risk of an occasional miscarriage of justice and would*

> *therefore be unacceptable. But it is equally important that such questioning, when permitted,* ***should not amount to a gratuitous exercise of prying into the personal life of a witness in order to discredit her or him in the eyes of the jury,*** *or to become, in the words of the Court of Criminal Appeal in G.K,* ***a form of character assassination****."*
>
> [emphasis in bold added by the Court].

14. Senior counsel on behalf of the prosecution indicated his "full agreement" with the submissions by counsel on behalf of the complainant. He further emphasised that the areas of questioning relating to the complainant's sexual history and his alleged visit to Paris and the photographs in connection to that supposed visit that were allegedly taken amounted to "*character assassination*" and submitted that they were "*precisely the type of matters which the legislation is designed to protect a complainant against.*" He continued:

> "*They are redolent of the type of questioning which unfortunately was all too common in the times before this legislation. It is, seems to me, impossible to imagine or to conceive how this question, how the questions are set out in relation to, for example, a lock on a bridge in Paris or the particular type of sexual activity which his brother is [par]taking as an adult in, how he chooses to meet particular men at hotels or whatever, how that is in any way relevant to the central question which the defence wish to put before the jury by way of motive. It is simply designed and can be seen as no more than being designed to reduce* (sic) [the complainant] *and to* (sic) *his character in the eyes of the jury by seeking to portray his sexual activity as unsavoury and immoral and unacceptable and it serves no purpose other than that.*"

15. In response, defence counsel sought to refute any suggestion that the s. 3 application if granted could give rise to a form of character assassination. He insisted that the application was "*relevant in terms of his reaction to the information, not the information in and of itself.*" As he sought to emphasise:

> "*So, the issue, Judge, is his reaction and his contention that what was being told about him was lies and such was his anger about it, Judge, that we say this has fuelled his resentment and spite against his brother, Judge. And which we say, Judge, has led him to make the allegations in the case.*"

Trial Judge's Ruling

16. The trial judge ruled as follows:

> "*I have considered the relevant legislation and two authorities, The People (DPP) v. GK, 2IR [2007] 92, and DPP v. EH [2019] IECA 30. I've also considered Mr O'Malley's book, Sexual Offences, second edition, chapter 18. Paragraph 25 of GK refers as follows: "Having regard to the severely restrictive terminology of the statutory provision, the court is of the view that, in general, a decision to refuse to allow cross-examination as to past sexual history may more readily be justified in most cases than the converse." The alleged motivation for the making of the complaints against the accused is an important*

aspect of [the appellant's] *defence. In the view of this Court, it is relevant and admissible. The conversation with his parents and the denial by* [the complainant] *can be put to the complainant. In addition, subject to the usual rules of hearsay and admissibility, the subsequent dispute or row in which a threat or threats were made can be opened in front of the jury. The complainant was a 27-year-old man at the time of the alleged outing or disclosure. Whom he associated with, the locus of any association are not relevant. A photo of a lock on a bridge is also not relevant. If I return to paragraph 25 of GK: "Where a form of questioning is allowed, it should be confined only to what is strictly necessary, and should never be utilized as a form of character assassination of a complainant." I will allow the defence to explore the question of motivation in the presence of the jury, but I will not allow it to be utilized as a form of character assassination, and by that, I'm referring to No. 4 on the list of points made by* [counsel for the complainant] *in relation to the conversation concerning the parents of the accused person, and of the complainant. Whether or not* [the complainant] *was in Paris or not is not central to the issues. This Court is of the view that is a collateral issue and, therefore, the defence will be bound by the final answer given by* [the complainant] *should he be asked whether or not he was in Paris. It is not a question which is central to the issues. Any question put must be central to the issues on the relevance and proximate to the matters which are before this court. The allegations before this court relate to allegations of wrongdoing between 1998 and 2002. Theoretically, it is open to the defence to cross-examine* [the complainant] *in relation to whether or not he was in Paris, but it is very far removed from the subject matter of this court, and I will not allow any in-depth exploration in relation to this. And the answers given by* [the complainant] *will be final, I will not allow the matter to go further. And as I've indicated already, there is to be no attempt to introduce a photograph of a lock with two names on it. Now, I do not regard that as admissible. And if any further clarification is sought, the Court can be addressed accordingly. All right?*

[…]

DEFENCE COUNSEL: *There is a photograph, Judge, of* [the complainant] *in the company of another man, which we believe is in Paris, separate --*

JUDGE: *No, I am absolutely not allowing that.*

DEFENCE COUNSEL: *Very well, Judge."*

Cross-examination of the Complainant

17. Following the trial judge's ruling the complainant was duly cross-examined within the parameters of the leave granted. The issue of motive was canvassed as follows:

"*Q. All right. But what I'm going to suggest to you, Mr* [complainant]*, is that your brother* [the appellant] *brought to your parents' attention that you were gay, all right?*

A. Okay.

Q. And he brought that to their attention and they subsequently then on hearing that information they came back home to [a named city]*, and they then had a conversation with you on the day after they came back from* [the named city] *in which they let you know what* [the appellant] *had told them about you being gay, all right?*

[…]

A. *… I remember that day, I remember* [the appellant] *ringing my mother to tell them that I was gay,* […]

[…]

Q. *Now, following this meeting or conversation with your parents in the first instance, Mr* [complainant]*, I'm going to suggest to you at that particular time when you had that conversation, you denied to your parents that you were gay?*

A. *Yes, I did deny it.*

Q. *You did deny it. And furthermore, in addition to that, I'm going to suggest to you that you told your parents that your brother* [the appellant] *was lying?*

A. *No, I just denied it that's --*

Q. *You just denied it and nothing more?*

A. *Correct.*

Q. *So, you denied it and what was your reaction to the fact to what your parents had told you and what was your reaction to the fact that the information had come from* [the appellant]*?*

A. *It was just something I wasn't ready to talk about.*

[…]

Q. *All right. Now, some short time after that, maybe the following weekend then I'm going to suggest to you that* [the appellant] *in fact came home for a visit to the family home, okay?*

A. *Okay.*

Q. *And on his arrival home then an argument developed between you and* [the appellant] *about what* [the appellant] *had told your parents?*

A. *Not true.*

Q. *That's not true. So, was there any discussion at all with* [the appellant] *or did you raise the issue at all with* [the appellant] *about what he had told your parents?*

A. *No, I never ever went to speak to him or ever be in the presence of his company, why would I?*

…

Q. *And furthermore, Mr* [complainant]*, in addition to you I'm going to suggest to you being angry and upset and having an argument with* [the appellant] *about this, that in the course of this argument you said to the* [the appellant] *that you would destroy him, or you disclosed to the family that you would destroy* [the appellant] *for telling lies about him?*

A. *That's not true.*

Q. *That's not true?*

A. *No, it's not.*

Q. *So, you weren't angry and upset with* [the appellant]*, there was no argument and you never offered words like that or anything like that at all?*

A. *I didn't want to talk about it full stop.*

Q. *Yes?*

A. *It was something I wasn't ready to talk about.*

Q. Yes, so I can take from that can I, Mr [complainant]*, that in light of and that can be understandable that you didn't want to talk about it, that therefore you would be upset about the fact that* [the appellant] *had outed you to your parents?*

A. No, as I said repeatedly, it's something I didn't want to talk about at all.

Q. And in fact, such was the nature of the argument that had developed between you and your brother [the appellant]*, as I suggest to you, that your father asked* [the appellant] *to leave the family home at that point?*

A. No, I don't recall any of this.

Q. You don't recall any of this?

A. No.

Q. Okay. And --?

A. Because I didn't have an argument with him.

[…]

Q. […]*, Mr -- I'm suggesting to you, and just so as I'm clear on this, at this point I'm suggesting to you, Mr* [complainant]*, that the reason you have made these allegations against your brother,* [the appellant]*, is because you were motivated by anger and by ill will towards him for outing you to your parents?*

A. None of that is true.

[…]

Q. And I've to suggest to you, Mr [complainant]*, that -- as I did yesterday, that these allegations that you've made against your brother are motivated by spite and ill will against him?*

A. No, not true.

Q. Because he outed you?

A. Untrue.

Q. In 2015?

A. Untrue.

Q. So, is it just a coincidence, Mr [complainant]*, that after your brother outed you to your parents, and this was sometime in August 2015, is it just a coincidence then that not long after that, a number of months later, you then made these very grave allegations against your brother* [the appellant]*, at Christmas time in 2015; is that just a coincidence?*

A. Well, may I answer your question with a question, please?

Q. Yes?

A. Isn't it an awful coincidence that when I came forward, my parents believed me for a certain amount of time? And then when I was still living in the family home, there was either constant silence or constant pressure put on me to drop the charges, and then magically, right in front of me, as you gave me, a barring order in 2016. Because when I wouldn't -- as my parents would say, I could not dictate such terms that I wouldn't be allowed to live in the family home, they got this to get rid of me. It was a case of out of sight, out of mind.

[…]

Q. […] *if we can go back to the question I asked you, Mr* [complainant]*; is it just a coincidence then that you made these allegations against your brother* [the appellant] --

A. No, it's not.

Q. -- after you were outed by him?

A. Yes, I was outed, but it was something I didn't want to discuss, so I stayed silent.

[…]

Q […] *So Mr* [complainant] *in any event, I laid out to you what I say to you is the motivation for these allegations against your brother?*

A. And everything you're saying to me is not true, absolutely none of it.

Q. And that these are fabrications, Mr [complainant]*?*

A. None of anything you have said to me is true.

Q. Because of your ill will towards your brother?

A. Everything you're saying to me is untrue."

Evidence of the Appellant in his Defence

18. After the close of the prosecution's case the appellant gave evidence in his defence and his counsel, when leading him through his evidence in chief, asked him to comment on each of the complainant's allegations, all of which he denied. He also gave the following evidence:

"*Q. Now, before the allegations were made, Mr* [appellant]*, did you tell your parents anything about* [the complainant]?

A. I told [the complainant] -- *excuse me, apologies for my -- apologies for speaking out of turn. I told my mother that* [the complainant] *was gay.*

Q. You told your mother that [the complainant] *was gay?*

A. Exactly, yes.

Q. And are you able to remember how soon this was before Christmas of 2015?

A. This was in around August/October, so it was two or three months before Christmas time.

Q. Now, you say you told your mother that [the complainant] *was gay?*

A. Correct.

Q. Now, did you personally become aware through interaction with [the complainant] *as to what* [the complainant]*'s reaction to this was?*

A. Yes. When I was in the family home, as I say, [the complainant] *threatened -- he said he'll kill me for what I did. When I left the family home I went back to my apartment in* [a specified location] --

Q. Well, can I just pause there for a moment.

A. Correct.

Q. You say first of all you were in the family home?

A. Yes.

Q. So, you actually -- did you meet with [the complainant]*? Did you speak with him? Were you present when* [the complainant] *said these things to you?*

A. Yes. As I say I went and I told my mother [the complainant] *was gay and --*

Q. Now, how soon after this incident that you're talking about with [the complainant], how soon did that occur after you telling your mother?

A. It would have been an hour/two hours after because my mother was in [a seaside location] *and she came back up.*

Q. Right.

A. She drove back up straightaway and then when I told my mother that [the complainant] *was gay* [the complainant] *reacted negatively and he was very angry.* [The complainant] *was very angry towards me.*

Q. Right. And how did he show that anger?

A. He was saying that -- he was shouting loudly saying he'll kill me, he'll kill me and then I was just telling him to stop and I left the family home and I proceeded to go back to where I was staying in [a specified location]*.*

Q. Right. You're staying in [a specified location]*?*

A. Yes.

Q. So, you went -- after you say [the complainant] *said these things to you, you went back to* [a specified location]*, are you talking about the same time or was it a different occasion?*

A. It was the same day.

Q. Right.

A. So after that then [the complainant] *proceeded to follow me down to* [a specified location]*. I was in my apartment and* [the complainant] *was shouting outside of my apartment saying "Come down,* [appellant's name]*, come down,* [appellant's name]*, I'm going to kill you." And he started saying where's my car, that he was going to destroy it. So, I came down out of my apartment to try and speak* to [the complainant]*.* [The complainant] *was very aggressive. He was saying,* "[Appellant's name]*, I'm going to kill you, I'm going to kill you."*

Q. Now, could I ask you at that particular time was there anybody else there or did anybody arrive?

A. No, there was no -- well, firstly I initiated a 999 call cause I was very scared of [the complainant] *and I wanted the guards to help and intervene. I cancelled the 999 call because I saw my father arrive in his car.*

Q. Right. So, when your father arrived then what happened?

A. When my father arrived in his car my father told me get into the car. I got into the car. My dad turned around the car to try and drive away. [The complainant] *came in front of the car and he started banging furiously, very violently on top of the car saying "*[Appellant's name]*, I'm going to kill you.* [Appellant's name]*, I'm going to kill you" and he started banging the car and my dad could not move his car away for a few minutes until* [the complainant] *left and when* [the complainant] *actually moved to the side my dad drove me down around half a mile to the* [Named] *Shopping Centre and he said, "*[Appellant's name]*, stay there for a while till everything calms down."*

Q. And did you then -- so, what did you do after that?

A. I took my dad's advice. I stayed in the [Named] *Shopping Centre for around half an hour to an hour before proceeding to go back up to my apartment because I was worried*

that [the complainant] *was going to hurt me, that I was worried that* [the complainant] *was going to hurt me.*

Q. Okay. Did you see [the complainant] *again that particular evening?*

A. No, I did not.

Q. Okay. How long did you live in [a specified location] *for?*

A. I would say that I lived there for a little over a half a year.

Q. Right, okay. Now, Mr [appellant]*, I don't want you to give me any information, I just want to ask you a specific question.*

A. Yes.

Q. You say you told your mother that [the complainant] *was gay?*

A. Yes.

Q. Now, why did you tell your mother that [the complainant] *was gay?*

A. I didn't want [the complainant] *to be living a lie. I didn't want* [the complainant] *to be living in secret. I wanted* [the complainant] *to have an open and loving relationship with my father and I wanted him to be honest with himself. The reason being is because I didn't tell my dad that I was gay, I didn't have the courage to say that to my dad and because of that I didn't want* [the complainant] *to not have a good relationship with my father. I have a very good relationship with my father but I just wanted* [the complainant] *to be honest with my dad."*

Submissions to the Court of Appeal:

Submissions by the Appellant

19. It was submitted that the trial judge, in ruling as she did, erred in fact and in law. It was said that the basis for the application on behalf of the appellant was not the sexual behaviour of the complainant in and of itself, but the complainant's reaction to the information relating to his sexual behaviour which was provided to his parents. It was submitted that the reaction of the complainant to the matters disclosed to his parents, namely the fact that he had been meeting men for sex at the named hotel and bringing male strangers back to the family home, thus disclosing his homosexuality, resulted in his anger and frustration culminating in the complainant threatening to ruin the appellant's life and that he would destroy the appellant for telling lies about him. It was submitted that such anger and resentment and spite, emanating from the details of the disclosures made by the appellant, led the complainant to then make the allegations of sexual abuse which he has made against the appellant.

20. It was submitted that the omission of the surrounding detail pertaining to the complainant's entertaining of strangers in the family home and his meeting of males for sex in a hotel, deprived the jury of the context of the disclosures as made by the appellant to their parents. It was said that, in the absence of these details, the jury could not adequately assess the true depths of what the appellant contends was the complainant's anger and resentment towards him, such that put him on a path to vengeance that resulted in the complainant making a formal complaint of sexual offending in January 2016.

21. The court was referred to *The People (DPP) v. G.K.* [2007] 2 I.R. 92, at p. 100 approving the following statement from Archbold on Criminal Pleading, Evidence and Practice (2000 edition, Sweet & Maxwell) at para. 8-123:

> "*Questions which really do go to the issue of consent should, it is submitted, never be excluded under the Act* […] *. Questions which do not go to that issue and which relate to the complainant's previous sexual experience should be excluded, unless they are such as might reasonably lead the jury to take a different view of the complainant's evidence. Clearly, if the complainant has lied about her previous sexual experience, this is a matter which may affect the weight to be attached to her evidence. The mere fact that the complainant has previous sexual experience, however, is of no significance whatsoever.*"

22. The court was also referred to *The People (DPP) v. T.C.* [2009] IECCA 63 at para. 18 where Denham J., as she then was, stated:

> "*It is for a trial judge to exercise his discretion under s.3. As this Court stated in The People (D.P.P.) v. G.K. [2007] 2 I.R. 92, the test is one of fairness. It is for a trial judge to exercise his or her discretion as to whether leave should be granted to adduce evidence. If such evidence were admitted it could have an important effect on the course of the trial, on the way counsel ran the case, on the cross examination, and on the jury.*"

It was submitted that in the context of the present case, on the facts as established in evidence, to not have permitted the entirety of what was disclosed to the complainant's parents by the appellant be put to the complainant in the presence of the jury represented an unfairness to the accused. Being deprived of the particular detail of the disclosures made by the appellant meant that the jury did not have the full picture and context upon which the appellant relies in putting forward his defence.

Submissions by the Respondent

23. It was submitted that the appellant, through cross examination of the complainant, and through his own evidence as well as evidence called on his behalf at the trial, contended that the motivation for the complainant making the allegations against him stemmed from the appellant having "*outed*" the complainant to their parents months before a complaint was made to gardaí. Other motives were put including jealousy on the part of the complainant towards the appellant, but this was the primary one. The respondent rejects the appellant's suggestion that the jury were deprived of the full picture and were left unable to assess the full depths of the complainant's anger and resentment the appellant. The respondent maintains that the appellant was able fully and adequately to make his case to the jury and that the jury was not inhibited from considering his defence in any meaningful way. In the respondent's submission, the trial judge's ruling on the section 3 application was correct and struck the right balance.

24. The respondent further maintains that a detailed review of the complainant's cross-examination reveals that the complainant did not harbour any ill will towards the appellant for revealing his sexuality to their parents. Rather, the appellant is seeking to attribute feelings to the complainant that he did not accept in evidence no matter how many times he was questioned on it. It follows therefore, that the detail of what the appellant put forward of the complainant's private life could not have led the jury to a different view of the complainant's evidence. In these circumstances, the respondent submitted that the test, as adopted in *G.K.*, had not been met.

25. Furthermore, the essence of the appellant's defence – that feelings of "*anger and resentment*" felt by the complainant motivated and to make a complaint to gardaí – was put numerous times to the complainant, to their father, and was also adduced in evidence by the appellant himself in his evidence to the jury. A full picture of events preceding the complainant's disclosure, and those that post-dated it, was therefore put before the jury, notwithstanding that the jury had rejected the defence and had returned guilty verdicts as set out.

The Court's Decision

26. We have carefully considered the basis for the s. 3 application and the context in which it was made. We have also considered the trial judge's ruling and have then had regard to the cross examination of the complainant in the light of the trial judge's ruling, and other evidence in the case including the evidence of the father and the appellant's own evidence. Having done so, we are satisfied that the trial judge approached the matter carefully and conscientiously and we agree with the respondent that her ruling was one that struck the right balance. While the accused has fair trial rights that must be protected, a complainant also has rights including with respect to privacy in matters of his/her sexuality and sexual history which also must be respected, unless to do so would visit an unfairness on the accused. Cross-examination of complainant cannot be used to traduce a complainant, or to pry unnecessarily into his/her personal life. Section 3 of the Act of 1981, as amended, is designed to ensure that a complainant's rights are not trammelled upon unnecessarily. By the same token, if it is truly necessary to explore an aspect of a complainant's private life or sexuality then it is incumbent on a trial judge to allow that exploration but only to the extent strictly necessary to ensure fairness. In the present case, far from introducing unfairness we believe that the trial judge's ruling was designed to, and in fact, achieved fairness, and we reiterate our belief that she struck the right balance.

27. It is clear from the run of the trial that counsel for the defendant was able to explore in depth with the complainant the background to the making of his complaints. He was able to, and did, directly confront the complainant with the suggestion that his complaints were motivated by anger and resentment, and with the contended basis for the suggestion that he was angry and resentful, namely that the defendant had told their parents that the complainant was gay. The complainant did not accept the motivation being attributed to him, but the jury could have been in no doubt as to the nature and extent of what was being suggested.

28. We have given careful consideration to whether the denials of the complainant that he was angry and resentful might have been less credible in the jury's mind if they had known that the appellant had not only told the parents about (a) the fact that the appellant was gay, (which was brought out in evidence), but also (b) that it had been suggested that he had been behaving in a promiscuous manner, by inviting men back to the family home and meeting men at a local hotel, implicitly for sex (suggestions which although mentioned on the *voir dire*, were not elicited before the jury). The ruling of the trial judge acknowledged that the motivation for the making of the complaints against the appellant was an important aspect of the appellant's defence. She made clear that the defence could explore the question of motivation before the jury, provided that that exploration was not being used as a form of character assassination. In the course of her ruling she said that *with whom* the complainant associated, and *the locus* of any association was not relevant. While we think that the imposition of this limitation, read in context, was probably only

intended to apply to identification, by production of a photograph or otherwise, of the alleged partner of the complainant to whom it was being suggested he was possibly engaged, and to the love locks on the bridge in Paris, we accept that it may possibly have been interpreted by the defence as extending more widely. However, even if that were so, that limitation would, in our judgment, not have precluded skilful cross examination of the complainant to the effect that part of what had made him angry and resentful was the imparting of information to his parents suggesting that not only was he gay but that he was behaving promiscuously. This could have been done without identifying the suggested promiscuous behaviour in the specific manner identified and prohibited by the judge (i.e. "who" and "where"). Alternatively, clarification could have been sought from the trial judge in the absence of the jury as to whether the limitation that had been imposed precluded it being put to the complainant that part of what had angered him and had made him resentful, and that indeed what had intensified his anger and resentment, was the suggestion made to his parents that he was meeting with men (without saying where, or identifying anybody with specificity) implicitly for the purposes of casual sex. Neither course was in fact adopted.

29. Ultimately, we have been satisfied that the appellant was not inhibited by the terms of the trial judge's ruling in making the defence that he wished to make. It is clear from the transcript that it was in fact fulsomely advanced that the complainant had been incandescent with anger and bitterly resentful arising from things that his brother the appellant had said to his parents, notwithstanding that the granular detail of what had been communicated, beyond the fact that the complainant was outed as being gay, was not elicited before the jury. The jury had heard that so angry was the complainant with whatever had been said that he had threatened to kill his brother, that he had threatened to destroy him, and that there had been a subsequent confrontation between them involving the furious banging of the appellant's car roof by the complainant, accompanied by the uttering of dire threats, such that the appellant had had to be driven away by his father. We believe that the jury could have been under no misapprehension as to the extent to which the defence were contending that the complainant was angry and resentful, and further that they knew at least in broad terms the basis for it. We are satisfied in the circumstances that the defence case would have been fully appreciated and understood by the jury, albeit that they ultimately rejected it.

30. The first ground of appeal is therefore dismissed.

Second issue: The Evidence of Mr C

Evidence and Procedural History

31. Mr. C was the second witness at trial. A first cousin of the appellant, Mr. C was related to the appellant through the appellant's father's side. Mr. C initially complained to the gardaí on the 30th of June 2016 after a series of conversations with the appellant in the weeks prior to that date, conversations which had caused Mr. C alarm. In relation to these conversations of which he complained to the gardaí, Mr. C made a formal statement to a gardaí on the 16th of August 2016. His statement, contained in the Book of Evidence commencing at page 14, disclosed details of

exchanges by SMS texts between the appellant and Mr. C, also concerning phone calls exchanged between them, and also concerning in-person conversations between them.

32. Of particular interest to the prosecution was the fact Mr C's statement asserted, *inter alia*, the following matters:

(i). That the appellant had informed Mr. C on the 31st of May 2016 when they went for a drive that there was a dispute within the family and that he, the appellant, was being accused of interfering with the complainant years previously, but that the complainant had no proof. Further, that the appellant had stated that he hated his father for bringing the complainant to the Garda station. Further, that towards the end of this conversation the appellant had asked Mr. C to have a word with his father to see if he could get the charges dropped; but that Mr. C had declined to get involved and instead had advised the appellant to sit down with his brother (i.e. the complainant), and his father and sort things out.

(ii). That as the appellant had got out of the car following the aforementioned drive, he had asked Mr. C, "*what would happen to the likes of me in prison?*"

(iii). That in a telephone conversation between the appellant and Mr. C later that evening, when Mr. C again urged the appellant to speak to his father and to his brother, the appellant had stated to "[The complainant] *won't speak to me over what I did to him*".

(iv). That Mr. C immediately responded to the appellant "*You're after admitting what you done* (sic) *to your brother*", to which the appellant had replied, "*No, no,no, I said it wrong",* and had then hung up the phone.

(v). That on the evening of the following day, the 1st of June 2016, Mr. C received a text message from the appellant which read, "*Hey, probably best to forget what I told you. I just needed to get it off my chest, I had no one to talk to apart from myself. But thanks for listening to me I appreciate it,* [Mr. C referred to by first name]*. He will be cut out in his lies. I just don't need any more crap in my life. I wish Nana was alive to talk to.*"

(vi). That on the 2nd of June 2016 Mr. C received the telephone call from the appellant asking him to meet with him at the weekend, as he wanted Mr. C to do him a favour. He would not specify at that point what the favour was but said that he would talk to Mr. C over the weekend.

(vii). That on the 4th of June 2016 the appellant met Mr. C by arrangement at Heuston station, and in the course of that meeting enquired of Mr. C, "*How much would it cost to hurt* [the complainant] *or* [his father]*?*", and whether he [Mr. C] knew someone who would do it. Mr. C claimed that his response was to tell the appellant to "*fuck off*". Responding to that, the appellant is said to have said "*Something will have to be done,* [Mr. C referred to by first name]*. I wouldn't survive in there.*"

(viii). That the appellant and Mr. C had parted with Mr. C warning the appellant that, "*[t]here better not be anything happen to my uncle* [named]*.*"

(ix). That on the 7th of June 2016 Mr. C received a phone call from the appellant in which the appellant asked him not to tell anybody what he had said to him. Mr. C claimed that his response was to tell the appellant not to ring him anymore because he didn't want to get involved.

(x). That on the 8th of June 2016 Mr. C received a text from the appellant saying "*Sorry*", to which Mr. C did not reply.

(xi). That the appellant made several subsequent attempts to contact Mr. C by telephone, but Mr. C did not answer his calls.

(xii). That on the 15th of June 2016 Mr. C subsequently received a call from a "*private number*", which transpired to be from the appellant, in which the appellant stated that he was coming to [his (named) home city] "*to sort things out*".

(xiii). That Mr. C, fearful of what the appellant might do, met subsequently with the appellant's father and informed him of what had occurred, and further reported his concerns to a Garda Tobin.

(xiv). That Garda Tobin, in turn, had apprised a Garda O'Callaghan was investigating the complainant's allegations against the appellant of what Mr. C had said, and that in due course Garda O'Callaghan met with Mr. C and took a formal statement from him on the 16th of August 2016

33. The DPP proposed to call Mr. C as a witness for the prosecution at the trial of the appellant, and this was objected to. The basis of the objection was that much of the contents of Mr. C's statement of proposed evidence related to uncharged misconduct, characterised by counsel for the appellant before the trial judge as "*new and specific*", and as comprising "*serious*" allegations. As defence counsel put it, the allegations being made were basically that the appellant was making or considering threatening behaviour against two prosecution witnesses in the case and that he was seeking assistance to try and cause harm to those witnesses. This, said defence counsel, amounted to a suggested attempt by him to interfere with the administration of justice. Counsel further contended that "*as a matter of fundamental fairness*", Mr. C's allegations should have been put to his client during the Garda investigation and he should have been afforded the opportunity to respond to them. It was too little and too late to suggest that the appellant could deal with them by giving evidence in his own defence. An accused was under no obligation to give evidence and should not be put in a position where that is the only means by which he could address allegations of uncharged misconduct. Counsel asked the trial judge to rule the evidence of Mr. C inadmissible in the circumstances.

34. Counsel for the DPP responded that Mr. C was simply a witness, and that the gardaí had been under no obligation to seek to question the appellant in relation to Mr. C's allegations. Moreover, the evidence to be adduced from Mr. C was relevant, and admissible as an exception to the hearsay rule, the appellant having made declarations against interest in the course of his conversations and exchanges with Mr. C. The trial judge was therefore asked to refuse the defence application.

Trial Judge's Ruling

35. The trial judge ruled on the objection raised as follows:

"*JUDGE: Now an application was made on behalf of the accused, Mr* [appellant named]*, to exclude the statement of witness number two, Mr* [C]*, and to exclude it from the jury. Submissions were made on behalf of* [the appellant] *inter alia that there was a fundamental unfairness; there would be a fundamental unfairness, a breach of first principles, if the statement as contained in the book -- which is contained in the book of*

evidence was admitted before the jury. It was also submitted that this would create an overwhelming prejudice to the accused person, that the accused person had not been re-interviewed in respect of the content of the statement of Mr [C]*, which was taken at a date later than the date on which the accused person was arrested and interviewed. It was also submitted that implicit in the statement is an allegation of a separate criminal offence and that this would be highly prejudicial and unfair to* [the appellant]*. The prosecution has made submissions that the statement in question is a statement; it is not a complaint. And there was no onus on the guards to reinterview* [the appellant] *in those circumstances. It has also been suggested that the jury can be told that* [the appellant] *is a person of no previous convictions and that they can be informed of the fact that there are no charges, that the relevance is in relation to the allegations before the Court, before this jury.*

Now I've read the statement and I have considered the contents of the statement over the course of the adjournment, and there is a very serious allegation contained within the statement. However, I am satisfied that the -- while it is prejudicial to [the appellant]*, the content of the statement is intimately connected to the rape allegations and the sexual allegations which are before the jury. In respect of a lack of fairness to* [the appellant] *in circumstances where he was not reinterviewed, the statement was taken years ago, and it was open to* [the appellant]*, while not in any way taking from the presumption of innocence and the onus on the prosecution to -- the onus to prove the case, it was open to him to attend at a garda station with his solicitor, and when the book of evidence was served, to take some action in relation to the contents of that particular statement. And as I've said, he has known since the book was served, and it was open to him to protest that it was grossly unfair and an inaccurate version of events, and there was not, in my view, an onus on the guards to reinterview him.*

That does not take from the onus on the prosecution to prove the case, and I have put considerable thought, because of the prejudicial element which is implicit in its suggestion in respect of another -- the commission of another offence. But having considered these matters, I am of the view that the statement is so intimately related with the allegations before the jury that it is safe for this matter to go before the jury, and it is a matter for the jury to consider the relevance of the material contained in the statement, and I will canvas the views of counsel in respect of how I charge the jury with this -- in respect of this matter when the trial gets to that stage.

I think the jury would essentially be left in a situation where it's left in a blinkered situation, if they were never to hear this evidence considering how connected to the allegations in this trial the content of the statement is. And I do not believe there is an unfairness to the accused person. And as I say, the onus remains on the prosecution to prove the case, but the probative value, in the opinion of this Court, given the connection to the events being tried by this jury, outweighs the prejudicial value and, as I've said, I

will canvass the views in respect of how I charge the jury when the trial reaches that stage."

Submissions to the Court of Appeal:

Submissions by the Appellant

36. The appellant contends that the trial judge's decision to admit the evidence of Mr. C was erroneous in law and fundamentally unfair. Mr. C's allegations were made five months after the appellant had been arrested and interviewed with respect to the substantive allegations before the court. Thus, the appellant was never afforded an opportunity to address the allegations is made by Mr. C, at any stage, either by way of a request by the gardaí to attend at the Garda station on foot of Mr. C's disclosures, or by way of rearrest, either for the substantive allegations once again or for attempting to pervert the course of justice. Such a request or rearrest, it was submitted, would, in the spirit of fairness and the interests of justice, have allowed the appellant to address these serious allegations, to state his position and to categorically refute same.

37. The appellant submitted that the trial judge erred in permitting the prosecution to adduce the evidence of Mr. C before the jury in circumstances where the trial judge herself, while acknowledging that the allegations as made by this witness were prejudicial, erroneously stated that the probative value of this evidence outweighed its prejudicial effect. It was submitted that clear allegations of threatening to harm the complainant and the complainant's father could not be more prejudicial and it was submitted that the probative value could not outweigh the harm done to the appellant by the admission of such evidence.

38. It was submitted that the trial judge's assertion that it was open to the appellant to attend with his solicitor at the Garda station upon receipt of the Book of Evidence, to address the allegations of Mr. C was an untenable position which, in effect, stood perilously close to undermining the presumption of innocence of an accused person and the burden of proof. It was submitted that it is never for an accused person to have to prove their innocence or to have to incriminate themselves or otherwise in the face of allegations. It was further submitted that to make such a suggestion about any accused having to peruse their Book of Evidence and have a solicitor make an appointment at the local Garda station to make a statement about prejudicial matters arising from statements of proposed evidence in any given Book of Evidence, is not only impractical but flies in the face of the rule of law and constitutes an error in law and in principle.

Submissions by the respondent

39. The respondent rejects the contention that the trial judge erred in admitting the evidence of Mr. C. The respondent says that there is no question but that the evidence of Mr. C was relevant in the context of the allegations that were before the court and jury. We were referred by the respondent to the following quotation from the judgement of Charleton J. in the case of *The People (DPP) v. Clement Limen* [2021] 1 I.L.R.M. 61 at para. 7:

> "*7. Relevant evidence is always admissible under our system of law. Evidence may be excluded but the burden of demonstrating that the law requires relevant testimony not to be heard with the jury, charged under Art.38.1 of the Constitution with trying fact, rests on the accused.*"

40. It was accepted that the trial judge can exercise a discretion to exclude evidence, otherwise admissible, where is prejudicial effect outweighs its probative value, and that this will

involve carrying out a careful balancing exercise such as that conducted by Charleton J. in *The People (DPP) v. Almasi* [2021] 1 I.L.R.M. 303 at para. 28

41. In this case, the evidence of Mr. C included conversations and phone contact with the appellant in which the appellant referenced directly, or, on other occasions, indirectly, the allegations the subject matter of the indictment in this case. The respondent submits that it is difficult to imagine how this witness's evidence could be more relevant to the issues of fact to be determined by the jury. In particular, the respondent refers to the conversation where the witness suggested to the appellant that he tried to resolve the issues within the family and the appellant replied, "[The complainant] *won't speak to me over what I did to him".* The respondent says that although the appellant denied that this meant anything in the context of the allegations, it was certainly open to the jury to consider it as a form of admission of wrongdoing by the appellant towards the complainant. In the circumstances, the respondent submitted that the trial judge exercised her discretion in accordance with the law in admitting the evidence of Mr. C.

42. Insofar as the suggestion is made that the gardaí should have requested the appellant to attend either voluntarily at the Garda station, or should have rearrested him, so that the contents of Mr. C's statement could be put to him, the respondent submits that Mr. C was not making a statement of complaint but merely a witness statement. There was no requirement on the gardaí to speak to speak with the appellant about this with the statement. That this witness statement included information and other potential criminal misconduct by the appellant does not alter the role of the gardaí which was to investigate the sexual misconduct allegations made by the complainant. The only onus on the gardaí was to put the allegations of the complainant to the appellant which they did, in detail, and which he denied outright in interview and in evidence.

The Court's Decision:

43. We are satisfied that the evidence of Mr. C was directly relevant. It contained what were ostensibly declarations against interest, rendering those declarations admissible as an exception to the hearsay rule. While Mr. C's statement was undoubtedly prejudicial we do not consider that its prejudicial effect outweighed its probative value, such that it should have been excluded as a matter of discretion. In our assessment the trial judge was right to consider it properly admissible as relevant probative evidence, subject to being also satisfied that its admission would not prejudice the accused's ability to have a fair trial.

44. Further, we do not consider that there was any unfairness to the accused or prejudice to his ability to receive a fair trial. The suggestion that he was unable to defend himself at trial due to the failure of the gardaí to put Mr. C's statement to him for his commentary is untenable in the circumstances of the case. Mr. C was merely a witness on the Book of Evidence and the appellant was, by the service of the Book of Evidence upon him, put on notice as to what potentially the witness might say.

45. We have been influenced in our decision by a recent relevant authority which we think it appropriate to refer to, and to which brief reference was made in the parties' oral submissions to us at the appeal hearing.

46. Shortly before the hearing of the appeal in this case the Supreme Court had given judgment in *DPP v. J.D.* [2022] IESC 39. That case had concerned an accused who had initially been charged with a number of summary road traffic offences, including dangerous driving, in

relation to which there was no power to detain an accused for the purposes of questioning. However, a file was prepared and sent the DPP in accordance with s. 8 of the Garda Síochána Act 2005 and the DPP's Guidelines for Prosecutors. The DPP, following consideration of this file, directed that the accused also be charged on indictment with reckless endangerment. That charge was preferred before the same District Court to which the accused had been remanded in respect of the other (summary) charges. He did not respond to the charge, having been cautioned in the usual way that he was not obliged to. It is relevant that before being charged he had not been arrested, detained, or questioned in respect of an offence of reckless endangerment. He was in due course returned for trial on indictment.

47. The accused in that case argued, *inter alia*, at his trial that he could not receive a fair trial in circumstances where the circumstances of the alleged reckless endangerment had not been put to him by members of An Garda Síochána in order to provide him with an opportunity to respond. He had suggested that by virtue of their failure to do so, he had been put in a position of effectively having to give evidence in his own defence, if he wanted his version of events to be considered by the jury. He maintained that if, on the contrary, he had been formally interviewed by the gardaí, there would have been a memorandum of the interview containing his account which he could later seek to insist was placed before the jury for their consideration, without having to subject himself to cross-examination. It was said that having been deprived of this opportunity, he could not receive a trial in due course of law.

48. The trial judge acceded in part to the defence submission and the jury were directed to enter a verdict of not guilty on the indictable charge. The DPP then successfully brought a 'without prejudice' appeal by way of case stated to the Court of Appeal. The question asked was:

> "*Was the learned trial judge correct in law in directing the jury to return a verdict of not guilty on counts three of the indictment [i.e., the endangerment charge] in circumstances where the investigation did not indicate the accused being interviewed?*"

49. The Court of Appeal, answered the question in the negative, holding that the trial judge had taken an incorrect approach in dismissing the endangerment charge. Rejecting any claim of unfairness, or inability on the accused's part to receive a trial in due course of law, it was observed that:–

> "[…] *it was open to the accused to respond when charged and cautioned. It was open to him to submit an account of events at any stage, if he wished to do so, and to argue at trial for the admissibility of that account. It was also open to him to participate in the trial, and to put forward his version of events by way of cross-examination and/or by giving evidence*".

50. The matter was further appealed to the Supreme Court, and in the course of argument before that court it was argued on behalf of the accused that the Court of Appeal, particularly by its use of the words "*and/or by giving evidence*" in the passage just quoted, had erred in its approach, and had failed to respect the accused's privilege against self-incrimination. The Supreme Court rejected that argument and upheld the Court of Appeal's decision, with MacMenamin J. giving judgment for the Supreme Court stating at para. 144:

> "*I would affirm the order made by the Court of Appeal. I would propose that the answer to the question in the case stated be answered in line with the reasons set out in this*

judgment. In brief, the answer to this case stated should be 'no'. While recognising that there will always be legitimate concerns on a fundamentally important constitutional issue such as the right to silence, I think the criticism of the Court of Appeal judgment was not warranted. If it had been deemed necessary in the interests of basic fairness, a ready resolution was available to the appellant himself who could have provided a statement on the endangerment charge. Perhaps, if recognising the importance of the values involved, the judgment under appeal had added the words 'subject always to the appellant's right to silence, and protection against self-incrimination'*, to the words quoted earlier, there might have been less concern.* [...]."

51. The Supreme Court concluded that the appellant had not shown how he was prejudiced in a manner that violated his constitutional rights to trial in due course of law. There was no evidence as to what he would, or might, have said in response to the endangerment charge. Not only did the appellant fail to establish, as he had argued, that the obligation asserted was to be seen as a constitutional right directly derived from Article 38 of the Constitution, it had not been shown that the effect of the omission would have imperilled his right to silence, or any other right to which he was entitled, under the law or the Constitution.

52. MacMenamin J, at para. 112 of his judgment, remarked:

"[…] *it is hard to see why, in this instance, the Constitution should be seen as a one-way process. An accused person themselves can decide whether to furnish a statement soon after arrest. An accused person can decide whether to testify, or to avail of their constitutional right not to do so. Reliance on the right to silence in this case would not have compromised his counsel's right to cross-examine the prosecution witnesses to test their credibility.*"

53. Returning to the circumstances of the present case, it is clear from the decision in *J.D.,* notwithstanding that the facts of that case were somewhat different from those in the present case, that the gardaí were not obliged to confront the appellant with the matters, said to constitute possible misconduct on an occasion other than that the subject matter of the charges, contained in the witness statement of Mr. C.. Fairness demanded that the appellant should not be placed on trial without being apprised of the nature and substance of the evidence that would be relied upon by the prosecution at his trial, but that was done when he was served with the Book of Evidence. It was then up to him and his legal team to make whatever tactical or strategic decisions they considered necessary to defend the case. It is clear to us, however, from the decision in *J.D.* that the gardai were under no obligation to formally interview him concerning what Mr C had told gardai, and we consider that there was no unfairness to him arising from the fact that they did not do so.

54. In conclusion, we reject the second ground of appeal as being without merit.

Conclusion:

55. The appeal should be dismissed.