

**UNAPPROVED**



**THE COURT OF APPEAL**

**Record Number: 169/2020**

**Edwards J.  
Kennedy J.  
Burns J.**

**BETWEEN/**

**MW**

**APPELLANT**

**- AND -**

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

**RESPONDENT**

**JUDGMENT of the Court delivered on the 26<sup>th</sup> day of February, 2024 by Ms. Justice Tara Burns.**

1. This is an appeal against conviction. On 17 February 2020, the appellant was convicted by majority verdict of the jury of 11 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) Act 1990 (as amended); 4 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981 (as amended); and 1 count of rape contrary to s. 4 of the Criminal Law (Rape) Act 1990 (as amended).
2. The appellant was sentenced to a term of imprisonment of 11 years, the final year of which was suspended on condition that the appellant enter a bond to keep the peace and be of good behaviour for a period of two years post his release and remain under the supervision of the Probation Service for a period of one year.

**Background**

3. The appellant is the father of the victim. They are members of the Travelling community which has a significance in the case having regard to the tradition of that community of not having sexual intercourse before marriage. The offending behaviour took place at multiple locations within the State over a 7-year period between 2008 and 2015 when the victim was between the ages of 11 and 17. The abuse ceased around the time the complainant got married in April 2015.

4. On 15 May 2015, the victim told her husband about the abuse she had suffered at the hands of the appellant.
5. On 16 May 2015, the victim recorded a conversation she had with the appellant at her home where she attempted to get him to say something incriminatory about the abuse. As the appellant departed the site, an altercation occurred between the appellant and the victim's husband. Her husband accepted in evidence that he smashed the window of the appellant's car with a machete whereupon he was held back by his own father and his brother. It was asserted on behalf of the appellant that he also sustained an injury to his leg in the course of this altercation. However, the victim's husband did not accept that an injury was caused to the appellant.
6. Later that evening, the victim attended at a garda station to make a complaint of sexual abuse against the appellant. As the offending behaviour had taken place in a different garda district, the report was transferred and assigned to an investigating guard at another garda station resulting in a formal statement of complaint not being taken from the victim until after 7 June 2015. The appellant also attended at a garda station on 16 May 2015 and made a complaint of assault against the victim's husband. A prosecution of the victim's husband did not arise as a result of this complaint.
7. On 3 June 2015, the appellant was seriously assaulted at his home by a number of men arising from which the victim's husband was charged with aggravated burglary and assault causing harm. The victim was arrested for the purposes of questioning in relation to this incident. She indicated to the guards that she was not at the appellant's house on the night of the assault, that she probably was on the site (where she lived), and that her husband would have been on the site as well. The victim gave similar evidence when cross examined by Counsel for the appellant. Defence evidence was called which instead put the victim at the appellant's house on the night of this assault.
8. The defence case pursued at trial was that the allegations were false; that they were invented by the victim to provide a cover to her husband about the fact that the victim was not a virgin before her marriage; and when the altercation between her husband and her father occurred on 16 May 2015, she had to follow through with a complaint of sexual abuse to An Garda Síochána.
9. Before this Court, a completely different reason was suggested for the victim making up what were asserted to be false allegations. It was claimed that the incident which occurred between the appellant and the victim's husband on 16 May 2015 was about something else entirely, but that after it occurred, the victim made up these false allegations to provide an excuse for her husband. This assertion had never been put to the victim in the course of the trial, nor had it been put to her husband. Neither had the appellant averred to such contrary instructions when he swore an affidavit setting out complaints he had about his legal representation at trial. Rather,

the question which was specifically put to the victim's husband in the course of cross examination regarding the altercation on 16 May 2015, was:-

*"You were shouting that he had been abusing his daughter?"*

10. Clearly, the defence case at trial, on foot of the instructions provided by the appellant to his legal representatives, was that the altercation on 16 May 2015 arose as a result of the victim's husband having been told by the victim prior to the altercation that she had been abused by the appellant. It is unacceptable that a different version of events was sought to be introduced in this appeal in such an inappropriate and nonchalant manner in complete disregard of the rules of evidence and the basic requirement to put one's case.
11. The victim's husband was cross examined regarding the assault on the appellant on 3 June 2015. He had been given a letter of immunity from the respondent indicating that any statement or admission made by him in the course of his evidence, relating to the alleged offences with which he was charged, would not be used against him in the pending trial. When questioned about this incident, he indicated that he had pleaded not guilty to the charges he was facing and stated *"I've never done anything wrong"* and *"I had nothing to do with that"*. When the victim's husband's trial came on for hearing, he entered a guilty plea to the charge of assault causing harm which clearly is contrary to the evidence which he gave before the jury.

### **Grounds of Appeal**

12. By notice of appeal dated 27 July 2020, the appellant indicated his desire to appeal his conviction and set out grounds of appeal. A new solicitor came on record for the appellant on 23 October 2021. On 2 November 2022, the appellant lodged submissions indicating that he wished to advance further grounds of appeal which included allegations of improper representation by his former legal representatives. The only ground which he appeared to be proceeding with from the original notice of appeal was ground No. 8, namely:-

*"The Appellant will make an application at the hearing of his appeal against conviction for permission to adduce, and for the Court of Appeal to receive, new evidence of an exculpatory nature that only came to light post the Appellant's conviction."*

13. By Notice of Motion dated 22 March 2023, the appellant sought an order permitting him to adduce new and/or additional evidence relating to the plea of guilty by the victim's husband to a s. 3 assault causing harm charge in relation to the assault of the appellant on 3 June 2015. He also sought an order for leave to amend the grounds of appeal lodged, to include an additional ground of appeal, namely:-

*"The convictions are unsafe because of the inadequacy of legal representation afforded to the appellant prior to and/or at trial."*

14. This motion was listed before the Court on the same day as the appeal hearing, namely 23 July 2023.

#### **Application to Adduce New Evidence**

15. The new evidence which the appellant sought to adduce was the plea of guilty which the victim's husband entered to a s. 3 assault causing harm charge relating to the assault on the appellant on 3 June 2015, having indicated in the course of his evidence that he had nothing to do with these events and the victim having indicated that her husband was at home with her on the night in question.

#### *The Submissions*

16. Counsel for the appellant submitted that the victim and her husband both committed perjury in respect of the testimony they gave at trial. It was further submitted that this perjury was jointly calculated and had the effect of strengthening the victim's credibility, whilst weakening the appellant's case which was further magnified by the letter of immunity from the respondent to the victim's husband in respect of the charges he faced relating to the 3 June 2015 incident.
17. Counsel for the respondent submitted that the victim's husband was called as a witness by the respondent in relation to the audio recording obtained by the victim on the 16 May 2015, and that the asserted perjurious testimony only arose as a result of the cross examination embarked upon by Counsel for the appellant. It was accepted that the victim's husband changed his plea in respect of the charges he faced following his evidence in this trial, but asserted that the guilty plea was to an alternative lesser charge, and that this was not tantamount to proof of perjury. Further, it was submitted, that if the Court was of the view that the victim's husband had perjured himself, it was irrelevant to the core issue in the trial which was an allegation of sexual abuse by the appellant against the victim. The respondent also submitted that this issue was already before the jury having regard to the cross examination of the victim and the defence evidence called. Furthermore, the trial judge, in delivering his charge to the jury, averted to this issue and the contradictory evidence which had been given making it clear that it was a matter for the jury as to whether this affected the victim's credibility.

#### **Discussion and Determination**

18. *The People (Director of Public Prosecutions) v. Willoughby* [2005] IECCA 4, sets out the relevant principles in relation to an application to adduce new evidence before the Court of Appeal as follows:-

*"Drawing these various strands together, it seems to this court that the following principles are appropriate to an application to introduce new or fresh evidence in the Court of Criminal Appeal:*

*(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.*

*(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.*

*(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.*

*(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."*

19. Clearly, the new evidence which is sought to be adduced is evidence that came into existence after the conclusion of the trial. Accordingly, the principle at issue is one of materiality, namely whether this new fact would have had a material and important influence on the result of the case.
20. The issue as to whether the victim and her husband were being truthful about the events of 3 June 2015 was already in the trial. Apart from the skilled cross examination which took place of the victim and her husband regarding this issue, and the closing speech made on the appellant's behalf which squarely addressed their credibility, the trial judge also averted to this issue in the course of his charge to the jury when he stated:-

*"So, [counsel for the appellant] also relates the question of [the victim's husband] testimony and it's quite clear if he didn't say it expressly he's saying it implicitly that in relation to the incident of the subsequent incident of the 3rd of June, what appears to be, if it happened, an extremely unpleasant incident and it wasn't suggested to anyone that it didn't happen, but that merely the suggestion is that (a) [the victim] wasn't present and (b) [the victim's husband] was not a participant because nobody is saying that [the victim] was a participant, she's not being accused or prosecuted for anything. Ms [T] says she was there and was shouting things and that was the height of it, but they say that they weren't there at all and indeed [the victim] is now providing an alibi for her husband, which puts them both elsewhere. So, look, you don't have to decide that case, that's for a jury in the Circuit Court but, of course, this does come into the question of the credibility of testimony and it's quite clear that [counsel for the appellant] is saying to you that both of these witnesses are being economical with the truth in relation to that aspect. So, however you - what effect that has on the overall credibility of their testimony on other matters."*

21. The direct evidence against the appellant of the offences at issue was the evidence of the victim. This is usual in sexual offence cases where there are only two parties involved and very rarely any other direct witness evidence. The evidence of the victim's husband had no direct relevance to the alleged offences. Accordingly, the credibility of the victim's husband was not a material matter in relation to the offences being considered by the jury. With respect to the victim's credibility, this of course was an important consideration for the jury. Establishing that the victim said something to the jury which was not true, even if not directly related to the offences at issue, might be considered material depending on the circumstances. However, the issue of whether the victim was giving a true account of the events relating to 3 June 2015 was already before the jury arising from the cross examination conducted of her and the defence evidence which refuted her assertion that herself and her husband were not present at the time of the assault on the appellant. In light of that, the fact that her husband subsequently entered a guilty plea in respect of the events of 3 June 2015 cannot be categorised as something which would have had a material and important influence on the result of the case.
22. Accordingly, for the reasons already set out, the appellant has failed to establish that the new evidence which he seeks to adduce is of such materiality within the meaning of *The People (DPP) v. Willoughby* to permit its introduction before us.
23. The Court therefore refuses the application to permit the appellant to introduce the evidence of the plea of guilty to s. 3 of the Non-Fatal Offences Against the Person Act 1997 entered by the victim's husband in the prosecution against him.

#### **Inadequate Legal Representation**

24. The recent Supreme Court decision in *The People (Director of Public Prosecutions) v. Shaughnessy* [2021] 3 IR 444, sets out the principles and procedure applicable where a conviction is sought to be overturned on the grounds of inadequate legal representation. Charleton J. stated at paragraphs 42 – 50 of his judgment:-

*"[42] On the decisions herein analysed as to an application to overturn a conviction due to inadequate representation, the following principles emerge. Firstly, the accused seeking to make out any case of wrongful conviction by reason of incompetent representation bears the burden of proof. In a jurisdiction with an effectively free choice of legal representation from a legal aid panel of professional lawyers, that requires a heavy burden to be discharged. Mere assertion does not satisfy this requirement of proof and an accused will thus be obliged to present evidence to the appeal court. That evidence is not in the category of evidence at the trial or evidence that would have been presented at the trial had diligence been exercised. It is to be expected that an accused will fully state his or her case by way of a comprehensive affidavit and, while the decision is for the accused, any holding back of instructions, of attendances and of legal notes of consultations, on an assertion of legal professional privilege, may tend to undermine any such case made. Delay in making a case of incompetence may, depending on the reason,*

*be a factor in considering how weighty the point or points made may be. The test for improper representation is that which so undermines the trial that it is no longer one in due course of law, as the Constitution at Article 38.1 requires. Any alleged misconduct or incompetence must, consequently, be of substance. The test cannot be: would a different approach have made a difference? If that were so, many trials would become suspect. And unnecessarily so since all trials have high and low points for both the prosecution and defence, many better approaches or questions might be summoned up in more tranquil circumstances outside the forensic contest and, furthermore, it should be recalled that insignificant errors or wrong approaches tend to balance with their opposite. Nor can the test require the accused to prove his or her innocence or any test amounting to that which posits that but for the incompetence or misconduct they would not have been convicted. Instead, what is required to overturn a conviction on the incompetence or misconduct ground is for the accused to establish such a denial of the function of counsel that the trial ceases to be one in due course of law.*

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

*[44] Thirdly, the aspect of the principles in *The People (Director of Public Prosecutions) v. O'Regan*[2007] IESC 38, [2007] 3 I.R. 805 in requiring that the evidence thus put forward be credible are generally applicable where an appellate court is required to hear testimony or to consider affidavit evidence. It is for the appellate court to assess the credibility of any such evidence. This should be done in the context of the evidence at the trial. Such matters as delay and any unjustifiable limitation on the ability of an appellate court to properly explore the accused's allegations in a meaningful way may here become relevant.*

*[45] Fourthly, such evidence as may be accepted on appeal must relate to a decision that is claimed to have had a material and important influence on the result of the case. That assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation from the detailed run of the case and the building*

*blocks of the prosecution and defence cases made. For completeness, it might also be mentioned that the arguing of law is a matter at the discretion of advocates at trial. While a case might possibly be made in that regard, a wanton disregard of what is both obvious and beneficial and for no good reason must be demonstrated. An appellate court should bear in mind that it is to be expected that lawyers may make a range of decisions as to fact and as to legal argument. Thus, the fundamental standard as to law and as to fact is that it is only such incompetence or neglect or misconduct as falls outside the ordinary standard of competence that could possibly invoke a jurisdiction to overturn a conviction based on a denial of a trial in due course of law.*

#### *Procedure*

*[46] As to procedure, in the first instance, where a case of incompetence is put forward by a full affidavit by an accused on appeal, an appellate court should give an opportunity in the ordinary way to the prosecution to seek to counter the accused's affidavit. Waiver of privilege has not been argued on this appeal and nor has any application of the principle of implied waiver. The prosecution may clarify the extent to which the accused has waived privilege, which is a matter for the accused since that privilege inures solely for a client's benefit, not that of his or her lawyers, or any claims the accused may make to adhere to the client's right not to have confidential discussions as to legal advice disclosed. That may be done by an exchange of letters. It follows as a matter of good sense, however, that where the accused has dismissed his legal representatives at trial and alleges a contrary instruction or incompetence or intoxication, that it necessarily follows that the prosecution may answer that case through his former solicitors and counsel being contacted by the prosecution and thereby making whatever case is required to specifically refute that allegation. It is for the prosecution, however, not the accused's former lawyers, to present any such answer on the appeal.*

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



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

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

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

## **Discussion and Determination**

25. The appellant claims to have been afforded inadequate legal representation in the course of his trial. Firstly, he asserts that despite being represented by Michael Staines & Co, Solicitors, a criminal defence solicitors practice of the highest renown, he was not afforded the services of a solicitor during the preparation of, and in the course, of his trial, but rather had the services of a legal executive. Secondly, he asserts that in particular respects, his defence case and instructions were not properly attended to and pursued in the course of the trial. In this regard he claims that he was not shown a copy of his Book of Evidence until three days before his trial; witness statements were not taken from potential defence witnesses who could have provided the appellant with an alibi; his instructions to Counsel were ignored; potential defence exhibits which aided his case were not used; and he had not agreed to the use of witness statements being admitted in the trial pursuant to s. 21 of the Criminal Justice Act 1984.
26. Quite bizarrely, the appellant had not taken the necessary step of waiving professional legal privilege to enable this avenue of appeal to be properly considered by the Court when the motion seeking to add this ground of appeal came before the Court on 23 July 2023. After an indication from the Court as to the consequences of the approach which the appellant was adopting, Counsel for the appellant informed the Court that the appellant was now waiving this privilege. This required the hearing to be adjourned so that the original defence file could be shared with the respondent.
27. The matter was listed for a resumed hearing on 4 December 2023. On this occasion, affidavits from all of the appellant's former legal team were before the Court to include affidavits from Mary Hughes, Legal Executive; Geraldine Wycherley, Solicitor; Aoife Corridan, Solicitor and Partner of Michael J. Staines; Patrick Gageby, Senior Counsel; and Kevin White, Barrister-at-Law. A replying affidavit was not filed on behalf of the appellant. Neither was a Notice to Cross Examine served on behalf of the appellant in relation to any of the affidavits filed.

*Legal Executive*

28. The appellant had the fortune to have the services of Mary Hughes, Legal Executive, assigned to his file when represented by Michael J. Staines and Co. As the criminal legal community is aware, Mary Hughes is a long standing legal executive of the highest standard whose experience, knowledge, dedication and professionalism is second to none.
29. The appellant does not make any specific complaint in relation to Ms. Hughes, but rather submits that the failure to assign a solicitor to his file in and of itself amounts to inadequate legal representation.
30. Ms. Aoife Corridan, Solicitor and Partner in Michael J. Staines & Co. in an affidavit sworn on 25 October 2023, refuted the appellant's suggestion that a solicitor had not been assigned to his file and averred to the fact that Geraldine Wycherley, Solicitor, was so assigned. Ms. Wycherley, also averred to this fact in an affidavit sworn on the 25 October 2023 wherein she detailed a

number of telephone attendances she conducted with the appellant and referred to a meeting she had with the appellant when the Book of Evidence was handed to him on 26 February 2018.

31. Ms. Corridan also explained how the conduct of criminal trials is organised and regulated by her firm. She stated at paragraph 8 and 10 of her affidavit:-

*"8. I say that Ms Hughes is a member of the Irish Institute of Legal Executives and has over 35 years' experience in criminal defence, having joined the firm in September 1988. Ms Hughes is a skilled, experienced, competent, and professional legal executive. She has dealt with some of the most high profile and complex cases in the Irish Criminal Courts during that time. Within our legal aid trial section, Ms Hughes is our 'Trials Manager' and has responsibility for the running of all cases before the Circuit Court, Central Criminal Court, Special Criminal Court, Court of Appeal and Supreme Court. Ms Hughes deals specifically with the more complex cases (such as the present case). She is also assisted by our trainee solicitors and on occasions, by one of our solicitors. Specifically in relation to any trials work, the trainee solicitors carry out this work under the direct supervision of either their training solicitor or a nominated solicitor of sufficient experience within the office.*

...

*10. I say that the suggestion that the 'sole carriage of the case' was entrusted to Ms Hughes is an entire mischaracterisation. I say that when a client is served with a book of evidence in the District Court, the book and the District Court file is passed to one of the partners, or in their absence the senior solicitor delegated to deal with their work. That partner or solicitor then reviews the book of evidence and allocates same to counsel most suitably skilled to deal with both the case and the particular client. A letter of instruction to counsel is sent. In terms of supervision, the partners and the solicitors in the office are kept advised of the progress of all cases in the higher courts. The office has a morning meeting each day at which each member of legal staff is required to set out what exactly is happening with each case listed in court that day. It is also an opportunity for the legal staff members to seek guidance or to raise any issues of concern in relation to any of the cases and clients of the office. An 'End of Day' e-mail is also sent by all legal members of staff. This e-mail provides an update as to the outcome of the cases which were before the court that day as well as identifying any other issues arising from cases that legal staff are working on. All legal staff within the office are required to bring any issues or problems to the immediate attention of one of the partners (or the senior solicitor in their absence). Indeed, I recall having a number of discussions with Ms Hughes during the progress of the Appellant's case where she discussed and advised in relation to issues arising in the course of his case. At all times the partners in this firm, and in their absence Senior Solicitors had oversight of the Appellant's case and Ms Hughes was not wholly and exclusively in charge of the case as suggested by the Appellant's solicitors."*

32. Ms. Hughes averred in her affidavit sworn on 25 October 2023:-

*"I say that at all stages when the Appellant was represented by the firm, I kept the Partners informed of what was happening in the case. The office has a morning meeting each day at which I set out exactly what is happening with cases listed before the courts. I also included in my "End of Day" email an update following on from consultations and court attendances. I recall having a number of discussions with one of the Partners, Ms Aoife Corridan, during the progress of the Appellant's case where I discussed and advised her about matters."*

33. The affidavit evidence of Ms. Corridan, Ms. Wycherly and Ms. Hughes establishes that the appellant is completely incorrect in his assertion that he did not have the services of an assigned solicitor. Furthermore, it is clear that Ms. Hughes, was at all times, acting under the supervision of a solicitor and was not wholly and exclusively in charge of the case. Nothing improper or inappropriate arose in relation to the appellant's representation.

34. At the resumed hearing on 4 December 2023, Counsel for the appellant suggested that there was something improper with Ms Hughes taking notes of consultations held with Counsel (the number of which the appellant appears to have forgotten about) rather than a solicitor. This was an absurd suggestion to make and has no basis whatsoever.

35. The Court deprecates that the standing of a legal executive of the experience of Ms. Hughes would be called into question in such a slipshod and irresponsible manner.

36. There is no merit at all to this aspect of the ground of appeal alleging inadequate legal representation.

### **Specific Complaints Regarding the Conduct of his Defence**

#### *Provision of the Book of Evidence and Taking of Instructions*

37. The appellant asserts that he did not receive a Book of Evidence in this matter until three days before his trial and that proper detailed instructions were never taken from him which resulted in his case not being properly presented before the trial court.

38. Ms. Geraldine Wycherley, Solicitor, avers in her affidavit that the appellant was given the Book of Evidence in the matter on the 26 February 2018 when a trial date of 3 March 2019 was set. Ultimately, the trial did not proceed until 6 February 2020. An exhibited "Note of Attendance" of a consultation held that day records this fact. A further exhibit in Ms. Wycherley's affidavit of a telephone attendance on 14 March 2018 notes comments which the appellant made during the course of that conversation having reviewed the Book of Evidence.

39. Ms. Hughes details in her affidavit four lengthy consultations which were held with the appellant and Counsel commencing on 25 July 2018. Consultation notes relating to these meetings are exhibited in her affidavit. She also details numerous consultation dates which were offered to the appellant, which he did not avail of. Furthermore, Ms. Hughes avers in her affidavit to the very many occasions when the appellant was asked to provide specific information but failed to do so despite reminders and further requests of him. Again, consultation notes and telephone attendances exhibited reflect these requests being made of the appellant. These notes also reflect the failure of proposed defence witnesses to show up to consultations despite requests that they make themselves available.
40. In light of the recorded notes exhibited in Ms. Wycherley and Ms. Hughes affidavits which reflect the fact that the Book of Evidence was provided to the appellant two years prior to the trial date in this matter; that regular requests were made of the appellant for specific information in relation to his defence which were not complied with; and that efforts made to meet with defence witnesses proved futile, the Court cannot accept the appellant's assertions in each of these regards.

*Social Media Posts*

41. In relation to the failure to put social media posts to the victim, the appellant asserts at paragraph 43 of his affidavit:-

*"I am concerned that social media posts that I shared with my previous legal team... were never put to the Complainant during her cross examination. I do not believe that there is any logical explanation for the complainant not to be cross-examined in respect of these posts. It was always my clear instructions that I wanted this avenue to be explored by my legal team, and no explanation was ever given to me as to why this was not done."*

42. Mr Gageby S.C., an eminent Senior Counsel of the highest standing who appeared on behalf of the appellant in his trial stated at paragraph 7 of his affidavit:-

*"Concerning the media posts that were produced by the Appellant and shown to us at trial, I well remember these. I thought them saccharine and not exactly private communications and advised Mr [W] that they were unlikely to advance our case. This is so particularly since putting them to the witness would shine a spotlight on the inherent unlikelihood of his daughter fabricating sexual abuse so to explain her apparent lack of virginity. **Mr [W] agreed to this.**"*

43. As the appellant has failed to controvert the averment by Mr. Gageby S.C., that the appellant provided instructions not to pursue the social media posts, by filing a replying affidavit and/or

by serving a Notice to Cross Examine, the Court cannot accept the appellant's assertion that his instructions in this regard were ignored.

*Audio Recording with "Tony"*

44. In relation to an audio recording with "Tony", the appellant stated the following at paragraph 44 of his affidavit:-

*"I am concerned that the audio recording that I shared with my previous legal team... were not put to the Complainant during her cross examination. I do not believe that there is any logical explanation for the complainant not to be cross-examined in respect of this audio, which clearly demonstrated that efforts were being made to persuade me to withdraw my criminal complaint against the Complainant's husband..."*

45. Mr. Gageby S.C. addressed this issue at paragraph 9 of his affidavit:-

*"Concerning the audiotape from "Tony"... Complaint is made that neither the audio or transcript were put to either the complainant, her husband, or anyone else. This material was only contingently admissible if the rules of evidence were to be respected. As a stepping stone, the two witnesses, daughter and son-in-law would have to have been asked what if any attempts to compromise the two criminal cases had occurred per the transcript. I did not know how the witnesses would answer. If in the negative the matter was probably closed, if positive the tape might be replayed to see if the voice was familiar to the witnesses. Aside from establishing date, time and provenance (Mr. [W]'s phone) I was of opinion that it did not establish that the [victim's husband] initiated the negotiation if indeed there were such negotiations. Some of the language might infer that Mr. [W] had initiated the bargaining. **Mr [W] agreed with my advice.** Either way the transcript/call was not admissible per se. Tony apparently called to Mr. [W]'s house in 2018. There was a substantial risk in opening this matter."*

46. Mr. Kevin White, Barrister-at-Law made the following averment in relation to the appellant's assertion regarding the audio tape at paragraph 13 of his affidavit:-

*"At paragraphs 50 the Appellant refers to a voice recording between the Appellant and a man called "Tony" which he alleges was provided to his previous legal team. I say that my recollection of this material is that the Appellant was repeatedly asked to provide a copy of the recording in advance of the trial and even during the trial as it progressed. I recall the Appellant was even asked to provide the recording to Michael J. Staines & Co on a USB which never materialised despite repeated*

*assurances from the Appellant. When the Appellant eventually played it to us from his phone, he was advised that reliance on the recording gave rise to a number of problems and risks. Firstly, the recording did not establish that the Complainant or her partner had initiated the purported settlement talks (if indeed there were any negotiations". Secondly, the Appellant could not assist in identifying "Tony" or establishing a date or time when the interaction occurred. Thirdly, and perhaps most significantly, the manner in which the conversation flowed was such that it was open to a jury to infer that the Appellant may have initiated the interaction himself. **I say that the Appellant was advised of these evidential difficulties and risks and instructed us not to put the contents of that recording."***

47. As the appellant has failed to controvert the averments by Mr. Gageby S.C. and Mr. White, Barrister-at-Law, that the appellant provided instructions not to pursue the contents of the audio recording with the victim, by filing a replying affidavit and/or by serving a Notice to Cross Examine, the Court cannot accept the appellant's assertion that his instructions in this regard were ignored.

*Section 21 of the B&B landlady*

48. The appellant also makes a complaint in relation to the manner in which his Counsel dealt with a particular witness's testimony. Apparently, Counsel on behalf of the respondent indicated that he wished to call the evidence of a landlady of particular B&B via video link pursuant to s. 13 of the Criminal Evidence Act 1992. The appellant indicates in his affidavit that he did not agree that she would give evidence in this manner. He proceeds to indicate at paragraph 46 of his affidavit:-

*"For reasons never explained to me by my legal team it was announced in Court, on 11<sup>th</sup> February 2020 on day 4 of my trial, that the prosecution and defence had agreed that this witness could be dealt with by s. 21 notice. I say that I did not give instructions to allow evidence be admitted in this manner. I do not believe that there is any logical explanation why circumstantial evidence damaging to my defence would be agreed to be admitted in such a way."*

49. Mr. White, Barrister-at-Law states in reply at paragraph 15 and 16 of his affidavit:-

*"15. I note that the Appellant raises a complaint about the agreement at trial to receive the evidence of [the landlady] pursuant to Section 21 of the Criminal Justice Act 1984. I wish to highlight a number of points about that particular portion of the evidence. Firstly, the evidence in support of the allegation at [the] B&B was particularly strong. It did not rely solely on the reliability of the Complainant and benefited from various strands of circumstantial evidence supporting the veracity of her allegation. For example, the [landlady] kept a contemporaneous record of her dealings with customers in a journal/notebook which on the relevant date recorded*

*that a customer initially sought to book in before changing his mind a short time later after using all the facilities. The record noted that the customer used the shower before leaving the B&B. The Complainant's evidence in respect of the allegation was to the effect that her father snuck her into the B&B, they had sexual intercourse and she showered before leaving a short time later. The proprietor's journal also recorded an attempt to note down the customer's car registration (...?). As it transpired, there was evidence that in the preceding month the Appellant had been stopped while driving a vehicle with the registration number (...). Significantly the Complainant also accurately described the B&B, she had a good recollection of the layout and it just so happened that the bedroom she described was the same (and only) bedroom that matched the one noted by the proprietor in her journal.*

*16. Furthermore I say that the Appellant furnished instructions that he had stayed at [the] B&B on previous occasions. In her statement [the landlady] indicated that the particular customer had also stayed previously. On account of these evidential features; the Appellant was advised that in live testimony it was impossible to predict what the witness might say beyond that already contained in her statement. Accordingly he was advised that admitting the statement pursuant to s. 21 was the safer course of action. I note that the Appellant seeks to contend that had [the landlady] given direct testimony she might have accepted that he was not the previous customer however the opposite was equally possible. **In any event, the Appellant sought to avoid any such adverse scenario unfolding by instructing us to s. 21 [the landlady's] testimony.**"*

50. As the appellant has failed to controvert the averment by Mr. White, Barrister-at-Law, that the appellant provided instructions to agree to the utilisation of s. 21 of the Criminal Justice Act 1984 in respect of the landlady's evidence, by filing a replying affidavit and/or by serving a Notice to Cross Examine, the Court cannot accept the appellant's assertion that his instructions in this regard were ignored.

*Alibi Witness*

51. Regarding not calling an alibi witness in relation to a particular count, which the appellant refers to in his written submission, Mr. Gageby S.C. sets out at paragraph 11 of his affidavit:-

*"I have a good recollection of Mr [W] suggesting an alibi witness for a count which was placed as occurring sometime when his wife ... was giving birth, possibly in the Rotunda. Mr [W]'s witness would support the idea that ... on or about that weekend Mr [W] attended a stag party in Kilkenny. I well remember it being discussed and advising Mr [W] the alibi was not only partial but also that such a narrative painted*



*a most unattractive picture. Mr [W] agreed and confirmed that he understood. Mr [W] therefore did not pursue that matter.”*

52. As the appellant has failed to controvert the averment by Mr. Gageby S.C., that the appellant provided instructions not to call this proposed alibi witness by filing a replying affidavit and/or by serving a Notice to Cross Examine, the Court cannot accept the appellant’s assertion that his instructions in this regard were ignored.
53. The appellant was properly and expertly represented by Counsel of the highest standing who consulted with him throughout the trial; advised him of the best options available to him; and who took instructions and acted on those instructions in relation to every aspect of the trial process.
54. After almost three years delay, the appellant made very serious allegations against his former legal representatives having not waived professional legal privilege which would have had the result of these allegations not being countered. Indeed, the appellant intended to continue to refuse to waive legal professional privilege until the consequences of that course of action were outlined to him by the Court.
55. The conduct of this appeal has been appalling. The best of the criminal defence community have been shamefully dragged through a mire of baseless assertions whilst the appellant has not adhered to the basic procedures which apply in an appeal of this nature. Having been forced to waive professional legal privilege, resulting in his former legal representative being placed in a position where they could contradict the assertions which the appellant made, the appellant’s claims crumbled revealing how baseless these claims were in the first instance. Nothing has been demonstrated in this case which comes anywhere close to a trial being conducted otherwise than in due course of law.
56. Accordingly, the Court will refuse the appellant leave to amend his original grounds of appeal to include this additional ground of appeal.

### **Conclusion**

57. In circumstances where the Court has refused the appellant the relief sought in the Notice of Motion and where no further grounds of appeal are advanced, the appellant’s appeal against conviction is dismissed.