An Chúirt Uachtarach

The Supreme Court

McKechnie J
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000078
[2020] IESC 000
Court of Appeal Record Number: 2018/ 133
[2019] IECA 367
Central Criminal Court bill number: CCDP0110/2016

Between

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

- and -

DC
Accused and Appellant

Judgment of Mr Justice Peter Charleton delivered on Thursday 18 March 2021

1. Where something is alleged to have happened, or has in fact occurred, after the conviction of an accused and which may have been relevant to the proof of that person's guilt, on what basis is an appellate court to evaluate this potential evidence and consider the safety of the conviction? Possibly relevant evidence which emerges after the conviction of an accused may be such that, with reasonable diligence, it could have been discovered and adduced at trial. In such a case, since the public interest requires that a defendant brings forward the entire case at trial, the evidence should generally not be admitted. There is however a different category of case where no test of diligence in discovering evidence can apply. This is where, after a trial, there is some new event which potentially casts doubt on the conviction. After conviction a material witness may claim, or be asserted to have said to others, that their testimony at trial was untrue. Such a change of heart may be in consequence of conscience or it could be engineered through duress. This judgment concerns the approach of an appellate court to any application to adduce such evidence and to considering the conviction in consequence of hearing it.

The basic events

2. DC, on 22 February 2018, was convicted by a jury of multiple counts of rape and other forms of sexual violence against his daughter, T, at locations in Ireland and in New Zealand, on dates between March 2006 and March 2010. On 23 April 2018, Murphy J sentenced him to 15 years imprisonment for each count of rape with, concurrently, 6 years for the sexual assault offences, with the last year being suspended on conditions. At the time of the offences, T was aged between 6 and 10 years old. These offences began shortly after T's mother, and DC's former partner, J, died of a brain haemorrhage, and continued until just before T and her older sister, M, were taken into care. T first disclosed the sexual abuse in 2013.

3. After the discharge of the jury, they having rendered their verdict, and while DC was remanded in custody before sentence, T visited her father in jail where an emotional encounter took place. In the background to this visit, however, are communications between T and RC, DC's wife, and a person of T's own age whom she knew from New Zealand, AD, and that person's mother, KD. After the visit, DC's solicitor Mr Collier telephoned T on the instructions of RC and spoke to her, suggesting that she arrange to consult with a different solicitor whose details he provided. As Mr Collier saw this exercise, it was with a view to T swearing an affidavit retracting and declaring as lies all of her testimony that had led to her father's conviction. While there was contact between T and this second solicitor and an appointment was made, T did not turn up. Before the Court of Appeal, on a motion to adduce fresh evidence, Mr Collier gave evidence as to his impression of the state of mind of T and asserted that he thought that she had in effect told him that she had lied at trial.

4. DC gave evidence on appeal to the effect that T had come to visit him after the trial because she was full of remorse and guilt, that she told him she was sorry, and that she inquired how she could get him out of there. KD testified that T had told her, at the time of the post-conviction prison visit, but not in any retrievable form such as texts or recordings, that her father did not belong in prison, that he was not a rapist, and that he did not do those things to her RC did not give evidence on appeal. In the context of this contested retraction, we have incontrovertible documentary evidence, preserved from social media exchanges, of suggestions from DC and RC that T ought to sue the State for having drugged and manipulated her into making false allegations and thereby recover substantial damages.

Determination

5. The trial took 17 days. While it may be said that the principal evidence was of T, in reality hers was the only evidence against DC; other testimony concerned factual or background circumstances and not the central issue of whether there was sexual violence perpetrated against the victim. On appeal to the Court of Appeal, many issues were raised as to the trial, including the relevance of background circumstances and the input of the trial judge, Murphy J, who exerted exemplary control in what was a lengthy and sometimes emotionally fraught trial. These grounds of appeal were all disposed of in the judgment of Edwards J of 20 December 2019. The Court of Appeal tested, but rejected after hearing live evidence, all post-conviction evidence that T had admitted that she had lied against her father and ruled that, as it was not worthy of belief, it should not be admitted in evidence. On an application to appeal to this Court, the determination granted leave on three related issues only:

1. The methodology deployed by the Court of Appeal in respect of an application to admit new evidence post-conviction;

2. The threshold test for the admission of such new evidence; and

3. The role of an appellate court acting act as a primary finder of fact.

Circumstances in detail

6. As to relevant family, DC has two daughters, M born in 1997 and T born in 1999. Both, at various stages accused him of sexual abuse and both were scheduled to give evidence at his trial on various counts of rape and sexual assault before the Central Criminal Court. As regards the charges arising from the allegations of M, however, a *nolle prosequi* was entered on behalf of the State just prior to the start of the trial in January 2018. The abuse of T is said to have commenced on the day after the death of her mother, and continued whilst the family lived in New Zealand. As an Irish citizen, it is not disputed that DC is liable for rape overseas as this is an offence carrying extra-territorial liability.

7. While the degree of drinking and the effects of his alcoholism on DC may be disputed, it is clear that the home life of M and T with their father and their mother J was dispiriting. In her evidence at trial, T described disharmony, despotism, violence and assaults, detailing a particularly serious attack on her mother and attributing her eventual death to that incident. This is without proof and could simply reflect the rationalisation of a young girl in the face of a tragic event. Before the death of T's mother, a new partner to DC had come into the picture, R, a woman from New Zealand. A number of months after J's passing, DC and his two daughters, M and T, and his new partner, R, moved from their small Irish hometown to live in a city in New Zealand. R and DC eventually married, her therefore becoming RC. For whatever reason, living in New Zealand did not work out and the four of them returned to where they had first lived about two years after having moved.

8. T emerges on the transcript as a highly intelligent person with, as she said, diligent application to studies. An occasion, however, of severe domestic disharmony resulted in her turning up to her national school without her homework done and missing her schoolbag. When confronted by a frustrated teacher, T blurted out words to the effect that her life was impossible because of her father's drinking and conduct and that schoolwork was the least of her concerns: "My dad drinks all the time and he hits us, I can't do my homework." Social services were informed. Her father's attitude was that she should deny that there was anything wrong when questioned and withdraw what she had said: "Say it's lies, say it's lies, you better say it's lies." DC also promised, on her account, in conjunction with other relatives, to buy her a mobile phone. She told social workers: "I lied, he doesn't hit me." Nonetheless, within months of making the allegation, she was taken into care.

9. In consequence, T, along with her sister M, were brought to a place of safety. This was opposed by her father, but nonetheless went through. T was placed in foster care with a couple who treated her lovingly and she remains in constant contact with them. She did not return to live with her father and RC but there was occasional contact. It was in 2013, during her time in foster care, that she revealed her father's sexual violence towards her. Nonetheless, once the investigation got underway, T at some point wanted the matter "cancelled" as regards the gardaí, though she never went through with the retraction. There were also references at the trial to a letter drafted by her to the Ombudsman for Children,

Emily Logan, and not sent. In addition, from the age of 12, she was in contact with the Child and Adolescent Mental Health Services. From the transcript, she was on suicide watch a number of times. At trial, T was questioned very extensively on her interaction with those to whom she turned for help and as to allegations of rape made against a young man by her and later retracted. There is no doubt that T was a troubled young person when she made the allegations against her father, DC. There is equally no doubt that her obvious vulnerability and isolation were sought to be exploited by DC and by others ostensibly acting in what they would, to take a sanguine view, consider his interests. That pattern of interference with T, of getting, as she put it eloquently in testimony, inside her head, began when she first formally made allegations as to what her father had done to her. This device was vividly and precipitously revived by them and by DC in the immediate aftermath of his conviction.

T's account

10. A representative account of the evidence of T at the trial demonstrates what she went through. As a result of her childhood experiences, she is understandably vulnerable. The first rape which she described happened the day after her mother died. She and her sister were at their maternal grandmother's home when their father came and collected them: "He was drunk. He was slobby." He brought them to his house nearby and raped her upstairs, wailing about her dead mother. She described the continuation of this sexual violence when they moved to New Zealand. On returning to Ireland, there were incidents described in the bathroom and on top of the washing machine. The lives of T and her sister were controlled to the extent of being locked in their room and some days not being permitted to go to school. There was an incident in her sister's room where T was grabbed by the hair and brought into her own room where she was forced onto a bed, called by her mother's name and raped. There was anal rape in some of the incidents. There was a rape after an attempted self-hanging, which her father started by ostensibly consoling her and kissing her neck.

11. In the letter that she drafted to the Ombudsman for Children, but which was never sent, she effectively said that she was pressured into believing that her father was a rapist and making false allegations against him. She responded to a question, posed by counsel for DC, as to why she had said in the letter that social workers and her mother's side of the family had brainwashed her:

> What you need to understand, and I can't really expect anyone to, but I was on my own in the middle of a country or a town that I didn't know anyone. I was isolated. I had nothing. I had nobody. I was self-harming. I was completely in a different stage of my life. I was not well, like, I wasn't – I had mental health difficulties, like, growing up and this was obviously one of the worst stages of that. What I did was wrong. What he did was wrong.

12. Cross-examined on behalf of DC, she was asked how after she had made her allegations, contact on a social media platform was initiated with her abusive father. She denied starting any such contact: "But I never made first contact with that man." The conflicted nature of the emotions with which she lived were revealed in her trial testimony. False names were used by DC on social media, including Scriosta Athair, meaning annihilated father and William Molyneux and Tir Na Nog (sic; presumably for Tír na nÓg, land of the young). Communications from William Molyneux commenced on 2 December 2012 with a message: "Hello princess, this is dad xx". It is not perhaps important as to

who started what. There are much more germane issues. She was asked as to whether and why such communications should continue and for what reason she might participate. T said:

> I accept it because it possibly could have happened. What you have to understand … is I was a lonely child in a care home, on my own, not belonging to anyone, stuck in a family that I didn't belong to. Of course I was going to make contact with someone that I knew from the day I was born. … It's reassurance.

13. Asked why such text messages on social media went on from 2012 up to 2016, two years before the trial, she said:

> Because I didn't have any conditions not to speak to this man. Do you know, I wasn't – do you know, whenever I was told not do not contact that man, do you know, of course I should've never contacted him. I will regret it forever. You know, it took a lot of self-dignity away from me, that I was that low in my life that I had to go that low, like.

The post-trial evidence

14. Following on from his conviction, DC refused to eat for at least three days, a fast he claims was for "religious reasons". This was presented to T differently. Due to social media communications directed at T, she came to believe that he was on hunger strike and would die; his death, the texts to her explicitly said, would be on her hands. Fearing his imminent death, she visited DC in prison on 5 March 2018. There, it appears, there was an embrace between DC and T, which T asserts was initiated by her father. The accused later alleged that she had there told him that she had lied against him and proposed to set matters to right. His solicitor, Mr Collier, was given DC's account of what T had said to him from RC, who made clear that T wanted him to call her. Mr Collier, having taken counsel's advice, telephoned T. In an affidavit and in testimony before the Court of Appeal he averred that she had said that "the whole situation is crazy" and that the accused "D should not be in prison." This he construed as confirming his client's instructions that she had lied at trial; affidavit of 17 May 2018, paragraphs 39-44: "I say that the complainant stated that she had lied during the trial but did not elaborate." He advised her of another solicitor from whom she might receive independent legal advice because of his conflict of interest. That other solicitor was to meet T on 8 March but the appointment was not kept. In addition, there was a video call between T and her friend from New Zealand time's mother, KD. That call was supposed, as T saw it, to exert pressure on T. On KD's version of events, during the call, T admitted, as she had allegedly done to her father, that DC had not done those things to her and that her father should not be in jail. Before the Court of Appeal, on a motion to admit this as fresh evidence on the appeal and overturn the conviction, all of these encounters were heavily contested.

Continuity of manipulation

15. What should not be overlooked in the context of these events is the continuity of manipulation that was engaged in from the time that T made the first complaint of abuse against her father, to the pressure that was put on her by DC and others in the immediate aftermath of his conviction for rape. Extracts suffice to illuminate what, on any reasonable view, is a pattern. Quotes which follow are anonymised and the grammar and punctation from relevant social media messages is as it was. Under cross-examination on behalf of

DC, T was taken back to the William Molyneux account for 20 October 2013, a text to which she said she did not reply. Purporting to come from T's stepmother RC, the message reads:

> Hey T, this is R. I have no understanding of why you would tell such rotten vile lies about your father. It will haunt you the rest of your life unless you make things right. Start with the truth. They say the truth will set you free. Dad loves you and would have brought you here to New Zealand at a moment's notice when you were asking for it last year had it been that simple. He still would you know. Why T, what has happened to you since you have been in foster care? It doesn't seem much like care from where we are. What sort of material are they letting you see for these fantasies to be conjured up on your head? Are they giving you drugs? Are they putting these vile notions into your head? You need help T, but not the sort you are getting. Psychiatrists and pharmaceuticals are not help, they screw people up. Dad thinks the police are picking up on these messages. Well if it's the police, I say [expletive] the lot of you. If it's you alone, T, think carefully and do the right thing. Lies have a way of coming back to you, maybe not today or tomorrow, but you can be sure karma is real.

16. On 4 November 2014 the William Molyneux account of DC sent T this message which initiates a theme of T being the victim of the State and that her appropriate action is to sue social workers and that if she persisted in her allegations she would herself end up in jail for perjury:

> I want you to know that I will always love you and I will always be here for you. I will never understand why you concocted the [expletive] you told the gardaí nor will I fully trust you ever again. That said, I'm your dad and because I have only unconditional love for you, my youngest child, I have no choice but to forgive you, that's the way of unconditional love. I realise you are very hurt and saddened at the way the past five years have turned out, but you must realise that there was very little that I could do to stop the social workers once they had come to our home. I believe you most likely harbour a hatred for me and that hatred has only been compounded by the fact that you are stuck in a situation that you can do little about right now, but you must look at yourself in all of this too. Ask yourself why you said those vile things about me? … I mentioned in a previous message that I wanted you both to go to prison for false accusations but to be truthful, that is the last thing I would want. I was and I am hurt but could never be anything either of you could do to me that would want me to see you both in a woman's prison. I believe that you have some psychological problems which isn't surprising seeing as you have been trapped in a system that cares about you with people whose only reason for caring for you is the monthly paycheck. You may not see that now, but I swear it's true, you have been damaged, your head has been turned. And because of over medication the wiring in your brain has gotten out of sync with reality.

17. These were not the only communications. From DC in New Zealand on 7 September 2016 came an elaborate message via the Scriosta Athair account, about social workers and them getting "their pound of flesh." Reference is made to those professionals and how there's going to be an action for damages for "what the HSE has done to you, love you xx". What becomes striking is the ramping up of this duress in the aftermath of the conviction of DC on 22 February 2018. It should here be noted that the contents of telephone conversations can only be remembered, if not recorded, and with social media

messages, these named accounts can be used by persons other than the named individual. Thus, while there are apparently messages from AD, a girl around her own age from New Zealand, these are not necessarily from that source.

18. A message of 26 February 2018 from the AD account reads:

> I hate to say this but he's going to get absolutely destroyed in there. Inmates never take predators like that kindly. I need to come over and see you it seriously breaks my heart everything that's happening because you guys are my family and I would never have planned out our future like this.

19. A series of messages arrived, supposedly from AD, on 27 February 2018, five days after DC was convicted, which are worth quoting as amalgamated thus:

> You need to promise me that if you act on this you didn't hear it from me okay… I'm telling you this because it's so upsetting. He is so broken, he's starving himself to death. Hasn't eaten since last Thursday and his gotten real sick. I know this because I kinda hacked my mum's Facebook and RC went to see him and that's what D told her. And it could be only a matter of days by this rate … I love you, but my heart is shattered for you all … If you have any faith that he has a little bit of decency in him please try and help him. He should still be in prison but he still needs to live … He's so sick … You cannot tell anyone this came from me please. But you need to know what's happening he's not drinking either. It's so horrible, he's blood yah know I don't think he deserves to die …

20. Naturally, in consequence of multiple messages and telephone calls, T was by this stage in emotional turmoil. KD added to that on 28th February with a message:

> I feel your pain hunny,? And I know that you feel you shouldn't have to explain. I'm so sorry that you were so upset that's the last thing I wanted for you. I find it so hard to come to terms with, that the father we saw do these things you said. We saw a loving man that adored his children. Things for your family were so good here, if you think back and remember those times. I just want to know you have not been coached into this terrible situation. If you have not the slightest doubt in your head and your heart will not be troubled. You are a beautiful girl that needs a life, a life without drugs that can heal.

21. Prior to this there was a phone call from that KD source which ended with a lost connection. To these messages T was replying that suicide was "a cowards solution" and diplomatically writing "I know you're just trying to help but that man is a rapist. I know that." There is never any assertion in any of these communications that T had engaged in a campaign of lying against her father and nor is there any admission by her of being manipulated by mysterious and unknown forces, collectively referred to as social workers or the HSE or the State. This, however, is what the barrage of messages is intent on pressing her into believing. From the Scriosta Athair account came messages identifying themselves as from RC, DC's wife using his account. For five days, T had not responded but the pressure on her continued. The RC account messages for 1 March 2018 are here amalgamated:

> Hello T, I fail to understand why you have done this to your father, he may not have been the father of the year, he made some mistakes but he never physically harmed you, he loved and cared for you, his heart broke for you when your mother died he was so concerned for your well-being, I remember him brushing your hair, ironing your uniforms and giving you just about anything you asked for. you have broken him and after all you have done he still loves you and would forgive you in a heartbeat, he asked me to tell you he understands why you did this, your father understands you better than anyone, you feel the safety and belonging of your mothers family right now. I hope it lasts, your father is the only one that no matter what with have your back, he would always protect you, he very sorry he didn't speak to you Jan 17 when you rang, you were a beautiful, funny, happy child and you adored you Dad as much as he adored you. He had his drinking under control and didn't drink most of 2007, 2008 and 2009, he fell off the wagon when [man's name] died, he didn't handle it well seeking solice in bottle … Social Services continued with all the legal stuff without us, it was unfair and not right, their was a legitimate reason for us being able to attend, it should have been postponed. When we got back Dad couldn't bear to be in the house without you, we went to Sicily and were to come back the custody hearing, Dad attempted suicide feeling his life was over without his precious girls, they put him in hospital and our solicitor tried to postpone the hearing, the judge in [Town] continued without him there, it was so wrong, they took you and put you in permanent care for three months, you couldn't repossess a bicycle that fast. Social Services are not a good organisation they should never have put and no contact order on your Dad, you had lost your mother and then your dad's contact was taken away very damaging to children. Well you know what happened to you from their, social workers, doctors, psychologist, very bad pharmaceuticals, they have alot to answer for. To put things right now would take alot of courage, look into yourself T, look hard and realise Dad would die for you, he will die in prison, you have your whole life ahead of you and you have taken what life your father has left from him. He is the kindest most generous respectful man I know, other than my Dad, he had drunk little for years now, just a few beers and never anything stronger, we were getting on with our lives, we had a beautiful cat [name of cat redacted] and a nice life in NZ we came back to Ireland because they put you in [location], we say a solicitor called [name] a few days after we arrived to see what we could do to get you out a few days after that Dad was arrested and charged. He always believed you would tell the truth right up to the court date. He had so much faith in… you it breaks my heart… Social Services and the Gardes have made many mistake, Dad says you joined the wrong team, you should have joined forces with him and sued them for there wrongs, you would become and very rich girl and have the security of a loving father. Though it is not about money or revenge its about a father that loves his butterfly with all his heart and soul.

22. From KD, on the Saturday and Sunday prior to T going to visit her father in the remand prison that Monday, came more messages about social workers and their machinations. To add to this, there was a telephone call around this time which T testified as being this woman telling her that her father was on the point of death because of his supposed hunger strike and then this message from RC via the Scriosta Athair account?:

> Hey T, had to go to the shower after your called my emotion were running away and I didn't want nanny to see, I've got it together again now, Dad will break down when he sees you tomorrow, puts me in mind of Elvis Presley Daddy don't cry, do

> you remember that song, it will be OK, don't worry, a huge weight will be lifted from you, you and dad have suffered so much my heart aches, my phone no. is [mobile number Irish style given], we can talk over messenger until we are away from [town], see you tomorrow you are a courageous young woman, I love you, I seriously can wait to see dad's joy, he has prayed for years to be with you his beautiful daughter. xx

23. After the prison visit on 5 March 2018, an adulatory message came from KD, praising her to the skies. This bombardment of texts and telephone calls had seemed to have had an effect:

> T my darling, you are the most courageous girl I know. You are amazing and beautiful. To do what you are about to do save saved his life and yours. To live that untruth would have destroyed you. You are worth so much more than that. I'm so very proud of you and no matter what I will always protect you. We can't wait for you to come and stay with us , so much to catch up on. Love you to always.! Talk again soon.

24. At his criminal trial, DC did not give evidence in his own defence. When giving evidence to the Court of Appeal, on the motion to admit new evidence of T allegedly having retracted her evidence against him, but not the duress she was under, DC claimed that his daughter had come to the prison to see him because she was full "of remorse and guilt" and had confessed to him to telling lies about him. On his account, this had nothing to do with DC apparently starving himself to death and being about to expire. In her evidence, given over video link from New Zealand, KD claimed to have known nothing about this supposed hunger strike to death. Instead, KD asserted: "I knew that he wasn't eating well, but that was as far as I knew." She eventually accepted that there was difference between not eating well and starving oneself to death. KD claimed that issues as to a hunger strike had been fed to her by RC.

25. A portion of the cross-examination by counsel for the prosecution of DC illustrates the deceptive nature of the pressure put on T:

> Q: Were you at any stage on a hunger strike?
> A: No, never.
> Q. Were you refusing to take liquids?
> A. No, never.
> Q: Were you at any stage fasting?
> A: I fasted for three days.
> Q: What was that all about?
> A: It was a religious fast … From the day after Ash Wednesday to the Sunday.
> Q: So, is that the day you went into prison?
> A: Yes.
> Q: I see. And did you ever put it about, either to RC or anybody else, that you were not eating?
> A: You don't eat when you're on a fast.
> Q: Well, did you explain that to them, that you are on a religious fast?
> A: Yes.
> Q: Can there be any explanation for how people were emailing or communicating that you know with T, suggesting that you were in fact starving yourself?
> A: I couldn't possibly comment on that, I would have no idea.

26. Much was also made before the Court of Appeal on behalf of DC of a supposedly three-way call involving T where admissions of deceit were supposedly made and overheard by two other of the participants to the message blitz. T denied participating in such a call or making the alleged admissions claimed by those individuals.

Legal ruling of the Court of Appeal

27. The Court of Appeal heard all of the evidence and considered such documents as were presented. The fresh evidence was asserted by counsel for the accused to be admissible on the appeal and was argued should lead to the trial of the accused being declared unsatisfactory, with the post-trial events being led in front of a new jury should the conviction be quashed and a new trial ordered. This illustrates the Court of Appeal's approach:

> 144. In those circumstances the third and fourth of the Willoughby principles are engaged, namely that the new or fresh evidence to be adduced must be evidence that is credible, and which might have a material and important influence on the result of the case; and moreover, the assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation. In so far as the first two Willoughby principles are concerned these are prima facie satisfied. It cannot be gainsaid that the alleged confessions, if they are credible, would qualify as fresh evidence that ought to be admitted. Such evidence was not available and could not have been available at the trial. If it had been available, it might have had a material bearing on the outcome. However, as already stated, the key issue is whether the evidence that the appellant now desires to adduce is credible.
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> 145. This Court has weighed carefully all the evidence both in support of the application to adduce fresh evidence, and the evidence adduced by the respondent in opposition to it, including all of the relevant affidavits and the documents exhibited therewith. Further, although this Court does not often have the opportunity to hear live evidence, in circumstances where, for the most part, it determines appeals on the basis of transcripts of the evidence in the court below, and/or affidavit evidence filed in support of procedural motions, the opportunity to hear live evidence has been afforded to us in this case by virtue of each of the deponents who filed affidavits either in support of, or against, the motion being cross examined as to their affidavits. In considering and weighing the evidence adduced at the hearing of the motion we have also considered and have taken account of all the evidence at the trial. It was for this reason that we felt it necessary to review that evidence in the detail that we have during this judgment.

28. The Court of Appeal found the evidence of DC and KD to be not credible:

> 146. Following our review, we have concluded that the evidence of the confessions allegedly made to DC, and to KD, is not credible. We found that neither DC nor KD impressed us as witnesses. DC's evidence must be regarded with appropriate scepticism and recognition of the possibility; indeed we believe likelihood, that it is entirely self-serving. KD's evidence exhibited bias to our minds and lack of independence. In our judgment, DC is a highly manipulative and controlling person, aided in that regard by RC; while the complainant TC is a vulnerable person

> who is racked by conflicting emotions. On the one hand she yearns for a normal family relationship, including with her father, notwithstanding his abuse of her. This is evident from the Facebook Messenger App conversations and her willingness to maintain contact with him for much of the periods we have reviewed. On the other hand, she wants to see him brought to account for those abuses and punished. Despite her conflicting emotions, she has presented both at the court of trial and before this court as adamant that she was sexually assaulted and raped by her father and as being determined, notwithstanding her conflicting emotions, to stand over her claims.
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> 147. In the circumstances … we are not satisfied to grant the relief sought in so far as it is proposed to lead evidence from DC and KD that TC confessed to them that she had in effect lied at the appellant's trial and had given false evidence against him.

29. As to Mr Collier's assessment of what was said in the telephone call with T that "she had lied during the trial", this was not noted contemporaneously. The Court of Appeal found that the solicitor had acted in good faith but rejected his recollection as an interpretation:

> 156. As already alluded to, Mr Collier later swore a supplemental affidavit in which he exhibits both a contemporaneous handwritten note of the conversation, and the aforementioned emails. Significantly the contemporaneous note does not record the complainant as stating that she had lied during the trial. The closest it comes to that is the notation therein: "will swear an affidavit that she told lies during the trial". Mr Collier was subjected to a detailed cross-examination on what had in fact been said during this conversation. Mr Collier said that: "The memo isn't a verbatim note of the conversation to and fro. So actually I didn't write on this note things I may have said, so this is listening". Counsel then put it to him: "You're writing essentially what she said? Mr Collier agreed, stating: "Yes, as I'm listening, yes". It was subsequently put to him: "Q: So when you say in your affidavit in relation to lies that she admitted that she told lies at the trial or referred to it, is really the point of it there your piece in the memo that she indicated or agreed to swear an affidavit that she had told lies during the trial? A: Yes. She confirmed that that is what she wanted to do, yes Q: In other words that she wanted to recant her testimony? A: Yes".
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> 157. It is our assessment that while there is clear and credible evidence that TC told Mr Collier that she would swear an affidavit indicating that she had told lies during the appellant's trial, that is not the same thing as evidence of a confession by TC to Mr Collier that she had told lies at the trial. Mr Collier's statement to the latter effect in the two emails referred to, and later in his main affidavit, appears to represent an assumption on his part that she was confessing to having lied, based on the appellant's asserted willingness at that point to depose on affidavit that she had told lies at the trial. However, there is no credible evidence that she confessed to him that she had lied. He has no note of it, and he specifically did not assert, either during his cross-examination or his subsequent re-examination, that in addition to saying she would sign an affidavit stating that she had told lies at the trial that she had separately positively confessed to him to having done so.

30. The question remains whether the legal test applied was correct and was correctly applied to the evidence on appeal. For DC it is argued that once any evidence becomes available of a possibly relevant event post-conviction, that an appellate court should hear and admit that evidence. Further, since Article 38.1 guarantees jury trial for all offences, save for minor crimes and military jurisdiction and special criminal courts, once any evidence could influence a jury it is for the appellate court to overturn the conviction and to return the evidence for consideration at a new trial. Particularly, since no judge has any constitutional function in assessing evidence that should properly be assessed by a jury, there is no basis upon which an appellate court can reject evidence as incredible and therefore inadmissible on a motion to adduce new evidence. The decision of the appellate court should simply be a ruling on whether a jury might possibly find evidence credible. The view taken of evidence by a panel of three or more appellate judges is not to be equated with a jury assessment. From counsel for DC's written submissions:

> 40. It is submitted the correct starting point must always be that in our system of trial on indictment, the jury is the body charged with making findings of fact, and it is the jury to which the all-important decision on the guilt of the accused is entrusted. Cf. *People (DPP) v M* [2015] IECA 65 at paragraph 52, namely, in the context of an application for a direction, it is for a jury to assess a complainant's evidence and decide whether it was "credible and reliable".
>
> 41. An appellate court, which is not the trial tribunal, should be very cautious in drawing inferences or making findings on evidence which it receives by way of motion seeking to admit new evidence. As a court of review, as opposed to a court of trial, the Court of Appeal should not usurp the role of a jury who are tasked with resolving issues of fact.
>
> 42. As such, where an appellate court is determining whether to admit new evidence, it is of course necessary to engage in a form of assessment which disallows evidence to be brought forward which is of an obviously dubious nature, demonstrably unreliable or untrue and/or is fanciful in nature. If it survives this assessment, its role must then be to assess whether the evidence might reasonably have a material and significant influence on the result of the case (see, for example, the unanimous decision of the Supreme Court in *People (DPP) v O'Regan* [2007] 3 I.R. 805 and the earlier decision of the Court of Criminal Appeal in *People (DPP) v Willoughby* [2005] IECCA 4.
>
> 43. The Court of Criminal Appeal, as recently as 2011, confirmed that it was not for the appellate court to adjudicate on whether the evidence was to be believed or not, but rather whether it was capable of being believed by a jury and whether a "jury might believe" it. In *People (DPP) v Dutton* [2012] 1 I.R. 442 the Court of Criminal Appeal confirmed that any assessment of credibility or materiality of the new evidence sought to be admitted must be conducted by reference to the other evidence in the trial, and not in isolation. However, after considering the evidence, the Court should go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the accused if that evidence is given. See pp.447-448 of the report.
>
> 44. It is significant that in *Dutton*, Fennelly J. noted at p.447 of the report the very serious question marks over the credibility of the co-accused and stated with reference to the English authority in *R v Parkes* [1961] 1 WLR 1484:

> "It is not for this Court at this stage to decide whether it should actually be believed. It is a question of whether it is capable of being believed. It was not evidence that was in the form of evidence before the Jury at the joint trial. In these circumstances the Court is satisfied that this is a case that comes within the very rare narrow and exceptional of cases where the evidence should be admitted for the purposes of the appeal".

45. Even though the decision in *Dutton* was debated extensively in oral argument before the Court of Appeal, it did not feature at all in the written judgment now under appeal. This is doubly surprising because it was a later and concurrent judgment to *Willoughby*. Neither was any apparent weight attached to the words of Fennelly J. in *O'Regan* where it was observed at p.809 of the report that "…the courts will not, for the reasons given by Kearns J., close their eyes to available new evidence which might correct an injustice…".

46. It is also worth noting that in the case of *Parkes*, which was relied upon by Fennelly J. in *Dutton*, the correct approach according to Lord Parker C.J. was, namely: "[i]f the evidence to which I have referred had been given at the trial, it is impossible to say that the Jury might not have had a reasonable doubt in the matter". A similar approach was also adopted in *R v Issac* [1964] Crim LR 721.

31. For the prosecution, a staged test of assessment of credibility, admission of evidence and consideration of testimony is proposed. It is argued on behalf of the prosecution that there is no avoiding judges being required within the constitutional scheme to take a view of the credibility of witnesses proposed as additional evidence since even the most expansive view from an accused's viewpoint cannot rule out wholly ridiculous, demented or beyond-belief evidence being rejected. In summary, therefore, the prosecution contend that the approach of the Court of Appeal was correct:

> It is submitted the present case falls into the category of case where the Court of Appeal concluded the evidence "*cannot be accepted",* while *Dutton* falls into the category of case where "*where the fresh evidence is clearly conclusive in favour of allowing an appeal".* It is acknowledged that the cases in the middle of the spectrum may be more difficult for an appeal court. In those cases, it would appear that an appeal court, having heard the evidence, and finding it material and credible must then admit the evidence and consider whether in light of same the conviction is unsafe or unsatisfactory. …
>
> Finally, if the fresh evidence had passed the credibility test and had been admitted by the appeal court, it is of assistance to consider what this Court said in an application pursuant to section 2 of the Criminal Procedure Act 1993 seeking to overturn a conviction on the basis that a newly discovered fact showed that there had been a miscarriage of justice. In *DPP v. Gannon [1997] 1 IR 40,* which was a case where the appellant was alleging that newly discovered documents rendered his conviction unsafe, Blayney J. stated at p. 48: -
>
> > "*What the Court is required to do is to carry out an objective evaluation of the newly-discovered fact with a view to determining in the light of it, whether the applicant's conviction was unsafe and unsatisfactory. The Court cannot have regard solely to the course taken by the defence at trial".*

Following on from these authorities, it is submitted that the following principles emerge in an application to an appeal court to adduce fresh evidence: -

- In determining whether to admit the fresh evidence, the court must consider whether the evidence is credible and material. This assessment must be conducted by reference to the other evidence at trial together with any other evidence before the appeal court and not in isolation.

- If the appeal court hears the evidence *de bene esse* the court necessarily must evaluate the evidence as to its credibility and materiality.

- If the appeal court finds, as it is entitled to do, that the evidence is either not credible or not material then it should not admit the evidence.

- If the appeal court finds that the evidence is credible and material, then the court must consider in light of the evidence whether the conviction is unsafe. This involves an objective evaluation of the evidence in the context of all the evidence at the trial and before the court of appeal. The court may test their own provisional view by asking whether the evidence, if given at trial, might reasonably have affected the decision of the trial jury to convict.

Role of an appellate court

32. Section 34 of the Courts of Justice Act 1924 gives power to the Court of Appeal on hearing a criminal appeal to affirm or reverse a conviction and to order a retrial. Section 33, as amended, provides:

> (1) The appeal shall be heard and determined by the Court of Criminal Appeal ('the court') on—
>
> (a) a record of the proceedings at the trial and on a transcript thereof verified by the judge before whom the case was tried, and
>
> (b) where the trial judge is of opinion that the record or transcript referred to in paragraph (a) of this subsection does not reflect what took place during the trial, a report by him as to the defects which he considers such record or transcript, as the case may be, contains,
>
> with power to the court to hear new or additional evidence, and to refer any matter for report by the said judge.

33. The Criminal Procedure Act 1993 enabled the Court of Appeal to consider applications based on an alleged newly discovered fact and to declare, separately, a miscarriage of justice; on these powers see *DPP v Buck* [2020] IESC 16. The 1993 Act at s 3(3) and (4) expands the existing appellate powers and these are not confined only to cases alleging newly discovered facts or seeking a declaration of miscarriage of justice:

> (3) The Court, on the hearing of an appeal or, as the case may be, of an application for leave to appeal, against a conviction or sentence may—

> (a) where the appeal is based on new or additional evidence, direct the Commissioner of the Garda Síochána to have such inquiries carried out as the Court considers necessary or expedient for the purpose of determining whether further evidence ought to be adduced;
> (b) order the production of any document, exhibit or other thing connected with the proceedings;
> (c) order any person who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings;
> (d) receive the evidence, if tendered, of any witness;
> (e) generally make such order as may be necessary for the purpose of doing justice in the case before the Court.
>
> (4) For the purposes of this section, the Court may order the examination of any witness whose attendance might be required under this section to be conducted, in a manner provided by rules of court, before any judge or officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court.

34. Neither legislatures nor judges are ignorant of the impulse to block the entitlement of the courts to "every man's (and every woman's) evidence", to quote Walsh J in *The People (DPP) v JT* (1988) 3 Frewen 141, or to distort that evidence to criminal ends. Perverting the course of justice does happen and is a crime at common law because it is a menace to the orderly disposal of cases. It is recognised that witnesses can be leant on and that some may be so vulnerable as to need protection even after a trial has concluded; *The People (DPP) v Meehan* [1999] 7 JIC 2901, *The People (DPP) v Gilligan* [2005] IECCA 78, *DPP v Special Criminal Court* [1999] 1 IR 60. These considerations are ancient, but more recently s 16 of the Criminal Justice Act 2006 provides that where a witness, who has previously given a voluntary statement realising the obligation to tell the truth, at trial "refuses to give evidence" or gives evidence "materially inconsistent with it", the statement may be admitted if the court is satisfied that the direct oral evidence of the fact concerned would be admissible in the proceedings, that the statement was made voluntarily, and that it is reliable. This does not apply to those cases where in the interests of justice the statement should not be so admitted.

35. It is clear from decisions in Canada, England and Wales and this jurisdiction that courts have had to evolve a workable test for the consideration of evidence where prosecution witnesses later recant. Here, that test was derived from the principles applicable to the admission of evidence that was discovered after the conclusion of a civil trial. Further, the test for admitting evidence that was available prior to trial, but not discovered or called, is related to but necessarily separate from the law dealing with events after a conviction. As a statement of principle, the judgment of MacMenamin J, sitting with Herbert and Moriarty JJ in *The People (DPP) v Eamon Flanagan and another* [2014] IECCA 43 recognises the perils to which witnesses may be subjected and affirms the primacy of the trial process in finding fact:

> 36. As is the case with the Supreme Court in civil matters, this Court leans against the admission of such evidence. Such fresh evidence can only be justified by special circumstances. Evidence will not be admitted if it was available at the trial but an applicant deliberately refrained from using it (*Attorney General v. McGahan* [1927] 1

> I.R. 503; *People (DPP) v. McDonagh* (CCA, Unreported, 22nd May, 2000); *People (DPP) v. Barr* (Ex tempore, 2nd March, 1992); *People (DPP) v. Flynn* (Court of Criminal Appeal, Unreported, 9th December, 2002). In general, new evidence will not be admitted for the purpose of allowing the applicant to make a new case, or a case inconsistent with that made at trial (*Attorney General v. McGahan* [1927] 1 I.R. 503; *People (DPP) v. Lee* [2004] 4 IR 166; *People (DPP) v. Gamble* [2009] IECCA 19). In order to justify the admission of new evidence, it will generally be necessary to explain why competent lawyers at the trial did not raise a point sought to be raised in the appeal. In general, the Court should have available to it evidence from the relevant participants, explaining why the evidence was not adduced at trial. A court will exercise special care in circumstances where, simply, a prosecution witness, retrospectively, and after the trial, thinks himself to have given unreliable evidence, or wishes to so portray himself.

36. What MacMenamin J identifies, in reiterating these fundamental principles, as requiring special care has been recognised in the Canadian courts in the context of witnesses supposedly recanting post-trial. This exercise is not a question of asking hypothetical questions on the basis of the mere proposition that a witness has recanted. Nor is it a paper exercise whereby the issue to be considered is merely how might some evidence look. What appears one way may turn out completely differently when tested in the context of the germane evidence in a criminal trial; what seems to be credible in itself may become incredible on closer examination.

37. In *Palmer v the Queen* [1980] 1 SCR 759 the Supreme Court reiterated an existing test whereby simply because of an apparent recantation a conviction should not unthinkingly be reversed. Douglas and Donald Palmer were major heroin dealers and one Frederick Ford, "an admitted heroin trafficker and a disreputable character with a criminal record", was a close associate who gave evidence against them at the behest of the Crown at trial, leading to his conviction and the imposition of a condign sentence. Ford, in his trial testimony, minutely described the dealing activities of the Palmers. Following on conviction, it was alleged that Ford had received $25,000 from the Royal Canadian Mounted Police "in payment for services". He had originally agreed to give evidence for the Crown when, after being sacked from the Palmer enterprise and continuing heroin dealing on his own, he was shot in the public street: believing it was his former crime bosses he told the investigators to "Pick up Doug Palmer." Section 610(1) of the Canadian Criminal Code allows an appellate court to hear evidence of any witness, if it considers it in the interests of justice. In post-conviction declarations, Ford claimed that the police had approached him and lent on him to provide false evidence against the Palmers in return for promises of payment of $60,000 and relocation. These allegations were denied by the Canadian royal officers. The Court of Appeal of British Columbia refused to receive the evidence and that of a similar individual called Twaddle, stating that it was "simply not capable of belief" and that "any intelligent adult would reject it as wholly untrustworthy." In the Supreme Court, this ruling was upheld since the trial judge was aware of the witnesses' infirmities and this latest round of deceit would not have altered the original verdict. McIntyre J set out this statement of principle:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evi-dence to reopen trials at will to the general detri-ment of the administration of justice. Applications of this nature have

been frequent and … [from] these and other [reported] cases … the following principles have emerged:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [1964] SCR 484.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evi-dence adduced at trial, be expected to have affected the result.

The leading case on the application of s. 610(1) of the Criminal Code is *McMartin v. The Queen*, supra. Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evi-dence for trial. The test he applied on this question was expressed in these terms at p. 493:

> With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

The evidence was admitted and a new trial ordered.

In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin*. The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be intro-duced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

Because the evidence was not available at trial and because it bears on a decisive issue, the inqui-ry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by

> the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

38. It is clear that the first principle enunciated, as to the criminal trial being the event where evidence may be offered on both sides, or if the accused has not given evidence then his factual instructions put to relevant witnesses, and the obligation to diligently search and present what is relevant, is rarely applicable to such post-trial allegations as in *Palmer*. In that context what becomes more important is the two stage test of: firstly not accepting evidence as a paper or theoretical exercise since evidence which is incredible is nothing but testing whether the proposed testimony might reasonably be believed; and, secondly, if that test is met, judged in the context of the building blocks of the evidence on both sides at trial, could that evidence have such an impact as to affect the original verdict; see also *R v Alec* [2016] BCCA 282.

Threshold standard

39. There must be a threshold standard. Verdicts of juries are not to be overturned and new trials ordered on evidence that is so devoid of substance or so wanting in integrity or so markedly at odds with reality as to compel rejection. While it is argued on behalf of DC that any assessment of evidence is a jury function, and is constitutionally required, an interpretation of the Constitution which is in harmony with its aims and which does not clash against its internal structure requires this contention to be seen as simplistic. True social order, as promulgated as the aim of the Constitution in the Preamble, would be undermined rather than promoted by a reading of Article 38 which did not take into account the context of the function of appellate courts in Article 34 which operate to not only correct error on appeal but to affirm what is correct. This system enables exceptional resort to further evidence on appeal, thus evidence not assessed by a jury, because the bedrock principle of the administration of justice is to base court findings on truth. Thus, while evidence on appeal is exceptional, it must be possible to enable access to justice to parties whose claim is that a serious factual error has rendered an injustice to invoke a necessary function of the correction of an incorrect verdict or order by bringing forward evidence. There is thus a broad discretion to admit such evidence subject to the necessary strictures as to the order of judicial business reiterated by MacMenamin J in *Flanagan and Another* and which also finds expression in the principle that those who have relevant evidence available, or discoverable by reasonable application and diligence, should bring it forward at trial. At trial, it should also be remembered, in aid of the integrity of jury verdicts, judges may have to exclude relevant evidence because of the rules of evidence such as hearsay, may require evidence to be actually relevant as opposed to leading away from the central elements of the case, may control cross-examination as to credit on the grounds of relevance and repetition, may focus the case for the purposes of necessary concision and in aid of the dignity of witnesses and may, finally, rule that because of absence of proof or gross inconsistency in testimony, as opposed to a conflict in evidence, a case should be ended by the judge directing the jury to find the accused not guilty on a particular count. This is all part of the architecture of jury trial. Hearing evidence on appeal as to a subsequent event to trial and finding that evidence irrelevant or beyond belief is part of the judicial function inherent in the constitutional structure.

40. Furthermore, it defies logic to treat evidence as if it were divorced from human analysis as to that for which it contends and as to its inherent trustworthiness. Once evidence is led on appeal, the function of a court is not to blindly receive it. All evidence requires to be assessed. The background of threat and intimidation which has inspired legislative intervention as to the resiling at trial from a prior statement declared to be the truth is indicative that awareness of how proposed evidence post-trial came about is essential. There has to be an assessment. Further, the two-stage test proposed by McIntyre J finds expression in other judgments. In *R v Pendleton* [2002] 1 All ER 524, it was proposed that post-conviction evidence should not be assessed by appellate judges but rather that their function was to imagine the evidence as having been called at trial and to ask whether it might have led to an acquittal. Thus, it was argued that it was not for judges to make their own decision on the significance or credibility of fresh evidence. The House of Lords rejected that proposition, holding where fresh evidence had been received on appeal, the correct test as to whether to allow that appeal was the effect of the fresh evidence on the minds of the members of the court, not the effect that it would have had on the minds of the jury, so long as the court bore in mind very clearly that the question on appellate consideration was the issue of whether the verdict of guilty was safe and not whether the accused was guilty. See also *R v Parkes* [1961] 3 All ER 633 which is authority for the judges on appeal admitting evidence only where it is credible. Lord Bingham in *Pendleton* had cautioned, at p 534, against any attitude on hearing evidence *de bene esse* as an exercise in trying admissibility, of merely looking at the text of the proposed evidence, since then:

> [18] … the evidence will almost always have appeared, on paper, to be capable of belief and to afford a possible ground for allowing the appeal. By the time the Court comes to decide whether the appeal should be allowed or dismissed, it will have heard the evidence, including cross-examination, and any submissions made on its effect. It may then conclude, without doubt, that the evidence cannot be accepted or cannot afford a ground for allowing the appeal.
>
> [19] ... The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence that the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of great difficulty, to test their own provisional view by asking whether the evidence, if given at trial, might reasonably have affected the decision of the trial jury to convict. If it might the conviction must be thought to be unsafe

41. Rightly, he also cautioned against an attitude of regarding juries as somehow more credulous than judges: at [19] "It would … be anomalous for the Court to say that the evidence raised no doubt whatever in their minds but might have raised a reasonable doubt in the minds of the jury." See also *R v Ahmed* [2002] EWCA Crim 2781 the analysis of Mantell LJ at [37] was that fresh evidence which has no impact on the safety of a conviction should not disturb a verdict. He included these observations on the decided cases:

> it is for this court to decide whether or not the evidence should be accepted. If it is to be accepted, the question is then as to its impact on the safety of the conviction. The new evidence here of [the witness] and the appellant's sister that they took part in the telephone conversations in the terms recorded and transcribed. That is not in dispute. The question is whether [the witness] told the truth to us or was telling the truth in the conversations. As previously indicated we are satisfied that she told the truth to us and was lying in the conversations.

> Although not strictly necessary to say so we are also satisfied that she lied because she was being threatened.

42. In this jurisdiction the principles as to the admission and analysis of fresh evidence on appeal are derived in the first instance from civil cases and are primarily directed at events existing prior to conviction, testimony as to which was not called at trial. From these authorities comes the requirement of reasonable diligence in searching out and presenting evidence at trial; *Lynagh v Macken* [1970] IR 180, *Murphy v Minister for Defence* [1991] 2 IR 161. These principles were adopted to criminal cases in *Willoughby v DPP* [2005] IECCA 4 and definitively restated by this Court in *The People (DPP) v O'Regan* [2007] 3 IR 805. There these principles, as set out in *Willoughby* [2005] IECCA 4, were restated by Kearns J:

1. 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.
2. The evidence must not have been known at the time of the trial and must be such that it could not be reasonably have been known or required at the time of the trial.
3. It must be evidence which is credible, and which might have a material and important influence on the result of the case.
4. The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation.

43. These principles are subject to the overarching requirement that justice should be seen to be done having regard to all the circumstances of the case. This requirement exists in protection of the constitutionally mandated standard whereby a criminal trial "in due course of law" under Article 38 of the Constitution requires proof of the accused's guilt beyond reasonable doubt. The first two principles outlined in *Willoughby* and *O'Regan* are not relevant to a case such as this where what is in issue is the supposed evidence that a witness lied at trial. It is necessary for an appellate court in such a case to consider whether the new evidence is credible. If fresh evidence post-conviction is admitted as credible and raises such a doubt through being cogent and apparently believable then it must be assessed in the context of all the evidence available at the criminal trial in order to determine whether a conviction is safe or unsafe. For DC, it is argued that this test was changed by the Court of Criminal Appeal through the judgment of Fennelly J in *Dutton* [2012] 1 IR 442, 447. It is suggested that the use in that *ex tempore* judgment of "capable of belief" was somehow an affirmation of the paper exercise condemned by Bingham J in *Pendleton*. The test is not altered. It may cynically be said that anything is capable of belief, since people can believe the most extraordinary things; one just has to consider any number of popular conspiracy theories to understand that. However, the phrase "capable of belief" actually reiterates that it is for appellate courts to test evidence as to believability: is this capable of being believed in a reasonable sense and not in the sense of any exercise detached from the proposed testimony and its context? If potentially credible, where is the situation as regards effect on the security of the verdict, seen in the light of the entirety of the evidence at trial?

Solicitors and post-trial apparent retraction

44. The Court of Appeal made its assessment of the evidence in light of the bombardment of duress under which T was at the time of the prison visit. In this respect, there is no basis

for criticising Mr Collier. It ought however to be noted that best practice in future is for accused persons' solicitors not to directly contact a prosecution witness due to the fact that witnesses being pressured into withdrawing statements post-conviction and improper pressure on witnesses before and during trial is part of the regrettable baggage of criminal conduct. Where an accused instructs a solicitor that someone who has given evidence against him or her has had a change of heart post-trial, the matter should be treated with dispatch but precipitously telephoning that person is not appropriate. Instead, the accused's solicitor should write to the witness in a neutral form, preserving the letter or the text or email. This should explain that the solicitor had acted for the accused in a named criminal trial which took place in whatever court on whatever date. The letter or text should make no suggestion or put anything in the form of a desired response. Instead, it is best to proceed simply stating that the solicitor is aware that there may have been a possible development as to the evidence given in a criminal trial and that if the witness would wish to speak to a solicitor on that matter, here is the name and contact details of a solicitor who can be left a message. Should the former witness consider that he or she should contact that solicitor, she or he will set up an appointment in early course. The message may be followed up by a formal letter if an address is available. If there is no address, a text or email may be repeated but caution should advise against more than two messages or letters. It should be left at that.

45. Best remembered in this context is that diligent preparation for trials, meetings with an accused client and their family, prison visits and the course of a criminal trial tend naturally to evoke sympathy in those legally supporting people facing the criminal process. Objectivity may be diminished, which is only human. Furthermore, those who are on the victim's side of the affair, or who are prosecution witnesses, may perceive a defence solicitor as hostile or identified with whatever wrong they assert was done to them. Taking instructions from a client and pursuing that factual case is the essence of the task of representing those accused of crime. Awareness of how pressure can be exerted cautions against any closer involvement with a prosecution witness or with someone who asserts she or he is a victim of a defence solicitor's client than that indicated above.

Result

46. Trials are events for those involved to present and test the best case that reasonable diligence can command in support of their contention. This involves calling evidence and involves putting factual instructions relevant to the prosecution case or defence case relevant to why it is to be claimed that the opposing case may be wrong. Applications to adduce fresh evidence on appeal that was there prior to the verdict require an explanation showing that due diligence would not have uncovered it. Such fresh evidence can only be justified by the proof of special circumstances. Where evidence was available at trial but deliberately not used, it should not be admitted on appeal. As a matter of general principle, fresh evidence on appeal should not be admitted for the purpose of allowing the applicant to make a new case, or one that clashes with the case made at trial. To justify the admission of new evidence on appeal, it will generally be necessary that an appellate court have available to it evidence explaining why the evidence was not adduced at trial. Though it is a matter for an accused as to whether legal professional privilege is waived, it is a matter for a court as to what inference might be drawn if it is not and the value of partial evidence generally may be perhaps diminished. These are the considerations underlying the first of the *Willoughby* and *O'Regan* principles.

47. Where there are supposedly relevant events post-trial, a court must exercise special care in circumstances where, simply, a prosecution witness presents a portrayal of himself or

herself as having given unreliable evidence, or it is sought to portray that witness as having done so through other witnesses, as in this case. Courts are not required to turn away from evidence as to the original circumstances under which a witness gave evidence and must closely analyse the circumstances as to any asserted change of mind. Once evidence is led on appeal as to a subsequent event that allegedly happened after the trial, the function of a court is not to blindly receive it. Such evidence must be closely assessed in the context of the entire evidence at the trial. That is the function of an appellate court. In that context what becomes important is the two-stage test of: first, not unthinkingly accepting evidence as a paper or theoretical exercise; a court should test whether the proposed testimony might reasonably be believed. The exercise is not to be carried out in isolation but in view of all of the relevant circumstances of the original evidence and of the supposed change of heart or admission of perjured prior testimony. Secondly, and then only if the credibility test is met, the evidence should be judged in the context of the building blocks of the evidence on both sides at trial, and it should be asked could that evidence reasonably affect the original verdict.

Dismissal of appeal

48. The relevant background circumstances to the evidence of T are fully and competently analysed in the judgment of the Court of Appeal. Particularly important is the context and continuity of blandishments, threats and undermining of confidence that was concentrated on T once she complained of sexual violence by her father. This became a veritable bombardment of deceit and duress once the conviction had occurred. In light of this sustained conduct of manipulation, the evidence from DC and others that T confessed to having lied at trial cannot be deemed credible. Their evidence was self-serving and, viewed in the context of DC and RC's behaviour throughout T's teenage years, simply a continuation of their abuse of T. T has remained adamant both throughout her examination at trial and in the Court of Appeal that her father raped her and she never accepted that she admitted to having lied at trial. As this fresh evidence presented with a view to undermining T's testimony at trial is not credible there is no basis for overruling the verdict or upsetting the analysis of the Court of Appeal.

49. This appeal is therefore dismissed.